

UNIVERSITY OF NAIROBI



SCHOOL OF LAW

**THE EFFECTIVENESS, ACCOUNTABILITY AND INDEPENDENCE OF THE
“FOURTH ARM” OF GOVERNMENT FROM A COMPARATIVE PERSPECTIVE**

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Declaration of Authorship, Originality and Anti-Plagiarism

I, Samuel Githaiga do hereby declare that this LLM Research Project Paper is my original work. It has not been submitted for award of any degree or any other academic credit in any other University or learning institution. I also declare that any reference made to books, texts, articles, journal articles, papers, websites and journals, and any other pertinent materials have been duly acknowledged.

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Dedication

To all those who toil quietly, but surely.

Acknowledgement

This study would not have been complete without the grace and blessings that God granted me.

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Abbreviations and Acronyms

AG	Auditor-General
CF	Consolidated Fund;
CGE	Commission for Gender Equality
CJ	Chief Justice
CORD	Coalition for Reform and Democracy
CKRC	Constitution of Kenya Review Commission;
CPPRC	Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities
DCJ	Deputy Chief Justice
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
EC	Electoral Commission
FEC	Federal Election Commission
IEBC	Independent Electoral and Boundaries Commission;
JSA	Judicial Service Act;
JSC	Judicial Service Commission;
KNHRC	Kenya National Human Rights Commission;
NACOSTI	National Commission for Science Technology and Innovation;
NGEC	National Gender and Equality Commission
NISRA	National Security and Intelligence Review Agency
NLC	National Land Commission
NPSC	National Police Service Commission

NT	National Treasury;
NTC	National Tallying Centre;
NTSA	National Transport and Safety Authority
OAG	Office of the Auditor General;
PFMA	Public Finance Management Act;
PSC	Parliamentary Service Commission;
PSA	Public Service Act;
PSC	Public Service Commission;
PSCR	Public Service Commission Regulations;
PSC	Parliamentary Service Commission
SA	South Africa
SAHRC	South African Human Rights Commission
SRC	Salaries and Remuneration Commission;
TSC	Teachers Service Commission
USA	United States of America

List of Constitutions and Constitutional Instruments

Constitution of Kenya, 2010.

Constitution of Kenya 1963.

Constitution of Kenya (Amendment) Act No 2 of 1990.

Constitution of Kenya (Amendment) Act No. 14 of 1986.

Constitution of the Republic of South Africa, 1996.

List of Kenyan Statutes

Ethics and Anti-Corruption Commission Act (Act No. 11 of 2011)

Independent Electoral and Boundaries Commission Act (Act No. 9 of 2011)

Judicial Service Act (Act No. 1 of 2011)

Judiciary Fund Act (Act No. 16 of 2016)

Kenya National Commission on Human Rights Act (Act No. 14 of 2011)

National Gender and Equality Commission Act (Act No. 15 of 2011)

National Land Commission Act (Act No. 5 of 2012)

Parliamentary Service Act (Act No. 22 of 2019)

Public Service Commission Act (Act No. 10 2017)

Salaries and Remuneration Commission Act (Act No. 10 of 2011)

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Council of County Governors v. Lake Basin Development Authority & 6 Others [2017] eKLR.

In the Matter of Interim Independent Electoral Commission [2011] eKLR.

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Independent Policing Oversight Authority & Another v. Attorney General & 660 Others [2014] eKLR.

Joseph Kimani Gathungu v. Attorney General & 5 Others [2010] eKLR.

Judicial Service Commission v. Speaker of the National Assembly & 8 Others [2014] eKLR.

Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] Eklr

New National Party v. Government of the Republic of South Africa and Others [1999] ZACC 5.

Re the Matter of the Interim Independent Electoral Commission [2011] eKLR.

Reverend Dr. Timothy M. Njoya and 6 Others v. Honourable Attorney General and Another [2004] eKLR.

South African Broadcasting Corporation SOC Ltd and Others v. Democratic Alliance and Others [2015] ZASCA 156.

Teachers Service Commission (TSC) v. Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR.

Trusted Society of Human Rights v. Attorney-General and Others [2012] eKLR.

Wilfred Manthi Musyoka v. Machakos County Assembly & 4 Others [2018] eKLR.

CHAPTER 1

INTRODUCTION TO THE EFFECTIVENESS, ACCOUNTABILITY, AND INDEPENDENCE OF THE “FOURTH ARM” OF GOVERNMENT FROM A COMPARATIVE PERSPECTIVE

1.1 Background and Emergence of Commissions and Independent Offices as the Fourth Arm of Government

The emergence of Commissions and Independent Offices is traced back to the appointment of barons by William I to conduct inquiries into the unrest for independence in Ireland.¹ This, coupled with the principle of separation of power saw the need for a proper distinction of functions on the three traditional arms of Government, that brought about the need for a check and balances mechanism for proper governance.

Additionally, from the traditional arms, namely the Judiciary, Executive and the Legislature, there emerged the “Fourth Arm of Government”, whose main function is to check on the excesses of the other Arms of Government, and it is this Fourth Arm of Government that citizens derive their coexistence with the traditional arms as well as the Constitution.

In 1993, the UN General Assembly adopted the Paris Principles,² that set out the critical elements that a national human rights body should meet to be considered functionally independent. This was premised on the fact that certain functions that are necessary to enhance democracy can best be carried out by a state body that is independent of the formal government, hence the need for the fourth arm of Government,

Commissions and Independent Offices have a long-standing historic importance in the Kenyan democracy and governance. The objects, authority and funding of Commissions and Independent Offices clause is anchored in Article 249 of the Constitution of Kenya, referred to as the independence clause, which clause is meant to protect the Commissions and Independent Offices

¹ Laura McAllister (2005) “Proving the Potential of Independent Commissions: A Critical Review of the Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales” 83:2 *Public Administration*.

² Principles relating to the Status of National Institutions (The Paris Principles) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>> accessed on 26th November, 2023.

from undue interference by other Government institutions.³ Further, the Constitution accords these Commissions and Independent Offices special governance mandates, as they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation.

In Kenya, Commissions and Independent Offices were therefore introduced as a means of checking the excesses of the National Government, and created with the hope of uniting the nation and instilling trust and confidence in Government.

1.2 Emergence of Commissions and Independent Offices in Kenya

The Commissions and Independent Offices' background in Kenya is appreciated by first interrogating their emergence in the light of Kenya's Constitutional history. The historical context within which the 2010 Constitution of Kenya emerged, is traceable to the post-independence Kenya and the evil of totalitarianism that bedevilled Kenya, during this period.

In 1963, Kenya enacted the Independence Constitution with the sole objective, according to the Report of the Kenya Constitutional Conference 1962, of creating 'a united Kenya nation, capable of social and economic progress in the modern world, and a Kenya in which, men and women have confidence in the sanctity of individual right and liberties'⁴. Thus, the mischief that the Independence Constitution was to reform, was the tyrannical imperialism, and in the quest to establish a united Kenya, in which the citizens would have confidence in their government.

The Constitution of Kenya, 1963 was meant to cure the mischief of oppressive colonial government.⁵ The drafters of the then Constitution hoped to deconcentrate the powers wielded by the Executive branch of the undemocratic colonial government. This Constitution established the three arms of government, a quasi-federal structure of government, and independent offices. The

³ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR para 159.

⁴ Quoted in K Murungi 'Kenya's Constitutional Theory and the Myth of Africanity' in K Kibwana (ed.) *Law and the Administration of Justice in Kenya* (1992) 58.

⁵ Walter Khobe Ochieng, *The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya*, Researchgate, 2019 <<https://www.researchgate.net/publication/339285800>> p 136 accessed on 27th August, 2023.

Constitution further established the Judicial Service Commission,⁶ the Public Service Commission,⁷ the Central Land Board,⁸ and the Local Government Staff Commission.⁹

These transformative prospects were followed by massive and far-reaching amendments that wilted the aim of the drafters of the Independence Constitution. The amendments were geared towards concentrating powers on the presidency, at the expense of other institutions.¹⁰ As noted by Justice Kubo in *Njoya and 6 Others v. Attorney General and Another*¹¹ the then Constitution underwent 38 amendments within a short span, with the most significant amendments being *inter alia*, abolition of security of tenure for Attorney General and the Controller of Auditor General.¹²

In 1969, the Parliament, vide the Constitution of Kenya Act 1969, amended and reproduced the Kenya Independence Order in Council 1963 in a revised form. Subsequently, the Parliament, vide the Constitution of Kenya (Amendment) Act 1990¹³ removed security of tenure for the Commissioners of the Public Service Commission (PSC). These amendments substantially altered the basic structure of the Independence Constitution, and brought with them large scale and far-reaching effects, leading to the creation of an unaccountable government as well as an authoritative Executive and the President.

Noteworthy, is that while the Constitution of Kenya 1963 contained checks-and-balances on Government power, the Constitution of Kenya 1969 watered these aspirations, trimming the said checks-and-balances. As noted above, the resultant authoritative Executive stifled constitutional institutions, depriving them of orderly and equitable procedures of access to civil goods.¹⁴ Burdened by these outmoded, undemocratic and despotic amendments, Kenyans sought for a new Constitution. Therefore, the Constitution of Kenya 2010 derived its character from the complex

⁶ Constitution of Kenya 1963, s 184 and 185.

⁷ Constitution of Kenya 1963, s 186.

⁸ Constitution of Kenya 1963, s 197.

⁹ Constitution of Kenya 1963, s 233.

¹⁰ Walter Khobe Ochieng, *The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya*, Researchgate, 2019 <https://www.researchgate.net/publication/339285800> p 137 accessed on 27th September, 2023.

¹¹ *Reverend Dr. Timothy M. Njoya and 6 Others v. Honourable Attorney General and Another* [2004] eKLR.

¹² Constitution of Kenya (Amendment) Act No. 14 of 1986 clauses 4 and 5.

¹³ Constitution of Kenya (Amendment) Act No 2 of 1990 clause 2.

¹⁴ *Joseph Kimani Gathungu v. Attorney General & 5 Others* [2010] eKLR.

and protracted law-making process, and the historical context marred with grievances and limitation of the 1969 Constitution.¹⁵

The Constitution of Kenya Review Commission (CKRC) of 2002, headed by Professor Yash Pal Ghai, which deliberated on the Constitution of Kenya 2010, came up with a Report in which it established several principles that ought to be observed in setting up Commissions and Independent Offices. Some of the said principles included the following:¹⁶

The Commissions and Independent Offices: -

- a) must have the powers they need to operate effectively;
- b) should have assured finance;
- c) should not be subject to direction by Government;
- d) should have security of tenure;
- e) should not be too large;
- f) should reflect the diversity of Kenyan society in terms of gender, disability, geography and ethnicity, economic, occupation and professional roles;
- g) should ensure a procedure and mechanism(s) to ensure that their reports are scrutinized and where appropriate acted upon;
- h) should report to the people or to the people's representatives (Parliament); and
- i) interaction with the Public should be accessible physically, finally and in terms of operating style.¹⁷

The Constitution of Kenya was promulgated and adopted in 2010 to resolve the complex problems of modern societies and constitutional institutions, to ensure integrity, accountability, to promote human rights and social justice, and to renew the Kenyan society and commitment to its values.¹⁸ It ushered a new Constitutional dispensation, anchored on the sovereignty of the people,

¹⁵ *Joseph Kimani Gathungu v. Attorney General & 5 Others* [2010] eKLR.

¹⁶ The Report of the Constitution of Kenya Review Commission, 'Dated, sealed and Issued by the Constitution Review Commission in Mombasa at 10.00 a.m on Wednesday 18th September 2002'.

¹⁷ *Ibid.*

¹⁸ Yash Pal Ghai 'Creating a New Constitutional Order: Kenya's Predicament' in G Elizabeth et al (eds) *Governance, Institutions and the Human Condition* (2009) 13-14.

supremacy of the Constitution, national values and principles of governance, bill of rights and devolution.¹⁹

Be that as it may, to ensure accountability, the Constitution promised to ensure checks and balances on the discharge of Government powers.²⁰ The system of checks and balances prevents despotism by controlling abuse of power. It ensures accountability and it is a principle of reciprocal application between different State organs and between organs of government exercising public authority.²¹ It is a subset of separation of powers, which diffuses powers and authorities among Constitutional institutions.²²

To protect these gains, the Constitution established various institutions to act as watchdogs. For instance, the Constitution adopted the concept of Independent Commissions as the “*fourth arm of Government*” to play an oversight role over the other arms of Government. Immediately after the promulgation, implementation of this new constitutional order kicked in.

As such, the philosophy, values, and structure of the previous dispensation have gradually given way to the new constitutional order, through enactment of enabling statutory instruments and judicial interpretation.²³ Expectedly, Constitutional questions have emerged as to the status of these Independent Commissions as the “fourth arm of government”. Indeed, there is inadequacy of jurisprudence in constitutional law in Kenya explaining the controversy.

With regard to Commissions and Independent Offices, whereas it is argued that the principle of separation of powers as conceived, applies principally between the Executive, Legislature and the Judiciary,²⁴ it has been argued that the principle serves the cause of accountability between state organs and among bodies exercising public power.²⁵ Therefore, this study assesses the significance of the Independent Commissions for the future governance of Kenya. In so doing, it examines the

¹⁹ *Council of County Governors v Lake Basin Development Authority & 6 others* [2017] eKLR.

²⁰ Walter Khobe Ochieng, The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, Research gate, 2019 <https://www.researchgate.net/publication/339285800> p 138 accessed on 27th August, 2023.

²¹ *Wilfred Manthi Musyoka v. Machakos County Assembly & 4 Others* [2018] eKLR para 74.

²² *In the Matter of Interim Independent Electoral Commission* [2011] eKLR para 54.

²³ *Council of County Governors v. Lake Basin Development Authority & 6 Others* [2017] eKLR para 2.

²⁴ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR paras 58-61.

²⁵ *Wilfred Manthi Musyoka v. Machakos County Assembly & 4 Others* [2018] eKLR para 94.

roles of the various Commissions and suggests a continued role for them in assisting policy formulation and legislative responsibilities of the government.

1.3 Statement of the Problem on the Effectiveness, Accountability and Independence of the “Fourth Arm” of Government

The Constitution of Kenya, 2010 provides that all sovereign power belongs to the people of Kenya.²⁶ The sovereign power can be exercised by the people themselves or through their elected representatives.²⁷ For direct exercise of the sovereign powers, Article 1(3) of the Constitution of Kenya, 2010 delegates the sovereign powers to the Parliament and County Assemblies, National and County Executive, and the Judiciary and Independent Tribunals.

In addition to these representatives, the Constitution of Kenya, 2010 establishes various Commissions and Independent Offices as the “*fourth arm of Government.*” Article 249(1) of the Constitution of Kenya, 2010 stipulates that the objects of the Commission are to protect the sovereignty of the people; to ensure the observance of democratic values and principles by all State organs; and to promote constitutionalism.

The Commissions and Independent Offices are accorded special governance-mandates which are particularly important in the new dispensation.²⁸ The Supreme Court in the *Matter of Interim Independent Electoral Commission*²⁹ noted that the Commissions and Independent offices are the custodians of the fundamental components of democracy, such as the rule of law, integrity, transparency, human rights and public participation. Principally, the Independent Commissions and Offices are peoples’ watchdogs.

In the quest to fulfil these duties, the Commissions and Independent Offices are subject only to the Constitution and the law.³⁰ They are also independent of the direction or control of any person or authority.³¹ Essentially, the “*the independence clause*” is a safeguard against undue interference

²⁶ Constitution of Kenya 2010, Art 1(1).

²⁷ Constitution of Kenya 2010, Art 1(2).

²⁸ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR para 59.

²⁹ [2011] eKLR para 59.

³⁰ Constitution of Kenya 2010, Art 249(2) (a).

³¹ Constitution of Kenya 2010, Art. 249(2) (b).

with the Commissions and Offices,³² meant to shield the Independent Commissions and Offices from emasculation by other arms of Government.

These Independent Commissions and Offices majorly perform investigative and complaints handling functions, meaning that their effectiveness lies on the enforceability of their findings and recommendations. In Kenya, the foundation of the recommendations of these institutions is highly contested, as it is not clear whether the Commissions and Independent Offices can issue binding recommendations or remedial actions. It is not clear whether state organs are bound by their findings and recommendations.

Some school of thought is of the view that, that independence does not mean detachment from other government bodies; therefore, Commissions and Independent offices need to harmonize their activities with other Government institutions.³³ In order to fulfil their tasks effectively, the Commissions and Independent Offices must constantly coordinate their activities with those of other State bodies.

Premised on the foregoing, this study examines the structure and composition of the Commissions and Independent Offices. It also seeks to identify the distinctive character of the Independent Commissions and Offices, and review their operation modalities. The study also assesses the relevance of the Commissions and Independent Offices in Kenya's multi-tier system of governance. In doing so, the study examines the jurisprudence emanating from the Kenyan courts on the independence of these Commissions and the implications of the place of the Commissions as the "*fourth arm of government*".

1.4 Objectives on The Effectiveness, Accountability and Independence of the "Fourth Arm" of Government

The general objective of the study is to assess the effectiveness, accountability and independence of the fourth arm of government.

The specific objectives are three (3):

³² *In the Matter of Interim Independent Electoral Commission* [2011] eKLR para 59.

³³ *Ibid*, para 60.

First is, to analyze the historical perspective and legal basis of Independent Commissions and Offices in Kenya.

Second is, to examine the effectiveness, independence and accountability of the fourth arm of government in Kenya.

Third is, to make recommendations for possible reforms on how to enhance the effectiveness, independence and accountability of Independent Commissions from a comparative study of South Africa.

1.5 Questions on the Effectiveness, Accountability and Independence of the “Fourth Arm” of Government

The research questions are three (3):

First, what is the historical perspective and legal basis of the Commissions and Independent Offices in Kenya?

Second, what is the effectiveness, independence and accountability of the fourth arm of government in Kenya?

Third, what kind of reforms meant to enhance the effectiveness, independence and accountability of Commissions and Independent offices can Kenya borrow, from a comparative study of South Africa, United States of America and Canadains?

1.6 Hypothesis on The Effectiveness, Accountability and Independence of the “Fourth Arm” of Government

From the research objectives and questions highlighted above, the study is premised on the hypothesis that Commissions and Independent Offices of Kenya are adequately entrenched in the Constitution of Kenya, 2010 and relevant statutes and regulations.

Second, Commissions and Independent Offices are less effective, lack independence, with minimal accountability contrary to the Constitutionally envisaged position.

Third, through borrowing best practices from South Africa, United States of America and Canada, as well as implementing various legal, policy and institutional reforms, the effectiveness, independence and accountability of Commissions and Independent Offices can be enhanced.

1.7 Literature Review on the Effectiveness, Accountability and Independence of Commissions and Independent Offices in Kenya

Commissions Independent Offices are non-partisan, independent and cross-cutting institutions charged with specific constitutional and statutory mandates,³⁴ which institutions ensure accountability within the Government.

Prof Ben Sihanya³⁵ wonders how efficient and effective the Commissions and Independent Offices are, in promising popular sovereignty including liberty and limiting power, and the extent in which they have advanced Constitutional democracy. According to Sihanya, proponents of strict separation of powers envisioned a neat typology of three arms of government, i.e. Judiciary, Parliament, Executive, but there had been an argument for the need of a fourth arm of Government in Kenya's constitutional framework from the 1980's.³⁶

Walter Khobe attributes the rise of Commissions and Independent Offices in traditional democracies to the "spoils".³⁷ According to Khobe, the Fourth Arm of Government was introduced as a means of checking abuse of power by the political majority.³⁸

The Commissions and Independent Offices predominantly perform investigative and complaints handling functions. It is therefore correct to note that the creation of Commissions and Independent Offices was a reaction on the need for independent bodies that would exercise checks over Government institutions. As such, Khobe notes, these Commissions and Independent Offices are

³⁴ Laura McAllister, Proving the Potential of Independent Commissions: A Critical Review of the Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, <https://booksc.eu/dl/9041172/62853d> p 294 accessed on 27th August, 2023.

³⁵ Sihanya, Ben M., Constitutional Commissions in Kenya: Experiences, Challenges and Lessons Problem Statement. Presented at Conference on State Implementation of the Constitution since 2010 Laico Regency, November 20, 2013.

³⁶ Sihanya, Ben M., (2011) "The Presidency and Public Authority in Kenya's new Constitutional Order", Constitutional Working Paper No.2, Society for International Development (SID) pp 23.

³⁷ Walter Khobe Ochieng, The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, Researchgate, 2019 < <https://www.researchgate.net/publication/339285800> > p 140 accessed on 27th September, 2023.

³⁸ *ibid.*

expected to effectively monitor the behavior of elected branches of Government and protect the Constitution.³⁹

In Kenya, these Commissions and Independent Offices are secured under Article 249(2) of the Constitution, and are not subject to control by any authority.⁴⁰ The independence clause is meant to ensure that the Commissions and Independent Offices effectively serve as people's watchdogs.

According to **P.L.O. Lumumba** and **L.G. Franceschi**, the Commissions and Independent Offices perform functions originally performed by the traditional three arms of Government.⁴¹ Therefore, these governmental functions must be separated from the well-known governmental bodies in order to promote transparency and objectivity, hence their reference as the 4th arm of Government, due to their oversight nature.

Elisha Ongoya,⁴² interrogates and examines the extent in which the designers and architects, and their eventual architecture and design of the Constitution paid homage to the doctrine of separation of powers, and identifies the overlaps of power and the mechanisms for checks and balances under the Constitution.

1.8 Commissions and Independent Offices as the “Fourth Arm” of Government

The emergence of the Commissions and Independent Offices as the Fourth Arm of Government in Kenya is hailed as an institutional restructuring associated with democratic transitions.⁴³ This was primarily driven by the functioning of the accountability system in the governance scheme, which was an innovative way of ensuring accountability outside electoral politics. As noted by Triggs, Commissions and Independent Offices are created to de-concentrate power across different bodies.⁴⁴

³⁹ *ibid.*

⁴⁰ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR para 58.

⁴¹ P.L.O. Lumumba and L.G. Franceschi, *The Constitution of Kenya, an Introductory Commentary*, (2014) p 19.

⁴² Elisha Ongoya, Patrick Lumumba, Morris Kiwinda Mbondenyei and Steve Odera 'Separation of Powers in the Constitution of Kenya: Contemporary Readings' (Law Africa 2011).

⁴³ Walter Khobe Ochieng, - The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, Researchgate, 2019 <<https://www.researchgate.net/publication/339285800>> p 140 accessed on 27th September, 2023.

⁴⁴ Gillian Triggs, Respect Independent Statutory Bodies as Central to Democracy, February, 205 *The Conversation* <<https://theconversation.com/respect-independent-statutory-bodies-as-central-to-democracy-37634>> accessed on 17th May, 2023.

This is meant to transition the state from authoritarianism and disregard of human rights and the rule of law, by ensuring that the three arms of Government are more accountable. According to Khobe, Commissions and Independent Offices were established as a reaction to the widespread perception that Government officials were not subjected to adequate checks and balances.⁴⁵

As such, the establishment of Commissions and Independent Offices was meant to embolden democracy and ensure that all state organs respected the law. Triggs notes that ‘modern well-functioning democracies depend upon the proper operation of independent statutory authorities.’⁴⁶ The purpose of an independence shield was highlighted in *Communications Commission of Kenya and 5 Others versus Royal Media Services and 5 Others*⁴⁷ in the following terms:

“[I]ndependence is a shield against influence or interference from external forces. [...], such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.

How is the shield of independence to be attained? In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain ‘independence’ in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these ‘other safeguards’ can singly guarantee ‘independence’. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence.”

Independent Commissions and Independent Offices therefore depict independence by operating only within the Constitution and the law. They enjoy financial and administrative independence, but are accountable Parliament.⁴⁸ However, independence has many dimensions and nuances. While Commissions and Independent offices express themselves through control of resources and

⁴⁵ Walter Khobe Ochieng, - The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, Researchgate, 2019 <<https://www.researchgate.net/publication/339285800>> p 140 accessed on 27th September, 2023.

⁴⁶ Gillian Triggs, Respect Independent Statutory Bodies as Central to Democracy, February, 205 The Conversation <<https://theconversation.com/respect-independent-statutory-bodies-as-central-to-democracy-37634>> accessed on 27th September 2023.

⁴⁷ *Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others* [2014] eKLR paras 169-170.

⁴⁸ *Judicial Service Commission v Speaker of the National Assembly & 8 Others* [2014] eKLR para 213.

budgets, some express themselves through the ability to address matters within the statutory mandate of the Independent Commission or bureau.⁴⁹ The independence of these Commissions and Independent Offices is therefore assessed on a case-by-case basis.

1.9 Effectiveness of Commissions and Independent Offices in Kenya

As noted above, it is not clear whether the other arms of Government are bound by the findings and recommendations of these Commissions and Independent Offices. Indeed, this negatively impacts on the ability of the Commissions to discharge their respective mandates.

The debate over the binding nature of the findings and recommendations of the Commissions and Independent Offices has subsisted in Kenya for long. The proponents of the argument the findings and recommendations of the Commissions and Independent Offices are not binding, and can only be enforced by the Parliament. On similar note, Triggs notes that the distribution of power between the Commissions and Independent Offices on one hand, and Parliament on the other, is an important aspect of democracy.⁵⁰

Similarly, Njoki Ndungu, SCJ *In the Matter of the National Land Commission*⁵¹ noted that recommendations are just actions that provide a facilitative role rather than a primary one. According to her, the use of those words presumes that there is another organ to implement such findings and recommendations. The learned Judge went on to note that a body performing oversight function and a body that implements its findings and recommendations are different and their roles do not overlap.

Noting the ineffectiveness in that perspective, Khobe proposes that the findings and recommendations of Commissions and Independent Offices should be binding.⁵² He decries that, it does not make sense to create independent offices, and then ignore their findings and recommendations. It is also argued that these Commissions cannot realise their constitutional

⁴⁹ John Wanna, - How independent is statutory independence? June 2015, The Sidney Morning Herald <<https://www.smh.com.au/opinion/how-independent-is-statutory-independence-20150618-ghqygl.html>> accessed on 27th September, 2023.

⁵⁰ *Ibid.*

⁵¹ *In the Matter of the National Land Commission* [2015] Eklr.

⁵² Walter Khobe Ochieng, - The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, *Researchgate*, 2019 <<https://www.researchgate.net/publication/339285800>> p 162 accessed on 17th May, 2023.

purpose if other organs of the State are allowed to ignore their findings and recommendations.⁵³ The proponents of this line of argument propose that these Commissions wield the authority to implement their recommendations.⁵⁴

On a slightly different perspective, Triggs observes that it is the responsibility of the other arms of Government to respect the processes of these Commissions and Independent Offices.⁵⁵ According to her, Government need not to agree with their findings or implement their recommendations, but must not undermine their operations.⁵⁶

1.10 Justification for the Study on the Effectiveness, Accountability and Independence of the “Fourth Arm” of Government

Kenyans from all walks of life had a vision of a Country that is guided by the rule of law and constitutionalism. As such, in establishing the Commissions and Independent Offices, they wanted them to act as a watchdog and balance the excesses of the three arms of Government. Therefore, the power vested in the said offices in the Constitution of Kenya 2010 must not be altered. It must be implemented as is in the black letter law and be allowed to discharge their mandated as required in the Constitution, free from, interference, undue influence and intimidation. By undertaking a comparative study of South Africa, United States of America and Canada, the study findings shall provide lessons and best practices that Kenya can learn and borrow respectively to enhance the effectiveness, accountability and independence of the commissions and offices in the country. Further, the study shall also add to the existing literature on the discourse on the effectiveness, accountability and independence of the fourth arm of the government as key constitutional bodies in the democratic governance.

⁵³ *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156.

⁵⁴ *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others* [2015] eKLR.

⁵⁵ Gillian Triggs, Respect Independent Statutory Bodies as Central to Democracy, “February”, 205 *The Conversation* <<https://theconversation.com/respect-independent-statutory-bodies-as-central-to-democracy-37634>> accessed on 27th July, 2023.

⁵⁶ *ibid.*

1.11 Conceptual and Theoretical Framework on the Effectiveness, Accountability and Independence of the “Fourth Arm” of Government

This study is guided by three theories. These are; Legal Positivism theory, Constitutionalism and Separation of Powers. Under the study, the main focus is two (2) theories, i.e., separation of power and constitutionalism.

Legal positivism school of thought propounds that laws, principles and written rules that have been adopted, enacted, or are recognized by a Government entity such as the three arms of Government or any other administrative or judicial organ, are a legitimate source of law.⁵⁷ The importance of this theory in this study is that it identifies the Constitution as the primary legal text, and all other laws therefore, derive their validity from this Constitution.

On the other hand, William Blackstone discussed the doctrine of separation of powers as⁵⁸;

“...In all tyrannical governments...the right of making and enforcing the law is vested in the same man or body of men and whosoever these two powers are united together, there can be no liberty....”

The purpose and objective of this doctrine is to check and limit the unpredictability inherent and common in Government. It also advocates for the concept of independence of the three Arms of Government, where no Arm of Government, can assume the role and functions of another. The relevance of this theory of separation of powers is to examine how the Constitution has entrenched the fourth arm of Government in Kenya. Lastly, constitutionalism is associated with the political theories and founders of the American Republic.⁵⁹ It concerns itself with the ability to legally control and limit government powers.

According to **Professor Ojwang**’ constitutionalism means a Government that is subject to restraint in the interest of the ordinary members of the society and a Government that is neither arbitrary nor totalitarian.⁶⁰

⁵⁷ Raymond Wacks, ‘*Understanding Jurisprudence*,’ An Introduction to Legal Theory (OUP, Oxford 2005).

⁵⁸ William Blackstone, Commentaries on the Laws of England. (Clarendon Press 1765) 14.

⁵⁹Stanford Encyclopaedia of Philosophy ‘Constitutionalism’ (September, 2012).

< <http://plato.stanford.edu/entries/constitutionalism/>> accessed 26th November, 2014.

⁶⁰ Ojwang J.B ‘Constitutional Development in Kenya: Institutional Adaptation and Social Change’ (Acts Press,1997)13.

According to **P.L.O. Lumumba *et.al***, constitutionalism has its roots in the 17th century struggle, between the Judiciary's assertion of the primacy of an authority system, based on law, and monarchists support for the doctrine of the divine right of the King and Parliament.⁶¹

This means that for it to be effective, constitutionalism requires obedience of the relevant statutes that specify limitations, powers and performance, which helps in reducing arbitrariness and misuse of discretionary powers by the traditional Arms of Government. With the Constitution's recognition as a supreme law, this theory will therefore be relevant in analysing how different the Fourth Arm of Government is the custodian of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation.

According to B. Sihanya, Independent Commissions and Offices are the "fourth arm of the government" since they are appointed through a dual multi-agency process, and operate independent of the other arms of the government.

On that light, it is imperative to appreciate that in the drafting of the Constitution 2010, Kenyans exercised their sovereign power and established Commissions and Independent Offices for checks and balances, as well as control the excesses of the three arms of Government. This recommendation is pegged on the foundation set by Abraham Lincoln where he said that the Government is of the people, by the people and for the people.

1.12 Research Methodology on the Effectiveness, Accountability and Independence of the "Fourth Arm" of Government

This study uses a desk-top research methodology wherein heavy reliance is placed on secondary materials obtained from various online sources to inform the analysis of the effectiveness, accountability, and independence of Commissions and Independent Offices. Desk-top method is preferred for the study since it's easier to obtain adequate information for sufficient analysis. Besides, this method is cheaper and time saving, compared to obtaining data from primary sources such as through interviews.

More precisely, the research shall utilize qualitative research methodology with a hybrid of doctrinal, comparative and non-doctrinal research methodology. This means that the doctrinal

⁶¹ P.L.O Lumumba, M.K Mbondenyei & S.O Odero, 'The Constitution of Kenya: Contemporary Readings' (Law Africa 2011) 46.

research involves studying a legal position or proposition and analysing the legal provisions using legal reasoning and critical thinking.⁶² Essentially, it will be concerned with the analytical approach to legal issues and provisions. The doctrinal research in this study will involve the use of books, journals articles, online materials, among others, commonly referred to as secondary research. The comparative research methodology on the other hand, being the type of research method that aims at comparing the situation in different jurisdictions,⁶³ is particularly useful in identifying, analysing and explaining the differences in the targeted jurisdictions.⁶⁴ To this extent, the study uses a comparative analysis of the independence and accountability of Commissions and Independent Offices in South Africa, United States of America and Canada. The three countries are preferred for the study owing to their advanced democracies, where Commissions enjoy both legal and substantive safeguard of their independence. More particularly, the South African model of the independent Commissions is vital for the study owing to the similarity in governance structure that Kenya has with South Africa, and thus Kenya can learn from its experience.

This study may also be supported by non-doctrinal or primary research methodology which may entail conducting interviews through administering questionnaires and also personal interviews guided by the same questionnaires.⁶⁵ The information may be collected directly from the target Respondent, through direct personal interview.⁶⁶ In the event of a study by non-doctrinal or primary research methodology, and prior to the interview sessions, there will be a research permit sought from the National Commission for Science, Technology and Innovation (NACOSTI) and a *bona fide* letter from the University of Nairobi, so as to be allowed to conduct interviews in the relevant bodies including: the Salaries and Remuneration Commission and the Electoral and Boundaries Commissions.

⁶² Olive M. Mugenda and Abel G. Mugenda, '*Research Methods: Quantitative and Qualitative Approaches*,' African Center for Technological Studies, 1999.

⁶³ Frank Esser et al, 'Comparative Research Methods,' (2017) the International Encyclopedia of Communication Research Methods.

⁶⁴ C.R. Kothari, '*Research Methodology, Methods and Techniques*,' 2nd Revised Edition.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

1.13 Limitation of the Study on the Effectiveness, Accountability and Independence of the “Fourth Arm” of Government

This study is limited to the analysis of the effectiveness of the Commissions and Independent Offices in exercising oversight function over the other arms of government in Kenya. In doing so, the study analyses the binding nature and the enforceability of the findings and recommendations of these Commissions. To fulfil the study objectives, much focus will be placed on critically analyzing the existing legal and institutional framework for the establishment, functions, powers, constitution and management of Commissions and Independent Offices in Kenya. This will entail an examination of the constitutional, statutory and regulatory framework pertaining to Commissions and Independent Offices in Kenya. Further, the study acknowledges that most judicial decisions, including the Supreme Court decision in *Kenya Vision 2030 Delivery Board v. Commission on Administrative Justice & 2 Others* have held that the findings and recommendations of these Commissions are not binding, but can be enforced by the Parliament.⁶⁷ The study therefore will assess how these judicial decisions have impacted on the performance of these Commissions and Independent Offices in Kenya.

1.14 Chapter Outline on the Effectiveness, Accountability and Independence of the “Fourth Arm” Of Government from a Comparative Perspective

Chapter 1 is the introduction of the study, which introduction, sets the general framework and outlines the purpose of the study, research goals and research questions;

Chapter 2 addresses the rise and development of Commissions and Independent Offices in Kenya: This chapter looks at the historical perspective of the “fourth arm” of Government. It then investigates some of the theories and concepts explaining the rise of the Commissions and Independent offices. The Chapter looks at the legal and institutional framework of the Commissions and Independent offices. Further, this Chapter interrogates the structure, composition and functions of Commissions and Independent Offices.

Chapter 3 critiques the effectiveness of the Commissions and Independent Offices.: The Chapter looks at binding nature of the findings and recommendations of the Commissions and Independent

⁶⁷ [2021] eKLR.

officers, and lastly, analyses the enforceability of such findings and the authority responsible for enforcement;

Chapter 4 is based on a comparative study looks at South Africa, United States of America and Canada. In South Africa, Chapter 9 of the Constitution and Section 181 establishes institutions similar to Commissions and Independent offices in Kenya. Canada and the United States of America also have statutory Commissions, which perform specific functions and enjoy considerable independence. Therefore, this chapter draws lessons from the experiences of South Africa, Canada and the United States of America with their independent institutions.

Chapter 5 provides the conclusion, summary of findings and recommendations of the study. It outlines the conclusion from the lessons drawn from the study.

CHAPTER 2

THE LEGAL AND INSTITUTIONAL FRAMEWORK OF COMMISSIONS INDEPENDENT OFFICES IN KENYA

2.1 Introduction to the Legal and Institutional Framework of Commissions and Independent Offices in Kenya

The ushering in of the 2010 Constitution was perceived as the basis for the transformation of law, politics and economics in Kenya, as it was in its core, the promise of imposing checks and balances on the discharge of governmental powers.⁶⁸ The Independence Constitution provided for the traditional three arms of government: Executive, Judiciary and Legislature. The scheme of separation of powers was strengthened by a quasi-federal structure of Government and the provision for Independent Offices including the office of the Attorney General, the office of the Controller of the Budget and the Auditor General.⁶⁹

The 2010 Constitution established Constitutional Commissions and Independent Offices, and this Chapter therefore, proceeds from the foundation that Commissions and Independent Offices are a means for delivering values and aspirations of the people, such as respect for human rights and engendering a culture of accountability in governance and the respect for constitutionalism.⁷⁰

In order to deliver their mandate, which is basically to provide checks and balances over other arms of Government, the independence and accountability of these bodies is thus crucial. It is important to note that the respect for and facilitation of the functioning of the Commissions and Independent Offices is crucial if they are to play their constitutionally designated roles.⁷¹ In that regard, this Chapter interrogates the structure, composition and functions of the Commissions and Independent Offices.

⁶⁸ Dinokopila and R Murangiri, 'The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation,' (2018) 26(2) *African Journal of International and Comparative Law* pp. 205-226

⁶⁹ *Ibid*

⁷⁰ *Ibid*

⁷¹ Walter Khobe, *The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya*. (2019) <<https://www.researchgate.net/publication/339285800>> accessed on 27th May, 2023.

2.2 The Constitution of Kenya, 2010 as the Foundation for The Legal and Institutional Framework of Commissions Independent Offices in Kenya

The Constitution introduced Commissions and Independent Offices with clearly defined functions and mandates to bolster democracy.⁷² The Commissions and Independent Offices were established to protect the sovereignty of the people, ensure multi-organ observation of democratic values and principles, and to promote constitutionalism.⁷³

The Commissions and Offices are guarded from state interference while performing their functions by the ‘independence clause’. The clause has been described as an antidote against a powerful Executive from emasculating the Commissions and Independent Offices.⁷⁴ It safeguards the Commissions and Independent Offices from interferences by other actors.⁷⁵

The Supreme Court in *The Matter of Interim Independent Electoral Commission*⁷⁶ described the phrase “without direction or control by any person of authority” as follows: -

“While bearing in mind that the various Commissions and Independent Offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression [...] means that the Commissions and Independent Offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. [...]

Commissions and Independent Offices must carry out its functions free from instructions or intrusions from Government, political and commercial interests.⁷⁷

The Constitutional Commissions and Independent Offices were established to secure specific constitutional objectives as stated in Article 249(1) including the protection of sovereignty of the people, securing the observance by all state organs of democratic values and principles and to promote constitutionalism.⁷⁸ In order to guarantee the implementation of these objectives, Article 249(2) provides a balance between independence and the constitutionality, legality and the rule of law. In that manner, the Constitution establishes that the Commissions and the holders of

⁷² *Judicial Service Commission versus Salaries and Remuneration Commission & Another* [2018] eKLR.

⁷³ Constitution of Kenya, Art 149(1).

⁷⁴ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR.

⁷⁵ *Communication Commission of Kenya & 5 Others v Royal Media Services limited & 5 Others* [2014] eKLR.

⁷⁶ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR.

⁷⁷ *Communication Commission of Kenya & 5 Others v Royal Media Services limited & 5 Others* [2014] eKLR.

⁷⁸ Constitution of Kenya, Art 249(1).

independent offices are subject only to the Constitution and the law and are independent and not subject to direction or control by any person or authority.

2.2.1 The Dimensions of the Independence Clause in Commissions and Independent Offices in Kenya

Commissions and Independent Offices are not subject to direction or control by any person or authority.⁷⁹ The State is therefore, obliged to support and protect the Commissions and Independent Offices to ensure their independence and effectiveness.

The shield of independence can be attained in various ways. The Constitution guarantees structural, administrative, and financial independence of Constitutional Commissions and Independent Offices.⁸⁰ However, the various safeguards must be combined and fortified to guarantee the independence of the Commissions and Independent Offices.⁸¹ This section dissects the three dimensions of the independence clause.

2.2.1.1 Structural Independence of Commissions and Independent Offices in Kenya

Structural independence is exercised by controlling the functions and duties of the Commissions and Independent Offices.⁸²

Structural independence is manifested through the process of appointing Commissioners, composition of the Commissions, and their procedures.⁸³ This independence demands that administrative control is safeguarded by ensuring that procedures employed in appointments of Commissioners are free from politics. The procedures should therefore guarantee that patronage is not used to gain any kind of influence in the institutions. To ensure such independence, the Commissioners should be apolitical and the recruitment process should be transparent and be based on meritocracy rather than political influence.⁸⁴

⁷⁹ Constitution of Kenya, Art 249(2); *Independent Policing Oversight Authority & Another v. Attorney General & 660 Others* [2014] eKLR.

⁸⁰ *Judicial Service Commission v. Salaries and Remuneration Commission & Another* [2018] eKLR.

⁸¹ *Communication Commission of Kenya & 5 Others v Royal Media Services limited & 5 Others* [2014] eKLR.

⁸² *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5.

⁸³ *In the Matter of the National Land Commission* [2015] eKLR; *Communication Commission of Kenya & 5 Others v. Royal Media Services limited & 5 Others* [2014] eKLR.

⁸⁴ Walter Khobe, *Supra* note 1, pg17.

Most notably, Article 253 of the Constitution envisions the Independent Commissions and Offices as bodies corporate with perpetual succession and a seal, capable of suing and being sued in their own corporate names.

2.2.1.2 Administrative Independence, Legal and Institutional Framework of Commissions and Independent Offices in Kenya

Administrative independence means that there is no control over those matters directly related to the duties that Commissions and Independent Offices are required to perform under the Constitution and the law. The independence implies that the Commissions and offices should only be subject to the Constitution and the law.⁸⁵ The bodies and offices should only be directed or controlled by any interests or person who is external to these bodies but only subject to the legally prescribed channels of accountability.⁸⁶ The Independent Offices and Constitutional Commissions should exercise their autonomy through carrying out their functions, without receiving any instructions or orders from other state organs or bodies.

This independence is in line with the general functions and powers of Commissions, as envisaged under Article 252 and 253 of the Constitution, which provides for their general powers and functions, as well as their incorporation, respectively. The effect of these constitutional provisions is that other organs cannot usurp and purport to discharge the functions that are constitutionally vested in a particular independent institution.⁸⁷ The administrative independence is further provided for, through Article 255(1)(g) of the Constitution, which provides that amendments of the Constitution on matters dealing with the independence of the Commissions and Independent offices must be approved in a referendum. Thus, the limitation of the independence of an institution must be done with the approval of the people and not of the bodies that are supposed to be held accountable by the very independent institutions.⁸⁸

The protection of the administrative independence of the Commissions and Independent Offices has played out with respect to the National Assembly's attempts to interfere with the mandate of

⁸⁵ Constitution of Kenya, Art 249(2)(a).

⁸⁶ Constitution of Kenya, Art 249(2)(b).

⁸⁷ *Okiya Omtatah Okoiti v Attorney General & 2 Others; Francis K. Muthaura (AMB) & 5 Others (Interested Parties)* [2019] eKLR for the erroneous suggestion by the Employment and Labour Relations Court that Parliament can legislate to take away or limit the Public Service Commission's function and power to establish and abolish offices in the public service, a function vested in the PSC by article 234(2)(a) of the Constitution: see Walter Khobe Supra n1.

⁸⁸ *Ibid.*

the Salaries and Remuneration Commission (SRC). The SRC at one point came under attack from the National Assembly for regulating the salaries of State Officers. The SRC published the remuneration of various categories of State Officers vide Gazette Notice Number 2886 which provided for remuneration of Members of Parliament.

Aggrieved by the terms set for them, the Members of the National Assembly pursued a two-pronged attack on the SRC. They first passed a resolution to nullify all the notices that were contained in the Special Gazette Issue. In addition, they sought to amend the Constitution removing the Members of Parliament, County Assemblies and Judges and Magistrates from the list that designate State Officers who came under the authority of the SRC.

These attempts to spay the SRC showed the lengths to which other bodies are willing to go to protect themselves from Independent Offices that threaten “vested interests”. However, in affirming the functional independence of the SRC, the High Court held that a constitutional amendment that goes to the root of divesting the SRC of its constitutional mandate must be approved in a Referendum.⁸⁹

Subsequently, the High Court held that the National Assembly exceeded its mandate by purporting to annul the Gazette Notices issued by the SRC.⁹⁰ The Court thus affirmed the exclusive mandate of the SRC in article 230(4) of the Constitution to set and regularly review the remuneration and benefits of all state officers.

This means that Commissions exercise their autonomy by carrying out their duties without receiving instructions from other state organs.⁹¹ However, the Executive must provide the assistance to ensure independence, and effectiveness of the Commissions and Independent Offices. Article 252(1) (c) of the Constitution allows the Commissions and Independent Offices to recruit their own staff. The numerous constitutive legislations also confirm the aspirations of Article 252(1)(c).

⁸⁹ *Commission for the Implementation of the Constitution versus the National Assembly of Kenya and Others*, Petition Number 496 of 2013.

⁹⁰ *Okiya Omtatah Okiiti & 3Others v. Attorney General & 5 Others* [2014] eKLR

⁹¹ *In the Matter of the National Land Commission* [2015] eKLR.

2.2.1.3. Financial Independence of Commissions and Independent Offices in Kenya

Financial independence is the ability of the Commissions and Independent Offices to access adequate funds to carry out their function.⁹² They have the powers to draw up their own budgets with a separate vote.⁹³ The Parliament is responsible for the budgetary process and must allocate adequate resources to enable the Independent Commissions and Offices to perform their functions.⁹⁴

It is necessary that the financial autonomy of Constitutional Commissions and Independent Offices is protected in order to avoid the budget process used to prevent them from fulfilling their mandate. They would be resourced with enough funds for them to discharge their functions. Where the Commissions and Independent Offices are under-resourced, they end up overwhelmed and thus unable to discharge their mandate, which may eventually lead to loss of public confidence by the offices. Besides, the failure to secure financial independence for these independent bodies can be exploited to frustrate and punish them.⁹⁵

The Constitution tries to secure the financial autonomy for the Commissions and Independent Offices. This has been done by the imposition of a constitutional obligation on the Parliament to allocate adequate funds that would sustain the operations of the independent offices and Constitutional Commissions.⁹⁶

This makes it a constitutional imperative for the Parliament to ensure that Commissions and Independent Offices are sufficiently resourced in order to perform their functions. In practice, this works out by the National Assembly considering the request for funding by the Commissions and Independent Offices in good faith in the light of the competing national interests.⁹⁷ The National Assembly must thus afford the Commissions and Independent Offices adequate opportunity to defend their budgetary requirements. Furthermore, resourcing of the Commissions and

⁹² *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5.

⁹³ Constitution of Kenya, Art 249.

⁹⁴ Constitution of Kenya, Art 249(3).

⁹⁵ Sihanya, Ben M. 'Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities,' (2019) (1) *Constitutional Democracy, Regulatory, and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*.

⁹⁶ Constitution of Kenya, Art 249(3). This provision states that: 'Parliament shall allocate adequate funds to enable each Commission and Independent Office to perform its functions and the budget of each Commission and independent office shall be a separate vote.'

⁹⁷ *Supra* n28.

Independent Offices should reflect the stature and significance of their role. Ultimately, this standard of sufficiency is one that must be negotiated between independent institutions and the National Assembly.⁹⁸

The question of the adequacy of budgetary allocation for Commissions and Independent Offices for the conduct of their functions arose following the annulment of the 8th August, 2017 presidential election by the Supreme Court. The Executive and the Legislative arms decided to slash the budgetary allocation for the judiciary and a number of other independent constitutional offices, including the JSC, Kenya National Human Rights Commission, the National Land Commission, the office of the Auditor General and the office of the Controller of the Budget.⁹⁹

The Government rationalized this reduction of the budgetary allocation on the basis that it needed money for the repeat Presidential elections and to enhance free day secondary education. As a result, the JSC, and independent Constitutional Commission, had its budget slashed by 62.6% (per cent). This confirms the fact that Commissions and Independent Offices can be punished through resource allocation when they are deemed to be a threat to the vested interests of the political branches of the government.¹⁰⁰

The Constitution envisages that remuneration and benefits payable to a Commissioner or the holder of an independent office shall be a charge on the Consolidated Fund.¹⁰¹ The *raison d'être* for this provision is to remove the issue of Commissioner's remuneration from the political sphere and avoid the use of remuneration as a bargaining tool to reward or punish Commissioners.¹⁰²

2.2.2 Perception of Independence of Commissions and Independent Offices in Kenya

It is very important that there be public confidence in the operations of these independent bodies. Any independent institution enjoys perception of independence whenever the body is viewed as independent from the objective standpoint of a reasonable and informed person.¹⁰³ This perception

⁹⁸ *Ibid.*

⁹⁹ W Menya, 'Treasury CS Raids Judiciary Coffers to Fund Presidential Poll,' Daily Nation (Nairobi, 1 October 2017) <<https://www.nation.co.ke/news/Treasury-CS-raids-Judiciarycoffers-to-fund-election/1056-4119008-e5wt/ec/index.html>>.

¹⁰⁰ *Ibid.*

¹⁰¹ Article 250(7) of the Constitution of Kenya 2010.

¹⁰² Walter Khobe, *The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya*, 2019.

¹⁰³ Article 250(7) of the Constitution of Kenya, 2010.

is only attainable when constitutional Commissions and Independent Offices are deemed in the public domain to be insulated from deliberate and inadvertent attempts to weaken their position or to call their authority into question¹⁰⁴

The public undermining of Commissions and Independent Offices has been a significant challenge. The antagonism from Parliament to independent Commissions such as the JSC and SRC has been a significant impediment to their work, particularly where cooperative governance is necessary.

2.2.3 Functions and Powers of the Commissions and Independent Offices in Kenya

Fundamentally, the Commissions and Independent Offices alongside the Judiciary are the custodians of the fundamental ingredients of democracy. They serve as the “people’s watchdog” and must be guaranteed adequate powers and autonomy to discharge that mandate.¹⁰⁵

The Commissions and Independent Offices are bestowed with the powers to initiate investigations on their own initiative or complaint from a member of the public.¹⁰⁶ The various constitutive Acts establish investigation roles of the Commissions such they can investigate and consequently take appropriate actions or grant appropriate remedies depending on the circumstances.

However, Article 252(3) of the Constitution only permits the Kenya National Human Rights and Equality Commission, Judicial Service Commission, National Land Commission, and the Auditor-General to issue summons to witnesses during investigations. For dispute resolution, Article 252(1) (a) of the Constitution empowers the Commissions and Independent Offices to conduct conciliation, mediation and negotiation.

Among the significant roles played by Constitutional Commissions and Independent offices are their investigative and complaints handling functions. A number of the Commissions and Independent Offices are enabled, through the Constitution or legislation, to investigate areas of concern and handle complaints that fall within their constitutional ambits.¹⁰⁷ In addition, other Commissions like the SRC are vested with the role of setting and regularly reviewing the remuneration and the benefits of state officers and advising governments on the remuneration and

¹⁰⁴ Supra n35.

¹⁰⁵ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR.

¹⁰⁶ Article 252(1)(a) of the Constitution of Kenya. 2010.

¹⁰⁷ See for instance Article 59(2)(d) (e) (f)(h)(i) and (j) that confers an investigatory and complaints redress role on the Kenya National Human Rights and Equality Commission.

benefits of state officers.¹⁰⁸ The effectiveness of the discharge of these functions implicates the enforceability of the findings of these bodies.

A huge concern that has arisen over the years is pertinent to ability of these Commissions and Independent Offices to issue ‘binding’ recommendations or their ability to prescribe ‘binding’ remedial action. For the effectiveness of these independent Commissions and offices, their findings, decisions, recommendations and conclusions should be binding and must be complied with.¹⁰⁹

2.2.4 Collaboration and Consultation with other State Organs in Kenya

Independence of the Commissions and the Offices is not a brilliant isolation from other state organs. The independence does not imply a complete detachment from other player in public governance.¹¹⁰ Acting in isolation of other state organs is anarchical and perpetuates undemocratic tendencies.¹¹¹ The Commissions and Offices must therefore coordinate and harmonize their activities with other organs.

In that regard, Article 254(1) of the Constitution requires the Commissions and Offices to report to the President and the Parliament at the end of each financial year. The President or either of the Houses may require any of the Independent Commissions and Offices to submit a report on a particular issue.¹¹² They must consult with other state organs and work with these state organs in cooperation and harmony.¹¹³

The Constitution also envisages oversight responsibilities over Commissions and Independent Offices by counterpart Constitutional Commissions and Independent offices.¹¹⁴ For instance, Article 229(4)(d) of the Constitution vests the Auditor General with the provision of financial checks on other Commissions . The Commission on Administrative Justice established pursuant

¹⁰⁸ Constitution of Kenya, Art 230(4).

¹⁰⁹ South Africa’s Supreme Court of Appeal in *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156.

¹¹⁰ *In the Matter of Interim Independent Electoral Commission* [2011] eKLR para 60.

¹¹¹ *In the Matter of the National Land Commission* [2015] eKLR.

¹¹² Constitution of Kenya, Art 254(2).

¹¹³ *In the Matter of the National Land Commission* [2015] eKLR.

¹¹⁴ See JT Gathii, ‘The Kenyan Judiciary’s Accountability to Parliament and to Independent Commissions: 2010-2016,’ in Ghai JC (eds) *Judicial Accountability in the New Constitutional Order* (ICJ Kenya, 2016) 133, 153.

to article 59(4) of the Constitution has a role in investigating administrative shortcomings in the workings of all state organs including the other Commissions.¹¹⁵

2.3 Collaboration and Consultation with the Salaries and Remuneration Commission as a Commission in Kenya

The Salaries and Remuneration Commission (SRC) is established under Article 230(1) of the Constitution to set and regularly review the remuneration and benefits of State officers.¹¹⁶ It is also required to advise the national and county governments on the remuneration and benefits of all other public officers.¹¹⁷

Article 230(5) of the Constitution requires the SRC to ensure that the total public compensation bill is fiscally sustainable but also ensuring that the public services are capable of attracting and retaining the required skills. SRC must also recognize productivity and performance while reviewing the remuneration and benefits of public officers.¹¹⁸ This Commission is key to governance, administration and the financial equity and efficiency of the public service.

2.3.1 Achievements by the Salaries and Remuneration Commission

The Salaries and Remuneration Commission Act is mandated to inquire into the salaries and remunerations to be paid out of public funds, and accordingly, advises the relevant authorities. The Commission in its operations, conducts comparative survey on the labour markets and trends in remuneration to determine the appropriate remuneration for public officers.¹¹⁹

The Commission has as part of its mandate, determined of the cycle of salaries and remuneration review, and made recommendations on matters relating to salary and remuneration of public officers.¹²⁰ Further, the Salaries and Remuneration Commission continues to review and make recommendations on pensions payable to public officers. However, its functions are limited to advising the two levels of Governments on remuneration and benefit of public officer, and do not extend to superintending the utilization of budget allocations.¹²¹

¹¹⁵ Commission on Administrative Justice Act No, 23 of 2011.

¹¹⁶ Salaries and Remuneration Commission Act, s 11(b).

¹¹⁷ Salaries and Remuneration Commission Act, s 11(c).

¹¹⁸ Constitution of Kenya, Article 230(5) (c).

¹¹⁹ Salaries and Remuneration Commission Act, s 11(d).

¹²⁰ Salaries and Remuneration Commission Act, s 11(e) & (f).

¹²¹ *Judicial Service Commission v Salaries and Remuneration Commission & Another* [2018] eKLR.

2.4 Collaboration and Consultation Independent Electoral and Boundaries Commission as a Commission in Kenya

The Independent Electoral and Boundaries Commission (IEBC) is established in Article 88(1) of the Constitution to preside over elections and referenda of any elective body or office.¹²² IEBC also performs other functions that are incidental to elections like continuous voter registration, revision of the voters' roll, delimitation of boundaries, regulations of nominations, and settlement of electoral disputes.¹²³

IEBC is a highly politicized Commission and the Constitution has incorporated various safeguards to detach it from politics. For instance, Article 88(2) of the Constitution disqualifies persons who have participated in elective politics in the preceding five years, and State officers from appointment as IEBC Commissioners.¹²⁴

Members of the Commission are required to act and decide collectively while discharging the mandates of the Commission. In that regard, the Court in *Raila Odinga & 6 Others versus William Ruto & 10 Others* commented thus:

*"We must hasten to clarify that the responsibility of tallying and verifying the results of a Presidential Election at the NTC, vests in the Commission as a collective entity (Article 138 (3) (c): while that of declaring the results, vests exclusively in the Chairperson..."*¹²⁵

The Supreme Court in *Raila Odinga & 6 Others versus William Ruto & 10 Others* pertained issues pertaining to the conduct of the affairs and business of the Commission. The court commented that:

Pursuant to Article 88(4) of the Constitution and similar provisions replicated under Section 4 of IEBC Act, the general or plenary powers and responsibility relating to the conduct or supervision of referenda and elections to any elective body or office, vests in the Commission. This then must mean that unless there are clear textual departures in the Constitution, all the powers and functions

¹²² Constitution of Kenya, Art 88(4).

¹²³ Constitution of Kenya, Art 88(4).

¹²⁴ Constitution of Kenya, Art 88(2).

¹²⁵ *Raila Odinga & Others v William Ruto & 10 Others* (2022) eKLR.

of the Commission are vested in the Commission as a collective body and must be exercised by the Commissioners acting collectively.¹²⁶

2.4.1 Achievements by the Independent Electoral and Boundaries Commission

The Commission has played a fundamental in helping secure key components of popular sovereignty and in the shaping of the present and the future of Kenya in terms of helping realize popular sovereignty through elections, nominations and referenda.¹²⁷ The Commission has ensured the continuous registration of voters and revision of the voter's roll, delimitation of constituencies and wards and settlement of electoral disputes that arise out of nominations.

The Commission has powers to create units within itself and appoint employees as it may determine. It is a body corporate and enjoys such rights and freedoms of a body corporate.

2.5 Collaboration and Consultation with the Public Service Commission as a Commission in Kenya

The Commission is established under Article 233(1) of the Constitution. The Commission is required to *inter alia* promote, undertake compliance evaluation and report on measures taken, progress achieved and the impediments in the realization of the values and principles in the public service. The Commission is equally mandated to oversee the implementation of recommendations made by the Presidency and the Parliament. Furthermore, the Commission is charged with the power to build both internal and external institutional capacity that is necessary for the promotion, compliance evaluation and reporting on the values and principles. It also develops and disseminates policy framework for the implementation of the values and principles.¹²⁸

2.5.1 Achievements by the Public Service Commission

In its operations, the Public Service Commission is guided by the values and principles of governance under Article 10 of the Constitution alongside the values and principles of public service under Article 232.¹²⁹

The Commission has as part of its mandate issued summons as may be necessary for the fulfillment of its mandate, as well as powers to appoint officers in accordance with the Act which establishes

¹²⁶ *Raila Odinga & 6 Others v. William Ruto & 10 Others* (2022) eKLR.

¹²⁷ Constitution of Kenya, Art 88.

¹²⁸ Public Service Commission Act, 2017, s 5.

¹²⁹ Public Service Commission Act, 2017, s 4.

the criteria for such appointments and promotions.¹³⁰ The Commission makes recommendations to the President regarding appointments as Principal Secretaries among other appointments.

The Commission has the power to investigate, monitor and evaluate an organization of the public service with respect to any public body and make recommendations to the public body, the President and Parliament.¹³¹ It has the power to excise disciplinary control within the public service, a power it can delegate in accordance with section 65 of the Act.

2.6 Collaboration and Consultation Judicial Service Commission (JSC) as a Commission in Kenya

The Judiciary is the ultimate defender of popular sovereignty, constitutional democracy, the Constitution, the rule of law, liberty and human rights. The JSC is established under Article 171 of the Constitution 2010, chaired by the Chief Justice.

The powers and duties of the JSC are provided for, by Article 172 of the Constitution. Thus, JSC is empowered to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. In that manner, the Commission is required to recommend to the President persons for appointment as Judges, review and make recommendations on the conditions of service the staff of the judiciary and judges and judicial officers, other than their remuneration.

The JSC is also mandated to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other Judicial Officers and other staff of the Judiciary in a manner prescribed by a legislation. It is also required to prepare and implement programs for the continuing education and the training of judges and judicial officers. Finally, the Commission is enjoined to advise the national government on improving the efficiency of the administration of justice in the country.¹³²

To ensure financial autonomy and independence, Article 173(1) of the Constitution establishes the Judiciary Fund to be administered by the Chief Registrar of the Judiciary.¹³³ The Commission is responsible for ensuring that the judiciary has adequate and motivated staff for efficient service

¹³⁰ Public Service Commission Act, 2017, s 36.

¹³¹ Public Service Commission Act, 2017, s 57.

¹³² Constitution of Kenya, Art 172(1)

¹³³ Constitution of Kenya, Art 173(1).

delivery. The Commission is expected to handle all matters that relate to human resource management and development.¹³⁴

2.6.1 Achievements by the Judicial Service Commission

The Commission has ensured the upholding, sustaining and facilitation of the independence and impartiality of the Judiciary.¹³⁵

The Commission is non-partisan and apolitical, that is accountable to the people of Kenya, and has also ensured transparency and integrity of the Judiciary.¹³⁶

2.7 Collaboration and Consultation with the National Land Commission as a Commission in Kenya

The National Land Commission is established under Article 248(2)(b) and Article 67 of the Constitution. The elaborate provisions on NLC are provided in the National Land Commission Act, No. 5 of 2012. The functions and mandates of the Commission are largely four-pronged as per Article 67(2) of the Constitution. The mandates include the power to manage public land on behalf of the national and county governments, to recommend a national land policy to the National Government and to initiate investigations on its own initiatives or on a complaint, into present or historical land injustices and to recommend appropriate address.¹³⁷

In its advisory opinion on the relationship between the Ministry of Lands and the NLC¹³⁸, the Supreme Court noted that unlike other Commissions, the National Land Commission has a unique and symbiotic relationship with the executive in the form of the Ministry of Lands. Negotiating this relationship has not been easy but the Commission reconnects with constitutional history and with the long-standing demands of Kenyans for an accountable and independent institution in charge of land.¹³⁹

¹³⁴ Article 172(1) of the Constitution of Kenya, 2010.

¹³⁵ Judicial Service Act, s 3(1).

¹³⁶ Judicial Service Act, 2011, s 4(f).

¹³⁷ Constitution of Kenya, 2010, Art 67(1).

¹³⁸ Advisory Opinion Reference No. 2 of 2014.

¹³⁹ Ambreena Manji and Smith Ouma, A Lost Opportunity: Can the National Land Commission Reclaim its Original Mandate and Regain the Public's Trust?.

The Commission is viewed as a solution to Kenya's long-standing land problems, including the massive and worsening inequalities in access to land, the concentration of land in a despotic executive, widespread land grabbing, the irregular and illegal use of land as a patronage resource, and continuing conflicts over who is and who is not to occupy land. The Commission is envisaged as a Constitutional Commission that stands apart from existing Commissions that are associated with facilitating a multitude of wrongs including corruption.¹⁴⁰ The Commission can initiate the investigation on historical land injustices.

2.7.1 Achievements by the National Land Commission

As part of its objectives, the Commission has ensured the proper management and administration of land in accordance with the principles of land policy established by Article 60 of the Constitution.¹⁴¹

The Commission further, continues to receive, admit and investigate all historical land injustices complaints and recommends appropriate redress.¹⁴²

2.8 Collaboration and Consultation Kenya National Commission on Human Rights as a Commission in Kenya

This is an autonomous National Human Rights Institution that has been established under Article 59 of the Constitution. Its core mandate is the furthering of the protection and promotion of human rights in Kenya. This Commission is the successor body to the one established in 2002. Its establishment and operations are chiefly guided by approved Paris Principles of the UN on the establishment and functioning of the independent National Human Rights Institutions.¹⁴³

The broad mandates of the Commission include acting as a watchdog over the government in the area of human rights. In that regard, the Commission provides key stewardship in steering the government towards a human rights regime.

¹⁴⁰ *Ibid.*

¹⁴¹ National Land Commission Act, 2012, s3(a).

¹⁴² National Land Commission Act, 2012, s15.

¹⁴³ The Paris Workshop, held in 1991, was a first step in the development of standards for National Human Rights Institutions (NHRIs). These were subsequently endorsed by the UN. General Assembly in 1993 (Resolution A/RES/48/134) and are generally referred to as the 'Paris Principles available on <<https://ennhri.org/about-nhris/un-paris-principles-and-accreditation>> accessed on 27th September, 2023.

2.8.1 Kenya National Commission on Human Rights (KNCHR) Act, 2011

The functions of the Commission are provided for, by Section 8 of the Kenya National Commission on Human Rights Act. The Commission is therefore mandated to promote the respect for human rights while developing a culture of human rights in the Republic.¹⁴⁴ The Act establishes the requirement that the Commission shall act in accordance with the values and principles espoused in the Constitution and other Laws of Kenya. In that manner, the Commission is enjoined to observe and respect *inter alia*, the diversity of the people of Kenya, impartiality and gender equity.¹⁴⁵

The Court in *Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others*¹⁴⁶ entertained the issue on whether KNCHR can lodge a claim against the State. The Attorney General, on behalf of the State, argued that KNCHR is an organ of the state and therefore lacked the requisite locus standi to lodge a petition against the government. KNCHR, on the other hand, contended that since it has constitutional mandates per Article 59 that permit it to lodge a petition where there is a violation of constitutional rights and seek relief, it could rightly bring a petition against the government.¹⁴⁷ The Court in agreement with KNCHR's submissions, decided that there is nothing in the constitution that prevents Constitutional Commissions from instituting any proceedings against the government on any ground as a remedial action.¹⁴⁸ In that regard, the Court noted that Article 249 of the Constitution gives the Commission powers and mandates to secure the observance by all state organs of democratic value and principles and the promotion of constitutionalism.¹⁴⁹

The powers of the Commission include the power carry out investigations and consequently to issue summons to a witness to assist the Commission in conducting investigations.¹⁵⁰ The Constitution enjoins the Commission to pursue the path of a peacemaker as its first course of action upon concluding investigations. The Commission also has powers to call for mediation, negotiation or conciliation for purposes of dispute resolution.

¹⁴⁴ Kenya National Commission on Human Rights Act, 2011, s8.

¹⁴⁵ Kenya National Commission on Human Rights Act, 2011, s7.

¹⁴⁶ [2015] eKLR.

¹⁴⁷ *Coalition for Reforms and Democracy (CORD) and 2 Others v. Republic of Kenya and 10 Others* [2015] eKLR.

¹⁴⁸ *Coalition for Reforms and Democracy (CORD) and 2 Others v. Republic of Kenya and 10 Others* [2015] eKLR.

¹⁴⁹ *Coalition for Reforms and Democracy (CORD) and 2 Others v. Republic of Kenya and 10 Others* [2015] eKLR.

¹⁵⁰ Article 59(3) of the Constitution of Kenya, 2010.

2.9 Collaboration and Consultation National Gender and Equality Commission (NGEC) as a Commission in Kenya

This Commission is established pursuant to Article 59(4) of the Constitution. The Commission has the mandate of promoting gender equality and freedom from any and all forms of discrimination. It focuses on special interest groups including women, youth, persons with disabilities, children, minorities, marginalized groups and the older members of the society.

2.9.1 Achievements by the National Gender and Equality Commission

The Commission continues to fight for the promotion of gender equality and freedom from discrimination pursuant to the Constitution. It also monitors and advises on integration of the principles of equality and freedom from discrimination in the country. It continues to co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalized groups in national development.¹⁵¹

2.10 Collaboration and Consultation with the Parliamentary Service Commission as a Commission in Kenya

The Commission is established by Article 127. The functions of the Commission include *inter alia*, the provision of services and facilities to ensure the efficient and effective functioning of Parliament, preparing annual estimates of expenditure of the parliamentary service and submitting the same for approval by the National Assembly. The Commission also appoints the Clerks for each House of Parliament.¹⁵²

The Parliamentary Service Act provides for further functions and powers of the Commission in accordance with Article 127(6) (e) and 252(1) (d) of the Constitution. Furthermore, the Act provides for the manner of appointment of the Members of the Commission pursuant to Article 127(2) (c) and (d) of the Constitution. It establishes the qualifications of a person capable of being appointed as a member of the Commission under Article 127(2) (d).¹⁵³

¹⁵¹ National Gender and Equality Commission Act, 2011, s 8.

¹⁵² Constitution of Kenya, 2010, Art 128(1).

¹⁵³ Parliamentary Service Act, 2019, s 8.

2.10.1 Parliamentary Service Act, 2019

Section 4 of the Parliamentary Service Act establishes the Parliamentary Service Commission.¹⁵⁴ The Act requires the Service to be an institution of exemplary technical and administrative competence. The independence of the Service is guaranteed by the Act such that, in the performance of their functions, the Act bars the employees of the Service from seeking directions from any external source. Equally, employees of the Service shall not receive directions from any source external to the service.¹⁵⁵ The Act enjoins members of Parliament to respect the independence of the Service.

The expenses of the Commission incurred in execution of their constitutional functions are to be charged on and issued out of the Consolidated Fund.¹⁵⁶ The provisions as to conduct of the affairs and the business of the Commission are contained in the Second Schedule of the Act and relates to when and how the Commission conducts its meetings.

The qualifications and procedure for appointment of the members of the Commission are prescribed by Section 9 of the Act.

The Act stipulates further the functions of the Commission. Accordingly, the Commission is mandated to *inter alia*, direct or supervise the administration of the services and facilities provided by, and exercise budgetary control over the Parliamentary Service.¹⁵⁷

A Member of the Commission can be removed from office under grounds such as serious violation of the Constitution or any other law, gross misconduct, physical or mental incapacity, and incompetence or on the grounds of bankruptcy. The procedure for removal from office is initiated through a motion by a Member of Parliament supported by at least a quarter of all members of the respective house. The motion must be supported by at least a third of the members of the house. The House appoints a select committee to investigate the matter. Depending on the outcome of the investigations, the matter proceeds to the other House of Parliament. The member of the Commission stand removed if both houses pass the motion in the same form.

¹⁵⁴ Parliamentary Service Act, 2019, s 4(1).

¹⁵⁵ Parliamentary Service Act, 2019, s 4(3).

¹⁵⁶ Parliamentary Service Act, 2019, s 42.

¹⁵⁷ Parliamentary Service Act, 2019, s 11.

The Commission is a body corporate and enjoys the rights and powers of such body corporate. It is allowed to form committees from time to time as it deems necessary for the better carrying out of its functions.

2.11 Collaboration and Consultation with the Ethics and Anti-Corruption Commission (EACC) as a Commission in Kenya

The EACC is established under Article 253 of the Constitution.

2.11.1 Achievements by the Ethics and Anti-Corruption Commission

As part of its mandate, the Commission, has powers to acquire, hold, charge and dispose both movable and immovable property. It also has powers to do or perform all such other things or acts for the proper discharge of its functions.¹⁵⁸ The Commission has powers to receive complaints on the breach of the code of ethics by public officers.¹⁵⁹ It has the powers to investigate and recommend to the Director of Public Prosecutions for the prosecution of any acts of corruption or economic crimes. It can recommend the appropriate action to be taken against state officers or public officers alleged to have committed or behaved unethically.¹⁶⁰

2.12 Collaboration and Consultation with the Independent Offices in Kenya

Article 228 and 229 of the Constitution creates the offices of the Auditor General and the Controller of Budget.

2.12.1 Collaboration and Consultation with the Auditor General as an Independent Office in Kenya

The Constitution creates the office of the Auditor General under Article 229. Further, the Constitution provides for the independence of this office per Articles 248 and 249. The Office is established and operationalized under Section 4 of the Public Audit Act. The Auditor General is mandated to, *inter alia*, audit and report on the accounts of National and County Governments, accounts of all funds and authorities of the national and county governments, accounts of all Courts and accounts of every Commission and Independent Office established by the Constitution.¹⁶¹ The

¹⁵⁸ Ethics and Anti-Corruption Commission Act, 2011, s 3.

¹⁵⁹ Ethics and Anti-Corruption Commission Act, 2011, s 11(1)(c).

¹⁶⁰ Ethics and Anti-Corruption Commission Act, 2011, s 11(1)(e).

¹⁶¹ Constitution of Kenya, 2010, Article 229.

office is also mandated to audit and report the accounts of political parties funded from Public Funds and public debt.

The Audit Reports are submitted to the National Assembly, whereupon, they debate and consider the Report and take appropriate action.

2.12.2 Collaboration and Consultation with the Controller of Budget as an Independent Office in Kenya

This office is established under Article 228 of the Constitution. The holder of the office is nominated by the President and with the approval of the National Assembly, and appointed by the President. Its core mandate is to oversee the implementation of budgets of both the National and County governments by the authorizing of withdrawal from public funds. The Constitution categorizes the roles of this office into oversight, controlling, advisory, investigative, arbitration and public sensitization roles.¹⁶²

The person appointed as the Controller of Budget holds the office for a term of eight years and is not eligible for a re-appointment.

The Controller of Budget reports to each House of Parliament after every four months regarding the implementation of the budgets of the National and County Governments.¹⁶³ The office prepares the Annual Reports on Budget Implementation and reports to the President and the Parliament.¹⁶⁴

The Office is empowered to prepare, publish and publicize statutory reports, conduct investigations based on their own initiative or on a complaint made by a member of the public. The investigations pertaining to the financial performance of a state organ and reports are submitted to the President and Parliament in accordance with the Constitution.¹⁶⁵ The Office has powers to conduct mediation, reconciliation and negotiation for purposes of dispute resolutions.¹⁶⁶

¹⁶² Constitution of Kenya, 2010, Art 228.

¹⁶³ Constitution of Kenya, 2010, Art 228.

¹⁶⁴ Constitution of Kenya, 2010, Art 254(1).

¹⁶⁵ Constitution of Kenya, 2010, Art 252(1)(a).

¹⁶⁶ Constitution of Kenya, 2010, Art 252(1)(b).

2.13 Composition and Institutional Framework of Commissions and Independent Offices in Kenya

Apart from the constitutive legislations, the Kenyan Constitution 2010 prescribes the standard of composition, appointments and terms of office for the Commissions and Independent Offices. In that regard, Article 250(1) of the Constitution limits the membership of the Commissions to a minimum of three and a maximum of nine.¹⁶⁷ The President is mandated to appoint the Chairperson of the Commissions in accordance with the constitution and the specific constitutive acts. The National Assembly while exercising its oversight authority, is, however, empowered to vet and approve such appointees.¹⁶⁸ Members of the Commissions are henceforth required to elect their vice-Chairpersons and appoint their Secretaries.¹⁶⁹

The Constitution requires that the holders of the Commissions and Independent Offices meet the specifications stipulated in the specific constitutive legislations.¹⁷⁰ In addition, the appointment to the very Commissions and Independent offices must factor in the national values and principles of governance, regional balance and ethnic diversity.¹⁷¹

The Constitution limits the term of office for the Commissions and Independent Offices to a non-renewable six years with the exception of the *ex-officio* members.¹⁷² The Constitution further bars from holding other offices or employment for profit, unless such persons are *ex-officio* or part-time Members.¹⁷³

The Commissioners have security of tenure, and can only be removed from office for serious violation of the Constitution and any other law, gross misconduct, physical or mental incapacity or on grounds of bankruptcy.¹⁷⁴ Any person who so desires the removal of a member of a Commission or any holder of an independent office is required to present a petition to the National Assembly for consideration. If satisfied with the petition, the National Assembly is required to

¹⁶⁷ Constitution of Kenya, 2010, Art 250(1).

¹⁶⁸ Constitution of Kenya, 2010, Art 250(2).

¹⁶⁹ Constitution of Kenya, 2010, Art 250(10) & (12).

¹⁷⁰ Constitution of Kenya, 2010, Art 250(3).

¹⁷¹ Constitution of Kenya, 2010, Art. 250(4).

¹⁷² Constitution of Kenya, 2010, Art 250(6) (a)

¹⁷³ Constitution of Kenya, 2010, Art 250(6) (b).

¹⁷⁴ Constitution of Kenya, 2010, Art 251(1).

send the Petition to the President, who is then required to form a tribunal to investigate the matter and make binding recommendations to the President.¹⁷⁵

2.14 Conclusion

H.W.O Okoth-Ogendo argues that most of the old African Constitutions were enacted and amended with the sole objective of removing any checks on governmental power and to limit peoples' sovereign power, and to restrict or deny them fundamental human rights.¹⁷⁶

However, the Fourth Arm of Government, has established the rule of law, protected human and people's rights and fostered democracy.

This chapter has established that the Fourth Arm of Government plays a vital role in the smooth operations of any government. The three arms of government are therefore meant to work separately yet complement the Fourth Arm of Government.

In the next Chapter, we critique of the effectiveness of Commissions and Independent Offices in Kenya.

¹⁷⁵ Constitution of Kenya, 2010, Art 251.

¹⁷⁶ Issa Shivji (ed), *State and Constitutionalism: An African Debate on Democracy* (Southern Africa Political Economy Series (SAPES) Trust, Harare 1991) at 3-26.

CHAPTER 3

A CRITIQUE OF THE EFFECTIVENESS OF COMMISSIONS AND INDEPENDENT OFFICES IN KENYA

3.1 Introduction

Commissions and Independent Offices were established in Kenya with the aim of promoting good governance, accountability, and protecting human rights. These Offices were created to address specific challenges and gaps in governance that existed in Kenya, particularly in the areas of oversight, anti-corruption, human rights, and electoral processes. Further, they were created to strengthen accountability mechanisms by providing oversight of government institutions and public officials.

The Commissions and Independent Offices play an important role in investigating complaints, monitoring compliance with laws and regulations, and holding individuals and institutions accountable for their actions. They essentially work to promote transparency in government operations, decision-making processes, and service delivery. Commissions and Independent Offices provide mechanisms for the public to access information, scrutinize government actions, and ensure transparency in the use of public resources. The establishment of these offices in Kenya reflects the country's commitment to improving governance, upholding the rule of law, protecting human rights, and fostering transparency and accountability in Public Institutions.

However, there are arguments and criticisms that certain Commissions and Independent Offices in Kenya have been ineffective in fulfilling their mandates. These criticisms are based on various factors, including challenges in implementation, resource constraints, political interference, and the perception of limited impact¹⁷⁷.

3.2 Mandate and Authority of Commissions and Independent Offices in Kenya

The Commissions and Independent Offices are established as separate entities from the Government and are meant to operate autonomously, free from political interference. They are often granted legal and operational independence to carry out their functions effectively. Each

¹⁷⁷ Sihanya, Ben M. (2011) "Constitutional Implementation in Kenya, 2010- 2015: Challenges and Prospects," A study under the auspices of the Fredrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper, No 5.

Commission and Independent Office has a specific mandate defined by law, outlining its scope of authority and responsibilities. This includes areas such as human rights, governance, electoral processes, anti-corruption, and public service delivery.

In the upshot, the effectiveness of Commissions and Independent Offices often depend on the clarity and strength of their mandate and the extent of their authority. Commissions with broad powers, clear responsibilities, and adequate legal backing are generally better positioned to carry out their work effectively. Whereas the mandates of the various Commissions and Independent Offices are outlined in the Constitution and the various pieces of legislations, the extent of the authority of the various Commissions and Offices varies depending on the Commission or the Independent Office.

Typically, Commissions and Independent Offices have the authority to make recommendations to relevant authorities based on their findings and investigations. They often provide reports and advice to the government, public institutions, or the public on matters within their expertise. The recommendations largely address shortcomings, propose policy changes, or promote improvements in their respective fields.

However, and as discussed above, some of the Commissions and Independent Offices have the authority to conduct investigations related to their respective mandates, including the power to gather evidence, summon witnesses, and obtain relevant information to facilitate their investigations. Additionally, some also have the power to monitor and assess compliance with relevant laws, regulations, and standards within their areas of jurisdiction, including monitoring election processes, compliance with human rights principles, adherence to ethical conduct, or the equitable distribution of resources. Further, some Commissions have the authority to mediate and facilitate the resolution of disputes within their purview, including providing a platform for dialogue, conducting alternative dispute resolution processes, or making recommendations for resolution.

The variation in power and authority of Constitutional Commissions and Independent Offices (CCIOs) in Kenya has significant implications for their effectiveness, accountability, and impact. The variation in authority has resulted in differences in the scope of their responsibilities, decision-making powers, and enforcement capabilities. It has also impacted on the ability of the

Commissions and Independent Offices to address specific issues effectively and fulfil their intended roles. Moreover, the variation in powers and authority has affected the level of accountability and oversight exercised by different Commissions and offices, with some Commissions having more robust mechanisms for monitoring and evaluating the actions of public officials, while others may have limited powers in this regard. Similarly, the variation in authority has impacted the extent to which Commissions and Independent Offices influence policy and decision-making processes, as Commissions with broader powers exert a greater ability to shape policy agendas and recommend necessary reforms.

Commentaries argue that the Ethics and Anti-Corruption Commission (EACC) is restricted in the scope of its mandate and authority.¹⁷⁸ For example, several arguments on the ineffectiveness of the Commission are in relation to the fact that it can only deal with corruption cases that touch on public officers but not state officers. While the EACC seems to capture the conduct of public officers, the Acts does not cover the conduct of state officers. Moreover, the EACC is deemed as lacking prosecutorial powers in spite of the Constitution's provision under Article 157(6) that allows the DPP to take over proceedings instituted by an individual or authority. In as much as the EACC is perceived to lack prosecutorial powers, the court in *Stephen Ndiba vs EACC & Another*¹⁷⁹ appeared to interpret the Constitution as giving the EACC power to prosecute. Perhaps, it would be interesting to see how the EACC exercises such function being that the Commission has not really lived up to the powers apparently conferred to it by the court in *Stephen Ndiba*.

3.3 Autonomy and Independence of Commissions and Independent Offices in Kenya

As noted in the preceding Chapter, the Constitution of Kenya and various constitutive legislation guarantee the autonomy and independence of the Commissions and Independent Offices in Kenya. The Commissions are granted the requisite autonomy and independence to effectively discharge their respective mandates. Autonomy ranges from the prescription of the specific requirements and procedures for the appointment and removal of Commissioners, including public participation and parliamentary approval. The Commissions also wield the power to determine their internal

¹⁷⁸ Sihanya, Ben M. *Constitutional Commissions and Independent Offices in Kenya: Experiences, Challenges and Opportunities* (2021) <https://www.bing.com/ck/a?!&&p=364eb8bf6143cff0>.

¹⁷⁹ *Stephen Mburu Ndiba v. Ethics and Anti-Corruption Commission & another* [2015] eKLR.

organization, manage their budgets independently, and make decisions within their respective jurisdictions.

To buttress the autonomy and independence of the various Commissions and Independent Offices, the Constitution explicitly prohibits any person or authority, including the executive, from interfering with the independence of the Commissions and Offices, in fact, it is an offence for any person to undermine the functions, or to improperly influence the decisions of the Commissions and Independent Offices.

However, since their establishment, Commissions and Independent Offices in Kenya have faced challenges related to political interference. Political actors often attempt to exert influence over these Commissions to serve their own interests, manipulate outcomes, or undermine their independence. Political interference can take various forms, such as appointing or attempting to influence the appointment of Commissioners who are aligned with specific political agendas, interfering in the decision-making process of the Commissions, or restricting their operational *autonomy*.

3.4 Perception of Commissions and Independent Offices as a Threat to Political Interests of Elected Officials in Kenya

Despite the foregoing legal and constitutional parameters, political interference remains a fundamental challenge to the roles and functions of Commissions and Independent Offices. Independent Commissions and Offices are constitutionally empowered to monitor public and elected officials. They serve as public watchdogs and ensure voters' trust in policymakers and political institutions. However, the potential conflict of interest arises when elected officials themselves may be subject to scrutiny or actions by Commissions and Independent Offices.

It is important to recognize that the constitutional design of Commissions and Independent Offices aims to strike a balance between their autonomy and the need for accountability. The intention behind their establishment is to provide a system of checks and balances, ensuring that power is not concentrated in a single authority and that elected officials are held accountable for their actions.¹⁸⁰ Nevertheless, in practice, elected officials often perceive Commissions and Independent

¹⁸⁰ Rauh Jonathan, 'Predicting Political Influence on State Ethics Commissions: Of Course, We Are Ethical—Nudge Nudge, Wink Wink' *Public Administration Review* (2015) 75 (1) <http://www.jstor.org/stable/24758030>.

Offices as a threat to their interests, especially when these Commissions and Independent Offices have the authority to censure or take action against them. This perception can lead to attempts at political interference, including attempts to undermine the independence and effectiveness of these Commissions.¹⁸¹

For instance, the Salaries and Remuneration Commission (SRC) has faced political targeting due to its stance on capping elected officers' salaries and addressing the issue of allowances abuse. The SRC is responsible for setting and reviewing the salaries, benefits, and allowances of public officials, including elected officers. The issue of high salaries and allowances for elected officials has been a contentious topic in Kenya, with concerns raised about the sustainability of the public wage bill and the equitable distribution of resources. The SRC, in its efforts to promote fiscal responsibility, fairness, and accountability, has advocated for salary caps and reforms to address the misuse of allowances.¹⁸²

However, these measures often face resistance from politicians who may perceive them as a threat to their own interests. Politically targeted actions often include attempts to undermine the credibility and authority of the SRC, challenging its decisions through legal or political means, or exerting pressure to reverse or weaken its recommendations. Political targeting has posed adverse effects on the ability of the SRC to carry out its mandate independently and effectively. It has also created a hostile environment for the Commission, undermine public trust, and hinder its efforts to address issues of salary disparities and allowances abuse.¹⁸³

3.5 Political Disempowerment of Commissions and Independent and Offices in Kenya

In some instances, the elected officials have intentionally disempowered and undermined Commissions and Independent Offices they perceive as a threat by limiting their resources, staff, and capacity to effectively carry out their mandates. Underfunding and understaffing Independent Commissions and Offices can have serious implications for their ability to operate independently

¹⁸¹ Rauh Jonathan, 'Predicting Political Influence on State Ethics Commissions: Of Course, We Are Ethical—Nudge Nudge, Wink Wink' *Public Administration Review* (2015) 75 (1) <http://www.jstor.org/stable/24758030>.

¹⁸² Biketi Kikechi, 'It's Never Been an Easy Ride for Independent Commissions' *The Standard* (Nairobi, December 11, 2022) <https://www.standardmedia.co.ke/politics/article/2001462382/its-never-been-an-easy-ride-for-independent-commissions>.

¹⁸³ Biketi Kikechi, 'It's Never Been an Easy Ride for Independent Commissions' *The Standard* (Nairobi, December 11, 2022) <https://www.standardmedia.co.ke/politics/article/2001462382/its-never-been-an-easy-ride-for-independent-commissions>.

and fulfil their roles as public watchdogs. Limited resources can hinder their capacity to conduct thorough investigations, implement necessary reforms, and ensure proper oversight. It can also impede their ability to attract qualified personnel and maintain a sufficient workforce.¹⁸⁴

Political disempowerment undermines the very purpose of having Commissions and Independent Offices, which is to provide checks and balances, promote transparency, and hold elected officials accountable. It undermines the ability of the Commissions and Independent Offices to carry out their mandates impartially, compromises the integrity of their work, erodes public trust in these Offices and weakens the Kenyan democratic fabric.

EACC has suffered from political interference because of its mandate in investigating cases involving grand corruption and the grabbing of public land by politicians and senior public servants. Given its mandate to investigate high-profile cases that involve influential individuals, the EACC's work can often clash with the interests of those in power. Politicians and senior public servants implicated in corruption or land-grabbing cases often attempt to interfere with the EACC's investigations in order to protect their own interests and avoid legal consequences. Political interference in the work of the EACC manifests in various ways, such as attempts to intimidate or pressure the Commission, undermine its credibility, manipulate or delay investigations, or limit its resources and capacity to carry out its mandate effectively.¹⁸⁵

The Parliamentary Service Commission (PSC) and the Constitution have helped secure a measure of independence in terms of the Parliament's legislative agenda. However, there still exists key challenges in the Parliament's role in limiting the powers of the Parliament. For example, the PSC has long been seeming to protect the interests of the MPs especially with regards to remuneration and reducing tax burden for the MPs. The PSC is required to continuously liaise with other Commissions while discharging its functions. The Commission has however, historically nailed this opportunity to cushion the welfare of the MPs welfare while undermining public interest. Furthermore, the PSC has often appeared to act *ultra vires* its constitutional mandate. In certain instances, it has unreasonably interfered with other Commissions while purporting to oversee

¹⁸⁴ Rauh Jonathan, 'Predicting Political Influence on State Ethics Commissions: Of Course, We Are Ethical—Nudge Nudge, Wink Wink' *Public Administration Review* (2015) 75 (1) <http://www.jstor.org/stable/24758030>.

¹⁸⁵ Biketi Kikechi, 'It's Never Been an Easy Ride for Independent Commissions' *The Standard* (Nairobi, December 11, 2022) <https://www.standardmedia.co.ke/politics/article/2001462382/its-never-been-an-easy-ride-for-independent-commissions>.

them. For example, the PSC has in the past dramatically summoned the Chief Justice (CJ) and Members of the Judicial Service Commission (JSC) for interrogation.¹⁸⁶ Instances of conflicts among Commissions and Independent Offices may result out of political and other ulterior interest far from honest exercise of mandates under the Constitution.

Between 2010 and just before the 2013 General Elections, the Independent Electoral and Boundaries Commission (IEBC) and the Judiciary enjoyed public confidence. This was partly due to the proper checks and balances secured for the Commissions by the then government. However, such high level of public confidence seemed to get eroded after the 2013 elections. The JSC has faced challenges with regards to institutional independence. The apparent conflict between the Chief Justice, the Judicial Service Commission (JSC) and the Chief Registrar of the Judiciary in 2016 over alleged financial misappropriations eroded public confidence in the JSC.¹⁸⁷

Interference by the Executive has greatly hampered the realization of functional independence of the office of the Auditor General. For example, President Uhuru Kenyatta's reversals and his political power playing in 2016-2017 adversely affected the independence of the Auditor General.

The Government seemed keen on discriminating against individuals who were apparently opposed to the President, especially those who were not the President's tribesmen. For example, during the Anti-Corruption Conference held in State House in 2016, the President cautioned the Auditor General's going to America to further investigate the lost Eurobonds.¹⁸⁸ In 2017, MPs allied to the President maliciously moved a motion in Parliament to remove the former Auditor General Edward Ouko. The MPs based their grounds on baseless allegations of financial misappropriation.¹⁸⁹ This was after the former Director of Public Prosecution (DPP), Mr Keriako Tobiko had cleared the Auditor General of abuse of office charges.

¹⁸⁶ Kabue Angelicah Wanjiru, *Effects of internal audit practice on performance of public Commissions in Kenya. A case of parliamentary service Commission of Kenya*. Diss. Africa Nazarene University, (2020) <http://repository.anu.ac.ke/handle/123456789/531>.

¹⁸⁷ Kipchumba Some 'Judicial Service Commission members mint millions every month from sittings' (2016) *Standard Digital News*, <http://www.standardmedia.co.ke/?articleID=2000094444>.

¹⁸⁸ Koigi Rosemary W, *Challenges of Strategy Implementation in The Office of Auditor General Of Kenya*. Diss. University of Nairobi, 2016. <http://erepository.uonbi.ac.ke/handle/11295/99623>

¹⁸⁹ Moses Njagi, Stop this witch-hunt, Auditor General Edward Ouko tells MPs in protest letter," *Standard*, 19/2/2017, <https://www.standardmedia.co.ke/article/2001229893/stop-this-witch-hunt-auditor-general-edward-ouko-tells-mps-in-protest-letter>.

The DPP had stated that there was no evidence that the Auditor General had abused office or misappropriated funds as alleged by the MPs. The matter also attracted the attention of the EACC where the Deputy Chief Executive Officer (CEO) of EACC continued to agitate for the Auditor General to be held liable. While there was misappropriation of funds in the Auditor General's office, the DPP recommended the prosecution of one of the Deputy Auditor General over such misappropriation. Evidence depicted that such loss of funds was attributable to the Deputy Auditor General rather than the Auditor General himself. The issue attracted the attention of a section of politicians loyal to the President who defended the Deputy Auditor General, who shielded him from prosecution.¹⁹⁰

While the Constitution requires SRC to harmonize salaries and look into issues regarding equal pay for work value alongside related benefits for public service employees in Kenya, reports show that there are still unjustified disparities yet to be addressed by the SRC. In fact, such remuneration in equities and discrepancies are reported to have been enhanced during the tenure of President Uhuru's tenure as compared to Kibaki's tenure. Whereas the SRC has come up with reports that attempt to explain the initiatives taken by the Commission to address income disparities, the reports have been rejected by sections of public employees arguing that the disparities are unjustified and unfair. Analysts and Commentators point that such inequities in remuneration depict unequal treatment and favoritism for public service employees hailing from certain regions of the country.¹⁹¹

The Ethics and Anti-Corruption Commission still remains controversial, conflicted and inconsequential in handling serious graft cases. The Commission remains ineffective partly because of the role of politics on whether corruption cases touch on state officers or public officers. While some of its inefficiencies are caused by lack of express prosecutorial under the Act

¹⁹⁰ Vincent Achuka and Paul Wafula, 'Why Ouko wants the Constitution changed to clip the President's powers' *Daily Nation*, Nairobi, 28 August 2019, at 9. See also the editorial in the Standard: 'Heed Ouko advice and give Auditor General's office teeth' *The Standard*, 29 August 2019, at p14; cf. Dr David Ndi (2019) 'We are not overrepresented, it's the imperial presidency that is killing us' *EastAfrican Review*, <https://www.theeastafricanreview.info/op-eds/2019/08/21/we-are-not-overrepresented-its-the-imperial-presidencythats-killing-us/>.

¹⁹¹ Patrick Lang'at, 'Civil servants reject Serem's pay scheme' *Daily Nation*, , 14/11/ 2016, <http://www.nation.co.ke/news/Civil-servants-reject-Serem-s-pay-scheme/1056-3451230-12lcc61>.

establishing it, the Commission has suffered lack of independence in conducting its investigatory powers.

To buttress the ineffectiveness of this Commission, it is proper to say that huge amounts of public funds continue to be unaccounted for, despite a progressive legal framework aimed at addressing corruption. The ineffectiveness of the EACC is attributed to several factors including, inadequate financial capacity and budget constraints. Moreover, there are reports indicate that EACC is also faced by inadequate capacity in terms of human resources.¹⁹²

The National Land Commission (NLC) and the Ministry of Lands and Physical Planning have, on numerous occasions, fought over areas of jurisdiction of the respective state entities. Both have claimed, in the past, that tasks falling within their constitutional powers and mandates are wrongly being executed by the other entity. Even the intervention by the Supreme Court over the matter, through an advisory opinion has not apparently brought an end to this issue.

In *Abdulkadir A. Khalif v Principal Secretary Ministry of Lands & Physical Planning & 4 Others; National Land Commission (NLC) & Another (Interested Parties)*¹⁹³, the Court of Appeal addressed the appellant's complaints on the duplication of roles between the Ministry of Lands and the NLC by commenting that indeed judicial intervention was necessary to address the conflict of jurisdiction between the two entities.

The Court of Appeal, while relying on the Supreme Court NLC Advisory Opinion, stated that the mandate of the NLC must be interpreted in a manner that would not create confusion or jeopardize public interest. The Ministry of Land and the National Land Commission have been in dispute with regards which entity should exercise administration and management of land and whether the mandates include preparation and execution of leases, execution of certificates of leases in relation to private land and issuance of letter of allotment. While the *Advisory Opinion*¹⁹⁴ is authoritative on the mandate of the NLC, the Ministry of Lands exercising such functions that the Constitution gives the Commission interferes with the functional independence of the Commission.

¹⁹² Mukunyi Catherine Wangui, *Impediments to effective investigation and prosecution of corruption cases in Kenya: The case of the Ethics and Anti-Corruption Commission*. Diss. University of Nairobi, 2014. <http://erepository.uonbi.ac.ke/handle/11295/76619>.

¹⁹³ [2020] eKLR.

¹⁹⁴ *In the Matter of the National Land Commission* [2015] eKLR.

3.6 Composition, Appointment and Security of Tenure of Commissions and Independent Offices in Kenya

The composition of Commissions and Independent Offices in Kenya varies depending on the specific Commission or Office in question. While some Commissions are composed of Commissioners appointed through a competitive process involving a selection panel, some are appointed directly by the President with the approval of the Parliament. Some like the Judicial Service Commission has its commissioners consisting of holders of specific offices like the Chief Justice, the Attorney General (AG), the Chairperson of the Public Service Commission, and other representatives from the legal profession and the public.

In 2021, the President appointed Judges to various courts but shockingly declined to appoint six (6) of the Judges nominated by the Judicial Service Commission (JSC). The Constitution requires that once the JSC has recommended names for appointment, the President has no power under the Constitution to tinker with the names. This is because any such attempt would amount to interference with the institutional independence of the JSC and a violation of the Constitution. It is then proper to say that the Executive has, in numerous times, interfered with appointment of Judges and operation of the Judiciary at large.¹⁹⁵

The criteria and appointment process for office holders in the Commissions and Independent Offices in Kenya has been a subject of scrutiny and concern. The composition and independence of the vetting panels play an important role in ensuring that the appointment process is fair, transparent, and free from undue political influence.¹⁹⁶ The potential for political influence in the composition of these Commissions and offices can lead to the appointment of individuals who are loyal to politicians rather than being independent and capable of carrying out their roles effectively.¹⁹⁷

¹⁹⁵ Keke Bildad M, *Guarding the Guardians: Determining the Suitability of Judges to Serve by the Judicial Service Commission in Kenya* Diss. University of Nairobi, 2021 <http://erepository.uonbi.ac.ke/handle/11295/157237>.

¹⁹⁶ Biketi Kikechi, 'It's Never Been an Easy Ride for Independent Commissions' *The Standard* (Nairobi, December 11, 2022) <https://www.standardmedia.co.ke/politics/article/2001462382/its-never-been-an-easy-ride-for-independent-commissions>.

¹⁹⁷ Biketi Kikechi, 'It's Never Been an Easy Ride for Independent Commissions' *The Standard* (Nairobi, December 11, 2022) <https://www.standardmedia.co.ke/politics/article/2001462382/its-never-been-an-easy-ride-for-independent-commissions>.

In the past, there have been instances where concerns were raised about the influence exerted by the President and powerful figures in the government and opposition on the selection of individuals to serve as Commissioners. This has led to apprehensions about the impartiality and independence of the vetting process.¹⁹⁸ The presence of Commissioners who are not independent and are more inclined to serve the interests of politicians or political parties can lead to conflicts of interest, lack of accountability, risk of civil strife and hinder the effective functioning of Commissions and Independent Offices.

The composition of the vetting panels is equally significant. It ensures that the panels comprise diverse members who are independent, impartial, and have the necessary expertise to assess the suitability of candidates. The selection process should be transparent and subject to public scrutiny to build confidence and trust in the appointment of Commissioners.¹⁹⁹ When Commissioners are appointed based on political considerations rather than their qualifications and suitability, it can undermine the independence and credibility of these Offices. Such appointments can compromise the ability of Commissions and Independent Offices to act as impartial watchdogs and fulfil their mandates in a fair and objective manner.

For instance, it is argued that the Independent Electoral and Boundaries Commissioners who were appointed in January 2017 were merely products of political impunity and manipulation. The appointments were biased on political, business and tribal affiliation such that there was not clear competency, integrity or moral-ethical considerations undertaken by the various committees during the appointment process.²⁰⁰ Reports claim that President Kenyatta literally ignored the list which embodied merit, public participation and diversity in the constitution of the IEBC as required by the Constitution. It thus follows that the Commission so constituted would serve political interests rather than safeguarding the sovereignty of the people and public interest.

¹⁹⁸ Biketi Kikechi, 'It's Never Been an Easy Ride for Independent Commissions' *The Standard* (Nairobi, December 11, 2022) <https://www.standardmedia.co.ke/politics/article/2001462382/its-never-been-an-easy-ride-for-independent-commissions>.

¹⁹⁹ Biketi Kikechi, 'It's Never Been an Easy Ride for Independent Commissions' *The Standard* (Nairobi, December 11, 2022) <https://www.standardmedia.co.ke/politics/article/2001462382/its-never-been-an-easy-ride-for-independent-commissions>.

²⁰⁰ Sihanya, Ben M' Conduct of IEBC Commissioners key to 2017 General Elections' *Advocate, Magazine of the Law Society of Kenya* (2017) 1(8) <https://www.bing.com/ck/a?!&&p=d577bf7961>.

The appointment process of the Supreme Court Judges has, in the past, depicted several flaws. For example, commentators say that the process of selecting and recruiting the Chief Justice, Deputy Chief Justice and other Supreme Court Judges in 2016 was not short of flaws. Accordingly, while it appeared that the JSC would be guided by the Constitution, it was apparent that the JSC panelists were largely compromised such that they had predetermined choices for themselves.

The manner in which some individuals were interviewed by the JSC left a lot to be desired. The JSC came under acute criticism from a section of the political class who were opposed to the appointment of Deputy Chief Justice (DCJ) Philomena Mwilu as she was accused of failing to give fair hearing to women while she was serving as Judge of Court of Appeal. Thus, according to them, her appointment was not short of political interference with the JSC.²⁰¹ The ill-famed act of the former President failing to appoint several judges who had been recommended by the JSC for appointment as Judges of Court of Appeal, Employment and Labour Relations Court (ELRC) and Environmental and Land Court (ELC) was a demonstration of how the Judiciary or the JSC could arbitrarily be disregarded by the Executive. The Court in *Adrian Kamotho Njenga vs Attorney General; Judicial Service Commission (JSC) & 2 Others*²⁰² declared that the failure of the President to appoint the judges was an illegality and unconstitutional.

The Public Service Commission has long been viewed as being controlled by the Executive. It has been greatly silent on illegal appointments of the Executive. Moreover, the Public Service Commission has not objected to the composition of the public service as reports show that the composition of the public service is greatly inequitable.²⁰³ For example, the National Cohesion and Integration Commission (NCIC) Report of 2017 showed that more than 25% of public service was composed of the Kikuyu tribe. This means that the Commission has not pushed for equity in the composition of the public service, evidence of political interference and control by the Executive.

²⁰¹ Brian Okoth 'Why Philomena Mwilu is not fit to be Deputy Chief Justice, *eDaily*, 2016, <https://edaily.co.ke/entertainment/why-philomena-mwilu-is-not-fit-to-be-deputy-chief-justice-jubilee-mp123360/enews/kenyan/>.

²⁰² *Adrian Kamotho Njenga v. Attorney General; Judicial Service Commission (JSC) & 2 Others (interested parties)* [2020] eKLR.

²⁰³ Maxon Robert M, 'Disservice to the Public? The Public Service Commission in Early Independent Kenya' *The Journal of the Middle East and Africa* (2019) 10(3) p237-252. <https://www.tandfonline.com/doi/abs/10.1080/21520844.2019.1652050>.

The Report also showed that individuals from the President's tribe inflated Parastatals and other Public Sector Institutions. Reports further indicate that between 2010 and 2017, there were irregular appointments, which the Public Service Commission did not manage at all or well. These appointments included the appointment of Joseph Kinyua as Secretary to the Cabinet and Head of Public Service yet he had retired twice and had no special skills. Moreover, the appointment of John Mututho as the Chairperson of National Transport and Safety Authority (NTSA) was not in conformity with the Constitution and yet, the Public Service Commission did not intervene. Thus, the Public Service Commission has been unable to bring equality, equity and diversity in appointments to public sector spaces.²⁰⁴

The IEBC is funded by the Government through Parliament under an independent budget that is no longer tied to the Treasury²⁰⁵. The law enjoins the Parliament to allocate adequate funds to enable the Commission to perform its functions. While charging the IEBC's entire election expenses to the Consolidated Fund has improved the Commission's financial independence, the IEBC continues to experience difficulties in securing adequate funding in a timely manner from the appropriate authorities to undertake its constitutional functions.

This has prolonged the Commission's reliance on donor funding and assistance and perhaps affected its financial independence.²⁰⁶ The Government directive in Circular Number 8 of 2018 dated 20th August 2018²⁰⁷ directed that all matters concerning the procurement of ICT for all Government Agencies were to be consolidated under the Ministry of Information, Communication and Technology. This interferes with the functional and operational functions of the Commission.²⁰⁸

²⁰⁴ Maxon Robert M, 'Disservice to the Public? The Public Service Commission in Early Independent Kenya' *The Journal of the Middle East and Africa* (2019) 10(3) 237-252. <https://www.tandfonline.com/doi/abs/10.1080/21520844.2019.1652050>.

²⁰⁵ Constitution of Kenya, Art 249 (3).

²⁰⁶ Muriuki Sylvia, 'Consolidating Electoral Democracy through Enhanced Electoral Management Body: A Case of Kenya, 1992-2017' *Journal of Language, Technology & Entrepreneurship in Africa* (2022) 13(1) p176-193. <https://www.ajol.info/index.php/jolte/article/view/226649>.

²⁰⁷ Guidelines for the Preparation of the Medium Term Budget for the Period 2019/20 – 2021/22, <https://www.treasury.go.ke/wp-content/uploads/2021/03/Circular-No.8-2018-Guidelines-for-Preparation-of-FY2019.20-2021.22-Budget.pdf>, accessed on 27th September, 2023.

²⁰⁸ See The National Treasury and Planning, Circular No. 8-2018 Guidelines for Preparation of FY 2019 <https://www.treasury.go.ke/wp-content/uploads/2021/03/Circular-No.8-2018-Guidelines-for-Preparation-of-FY2019.20-2021.22-Budget.pdf>.

The Independent Electoral and Boundaries Commission Fund Regulations, 2012, provide the Commission with legitimate means of administering monies accruable to the Commission for purposes of elections. The lack of operationalization of this Fund impedes the Commission from effectively carrying out its mandate. The actualization of this Fund is imperative for operational integrity and efficiency of the Commission. Thus, the Commission cannot fully enjoy financial independence despite the legal framework guaranteeing such independence.²⁰⁹

3.7 Compliance and Implementation of Respective mandates within the Commissions and Independent Offices in Kenya

Compliance involves various processes, tools, and structures to facilitate the identification, understanding, and management of risks. It requires clear communication of regulations and expectations, as well as establishing consequences for non-compliance that are appropriate and proportionate to the risks involved.²¹⁰ Independent Commissions and Offices, play an important role in promoting and ensuring compliance within their respective areas of jurisdiction. They have the responsibility to develop clear and coherent rules, guidelines, and advisories that public officers and other relevant stakeholders can understand and follow. Additionally, they are tasked with monitoring compliance and conducting regular checks to identify any deviations or non-compliance.

As such, the Commissions and Independent Offices must carry out compliance and monitoring checks to detect and address any aberrations, violations, or instances of non-compliance. Compliance and monitoring checks are important in maintaining accountability, transparency, and the integrity of public institutions.²¹¹ They also contribute to building public trust and confidence in the effectiveness and fairness of these bodies. It must also be noted that compliance is a shared responsibility between the Commissions and Independent Offices and public officers to promote the culture of compliance, ensuring effective risk management, and upholding the principles of good governance.

²⁰⁹ Muriuki Sylvia, 'Consolidating Electoral Democracy through Enhanced Electoral Management Body: A Case of Kenya, 1992-2017' *Journal of Language, Technology & Entrepreneurship in Africa* 13.1 (2022) 13(1) p176-193. <https://www.ajol.info/index.php/jolte/article/view/226649>.

²¹⁰ *Salaries and Remuneration Commission Report 2011-2017* <https://src.go.ke/download/src-report-2011-2017/?wpdmdl=618&refresh=64806682abbfb1686136450> accessed on 28th September, 2023.

²¹¹ *Salaries and Remuneration Commission Report 2011-2017* <https://src.go.ke/download/src-report-2011-2017/?wpdmdl=618&refresh=64806682abbfb1686136450> accessed on 28th September, 2023.

3.7.1 Enforceability of the SRC’s Mandate in Compliance and Implementation of its Mandate in Kenya

SRC, in its 2011-2017 Report, decried the lack of enforcement of its recommendations of compliance checks by the relevant institutions in accordance with the law.²¹² It also noted that some state institutions, particularly the county assemblies, did not provide the information requested by the SRC.²¹³ Non-compliance with the SRC recommendations has been faulted for undermining the management of the wage bill, fairness, equity and harmonization.²¹⁴

The Court in *KUDHEHIA Workers v Salaries and Remuneration Commission*²¹⁵ observed that SRC had the mandate of setting and regularly reviewing the remuneration and benefits of all state officers and advising the national and county government on the remuneration and benefits of all other public officers.

3.7.2 Enforceability of the EACC’s Recommendations in Compliance and Implementation of its Mandate in Kenya

EACC has an enforcement mandate which constitutes receiving and processing reports, conducting proactive investigations, reporting to the Director of Public Prosecutions (DPP), issuance of advisories, cautions and notices, integrity verification, and review of policy and legal framework.²¹⁶ While discharging its mandate in 2018/2019, the Commission completed 234 investigation files on Corruption and Economic Crime which were forwarded to the DPP for review. Out of the files forwarded to the DPP for review, EACC recommended 78 for prosecution, 13 for administrative action and 33 for closure.²¹⁷

In 2019/2020, the Commission completed 163 investigation files on corruption and economic crime which were forwarded to the DPP for review. Out of the files forwarded to the DPP for

²¹² *Salaries and Remuneration Commission Report 2011-2017* <https://src.go.ke/download/src-report-2011-2017/?wpdmdl=618&refresh=64806682abfb1686136450> accessed on 28th September, 2023.

²¹³ *Salaries and Remuneration Commission Report 2011-2017* <https://src.go.ke/download/src-report-2011-2017/?wpdmdl=618&refresh=64806682abfb1686136450> accessed on 28th September, 2023.

²¹⁴ *Salaries and Remuneration Commission Annual Report and Financial Statements for the Year 2012-2013* <https://src.go.ke/download/annual-report-and-financial-statements-for-the-year-2012-2013/?wpdmdl=192&refresh=648077d3325191686140883> accessed on 28th September, 2023.

²¹⁵ [2014] eKLR.

²¹⁶ Report of Activities and Financial Statements for the Financial Year 2021/2022 <https://eacc.go.ke/default/wp-content/uploads/2023/01/EACC-Report-text-B-16-1-23.pdf> accessed on 28th September, 2023.

²¹⁷ Report of Activities and Financial Statements for the Financial Year 2018/2019 <https://eacc.go.ke/default/wp-content/uploads/2021/04/EACC-ANNUAL-REPORT-2018-2019.pdf> accessed on 28th September, 2023.

review, EACC recommended 116 for prosecution, 17 for administrative action and 30 for closure.²¹⁸ Further, in 2020/2021, EACC completed 104 investigation files on corruption and economic crime which were forwarded to the DPP for review. Out of the files forwarded to the DPP for review, EACC recommended 70 for prosecution, 15 for administrative action and 19 for closure.²¹⁹ Subsequently, in 2021/2022, the Commission completed 154 investigation files on corruption and economic crimes, which were forwarded to the DPP for review and direction. The DPP recommended 97 case files for prosecution, 9 for administrative action and 48 for closure.²²⁰

The outlined reports indicate a relatively low success rate in handling anti-corruption cases referred to the DPP by the EACC. The statistics are further buttressed by the unprecedented quashing and withdrawal of corruption cases of high-profile persons associated with the President.²²¹ The cases started dropping soon after the President was sworn into office. Withdrawal of cases soon after the election is an indication of institutional weakness in the office of the DPP and weak enforceability of recommendations by the EACC for prosecution. Such actions have undermined public trust in the justice system and given the impression of political interference or manipulation of the legal process.

The EACC is also affected by adverse judicial decisions, lenient penalties pursuant to the law, lack of enforcement mechanisms for regulatory breaches and implementation of prevention advisories, public apathy on governance issues and politicization and ethnicization of the fight against corruption.²²²

²¹⁸ Report of Activities and Financial Statements for the Financial Year 2019/2020 <https://eacc.go.ke/default/wp-content/uploads/2021/05/Final-Annual-Report-2019-20-18th-MAY.pdf> accessed on 29th September, 2023.

²¹⁹ Report of Activities and Financial Statements for the Financial Year 2020/2021 <http://eacc.go.ke/default/wp-content/uploads/2022/05/EACC-Annual-Report-202021.pdf> accessed on 29th September, 2023.

²²⁰ Report of Activities and Financial Statements for the Financial Year 2021/2022 <https://eacc.go.ke/default/wp-content/uploads/2023/01/EACC-Report-text-B-16-1-23.pdf> accessed on 29th September, 2023.

²²¹ Sam Kiplagat, Bad Year for DPP as High-Profile Corruption Cases Collapse, *Business Daily* (Nairobi, 27th December, 2022) <https://www.businessdailyafrica.com/bd/economy/bad-year-for-dpp-as-high-profile-corruption-cases-collapse-4067346> accessed on 27th September, 2023.

²²² Report of Activities and Financial Statements for the Financial Year 2017/2018 for the Ethics and Anti-Corruption Commission (EACC), <https://www.eacc.go.ke/wp-content/uploads/2019/01/EACC-Annual-Report-2017-2018.pdf> accessed on 27th September, 2023.

3.8 Conclusion of Challenges faced by Commissions and Independent Offices in Kenya on the Implementation of their Respective Mandates

The Constitutional entrenchment of Constitutional Commissions and the Independent offices in Kenya was a means by the drafters of the Constitution to reconfigure and distribute power within the state while democratizing governance. The major concern for the search of the new constitution being the need to establish more effective mechanisms for accountability, rule of law and checks and balances. The distinct roles and mandates of the Commissions and Independent offices have enabled an elaborate governance structure with serious checks and balances mechanisms instituted to restrain the adverse powers of the political arm of the government. As depicted herein, there is indeed a clear demarcation of the constitutional mandates of the Commissions and independent offices.

Commissions and Independent Offices in Kenya are faced with several challenges that have impeded their effectiveness and independence while discharging their respective constitutional and statutory mandates. As enumerated in the foregoing analysis, political interference is among the biggest challenges bedeviling Commissions and Independent Offices in Kenya. This manifests itself in various forms, such as attempts to control appointments, influence investigations, or undermine the autonomy of Commissions.

Further, many Commissions and Independent Offices struggle with insufficient funding and resources to carry out their mandates effectively. Furthermore, the criteria and processes for appointing Commissioners to Commissions and Independent Offices are sometimes influenced by political considerations, leading to the appointment of individuals who may be loyal to political interests rather than being truly independent and impartial. Some Commissions also lack adequate enforcement powers to ensure compliance with their recommendations or rulings, hence limiting their ability to hold accountable those who violate regulations or engage in misconduct.

Addressing these challenges requires a multi-faceted approach that involves strengthening legal frameworks, ensuring adequate funding and resources, promoting independence in appointments, enhancing public awareness and support, fostering collaboration, and addressing political interference. It is essential to create an enabling environment that allows independent Commissions to operate freely, transparently, and effectively in fulfilling their mandates.

This Chapter has analyzed some of the common arguments put forth, regarding the perceived ineffectiveness of the Commissions and Independent Offices in Kenya.

In the next Chapter, we undertake a comparative study of Commissions and Independent Offices in other Jurisdictions and lessons that Kenya can learn.

CHAPTER 4

COMPARATIVE STUDY OF COMMISSIONS AND INDEPENDENT OFFICES IN OTHER JURISDICTIONS

4.1 Introduction to the Comparative Study of Commissions and Independent Offices in Other Jurisdictions

The traditional framework of separation of powers establishes three arms of government within which all government institutions fall. However, Commissions and Independent Offices are not Legislative, Judiciary or Executive organs. They are essentially a branch of Government, and do not exercise power in the same way as the Executive, Legislature or the Judiciary.²²³ The establishment of Commissions and Independent Offices is a hallmark of evolving constitutionalism, representing significant developments in legal landscapes worldwide.

This Chapter seeks to explore the Constitutional foundations, structures, powers, and lessons from three such institutions – State Institutions Supporting Constitutional Democracy in South Africa (SA), the Federal Election Commission (FEC) in the United States of America (USA), and the National Security and Intelligence Review Agency (NISRA) in Canada. These institutions play crucial roles in safeguarding democratic principles, ensuring electoral integrity, and overseeing national security and intelligence activities, respectively.

In South Africa, Chapter 9 of the Constitution of the Republic of South Africa has given rise to a diverse set of independent institutions tasked with supporting constitutional democracy. These institutions serve as watchdogs over the government while striving to foster a socially just society. They maintain distinct identities separate from the government, upholding high standards of independence and impartiality. This chapter delves into the principles of independence, adaptability, and the relationship between these institutions and other state actors, shedding light on their unique role as intermediaries between citizens and the government.

The United States of America, on the other hand, has the Federal Election Commission (FEC), a bipartisan agency responsible for overseeing federal campaign finance laws. Lessons from the FEC highlight the importance of a politically neutral and professional electoral Commission in

²²³ *President of the Republic of South Africa and Another v. Hugo* [1997] ZACC 4.

promoting electoral integrity. The Commission's credibility rests on the pillars of independence, performance, and cooperation with other agencies. This section outlines the FEC's composition, powers, and its role in ensuring transparency and accountability in campaign finance.

Canada's National Security and Intelligence Review Agency (NISRA) plays a crucial role in reviewing national security and intelligence activities, ensuring transparency and accountability. NISRA's powers include making findings, accessing privileged information, and summoning witnesses. The chapter highlights the agency's appointment process, enforcement of recommendations, and the delicate balance between oversight and national security.

Drawing from these international examples, the chapter extracts essential lessons for Kenya. These lessons encompass the importance of diverse and impartial oversight bodies, the significance of structured appointment processes, the need for robust powers to fulfill oversight responsibilities, and the delicate balance between safeguarding national interests and ensuring effective oversight. Ultimately, the chapter underscores the critical role of these institutions in upholding democratic principles, providing valuable insights for Kenya and other nations seeking to strengthen their democratic foundations.

4.2 Comparative Study of State Institutions Supporting Constitutional Democracy in South Africa

The establishment of the State Institutions supporting Constitutional democracy in South Africa in Chapter 9 of the Constitution of the Republic of South Africa marked a significant development in South Africa's legal landscape. These Institutions represent a product of the country's evolving constitutionalism, and their emergence carries substantial implications for other branches of the government. These branches must grasp and acknowledge their respective roles within this new constitutional framework.²²⁴

In the Constitution of the Republic of South Africa, six (6) independent Institutions are established to support constitutional democracy, comprising the Public Prosecutor, South African Human Rights Commission (SAHRC), Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (COPPRC), Commission for Gender Equality

²²⁴ *New National Party v. Government of the Republic of South Africa and Others* [1999] ZACC 5.

(CGE), Auditor-General (AG), and Electoral Commission (EC).²²⁵ The Constitution imposes a constitutional duty on these state organs to provide assistance and safeguard the Commission, ensuring its independence, impartiality, dignity, and effectiveness. If this necessitates revising existing legislative and policy structures, altering public administration practices, or adapting budgetary norms to align with the new constitutional mandates, these adjustments must be made accordingly.

The establishment of these institutions signifies a departure from traditional governance norms, emphasizing the need to uphold their independence and effectiveness. The Constitution's directive obliges all state organs to adapt to these evolving constitutional principles, reinforcing the idea that no aspect of governance is immune to the changes necessitated by this new constitutional framework.

The Independent institutions in South Africa serve dual roles: first, they act as watchdogs over the government, ensuring accountability, and second, they play a pivotal role in the country's journey towards a more socially just society.²²⁶ Despite being state entities, they maintain a distinct identity separate from the government and are not considered a branch of the government itself. In line with the judiciary, they are held to high standards of independence and impartiality. Moreover, these institutions function as intermediaries, bridging the gap between the citizens and the executive branch as well as Parliament.²²⁷

4.2.1 Comparative Study of the Independence of State Institutions Supporting Constitutional Democracy in South Africa

Section 181(2) of the Constitution of South Africa stipulates succinctly, that South Africa's State Institutions are independent, and subject only to the Constitution and the law. Further, the institutions are enjoined to be impartial and exercise their powers and perform their functions without fear, favour or prejudice. They are intended to be independent not only outside government, but also outside partisan politics and free from interference by other organs of state.

²²⁵ Constitution of the Republic of South Africa, 1996, s 181.

²²⁶ Christina Murray 'The Human Rights Commission Et al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 2 *PER* <https://www.ajol.info/index.php/pelj/article/view/43447/26982> accessed on 27th September, 2023.

²²⁷ Christina Murray 'The Human Rights Commission Et al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 2 *PER* <https://www.ajol.info/index.php/pelj/article/view/43447/26982> accessed on 28th September, 2023.

The South African Constitutional Court in its *Certification of the Constitution of the Republic of South Africa*, 1996²²⁸ observed that the factors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence.

The assurance of independence and impartiality for state institutions supporting constitutional democracy cannot be solely reliant on proclamations. Instead, to safeguard their autonomy, the appointment of individuals to positions delineated in Chapter 9 of the Constitution of the Republic of South Africa, with the exception of Commissioners within the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, necessitates a special majority vote in the National Assembly.

Similarly, their removal from office calls for a special parliamentary majority. This procedural approach serves as a customary mechanism designed to ensure that public officials garner broad political support and are not merely perceived as loyal to the ruling party. Consequently, this mechanism fosters credibility across all political spectrums and mitigates perceptions of partisanship.

By enacting these measures, South Africa's state institutions not only fortify their independence but also bolster their impartiality. They stand as a testament to the principle that their roles transcend party politics and work toward the broader goal of serving the nation's constitutional democracy. This framework underscores their commitment to maintaining credibility among all political stakeholders, cementing their status as critical pillars of impartiality and fairness in South Africa's governance.

4.2.2 Comparative Study of the Relationship between the State Institutions Supporting Constitutional Democracy and Other State Actors in South Africa

The Constitution of the Republic of South Africa mandates the state organs to aid and preserve the autonomy, neutrality, and efficacy of the state institutions supporting democracy. The commitment to secure their independence is a deliberate strategy aimed at depoliticizing the multifaceted matters these institutions address. Placing the state institutions supporting constitutional democracy outside the direct sphere of government influence seek to fortify their independence,

²²⁸ *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26.

and insulate their functions from political maneuvering to ensure that they remain focused on their core missions.²²⁹ This approach underscores the recognition that issues related to constitutional democracy transcend political affiliations should be handled with the utmost integrity and impartiality.

In practical terms, the Constitution of the Republic of South Africa underscores the importance of a collective effort among state actors to provide the necessary legislative and procedural frameworks that reinforce the independence and effectiveness of the state institutions supporting constitutional democracy.²³⁰

This collaborative approach acknowledges the shared responsibility of the government and other state entities in upholding the constitutional principles that underpin the operations of the institutions. By doing so, it helps prevent the entanglement of political interests in matters that should be addressed objectively and transparently, ultimately fostering public trust and confidence in the functioning of these critical pillars of constitutional democracy.²³¹

The state institutions supporting constitutional democracies offer a distinct avenue for public engagement within the realm of public affairs, one that diverges from the participation channels found in conventional political processes. Positioned as intermediaries between the citizenry and the government, they facilitate the expression of citizens' needs in a space removed from the partisan context of political competition.²³²

These institutions are tasked with acting as a dependable conduit for public expression, unencumbered by the immediate political considerations of the day or vested interests. It is this potential connection with the populace that endows the state institutions supporting constitutional democracy with their unique capacity to simultaneously serve as watchdogs over the Government and contribute to the transformative objectives outlined in the Constitution.

²²⁹ C. Murray 'The Human Rights Commission Et al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 2 *PER* <https://www.ajol.info/index.php/pej/article/view/43447/26982> accessed on 27th September, 2023.

²³⁰ C. Murray 'The Human Rights Commission Et al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 2 *PER* <https://www.ajol.info/index.php/pej/article/view/43447/26982> accessed on 27th September, 2023.

²³¹ C. Murray 'The Human Rights Commission Et al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 2 *PER* <https://www.ajol.info/index.php/pej/article/view/43447/26982> accessed on 27th September, 2023.

²³² C. Murray 'The Human Rights Commission Et al: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 2 *PER* <https://www.ajol.info/index.php/pej/article/view/43447/26982> accessed on 27th September, 2023.

4.2.3 Accountability Mechanisms for the State Institutions Supporting Constitutional Democracy in South Africa

Section 181(4) of the Constitution bars any person or organ of state from meddling into the functioning of Chapter 9 institutions, which are, The Public Protector; The South African Human Rights Commission; The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; The Commission for Gender Equality; The Auditor-General; and The Electoral Commission. However, the institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions at least once a year.²³³

By ensuring that Chapter 9 Institutions are located outside the mainstream Government in a bid to secure their independence, the Constitution doubtless intends to depoliticise the issues that they handle, which is the main reason for entrusting various tasks, such as running elections to a Chapter 9 institution²³⁴.

4.2.4 Lessons for Kenya from South Africa on Institutions that Support Democracy

The establishment of State institutions supporting Constitutional democracy, as outlined in Chapter 9 of the South African Constitution, demonstrates the evolution of constitutionalism within a nation. The evolution carries profound implications for the roles and responsibilities of various branches of government. The Constitution of the Republic of South Africa establishes six independent institutions to support constitutional democracy, each with distinct roles and mandates. This diversity reflects the multifaceted nature of democracy and governance, requiring specialized oversight bodies.

The Constitution imposes obligates state organs to assist and safeguard these institutions, ensuring their independence, impartiality, dignity, and effectiveness. This underscores the broader principle that democratic institutions should receive support across the political spectrum. State organs are expected to adapt legislative, policy, administrative, and budgetary frameworks to align with new

²³³ Constitution of the Republic of South Africa, 1996, s 181(5).

²³⁴ Christina Murray, The Human Rights Commission Et Al: What Is the Role of South Africa's Chapter 9 Institutions? file://Downloads/ajol-file-journals_366_articles_43447_submission_proof_43447-4369-40147-1-10-20090612.pdf accessed on 27th September, 2023.

constitutional mandates when necessary. This adaptive approach demonstrates a commitment to upholding constitutional principles.

State institutions supporting constitutional democracy are expected to maintain independence, impartiality, and autonomy while remaining accountable to the National Assembly. This balance ensures that these institutions are not unduly influenced by political pressures. These institutions serve as intermediaries between citizens and the government, providing a unique avenue for public engagement that transcends the partisan realm of conventional politics.

Placing these institutions outside direct government influence aims to depoliticize critical matters related to constitutional democracy. This separation helps ensure that these institutions focus on their core missions with integrity and impartiality. However, the Constitution of the Republic of South Africa encourages a collaborative approach among state actors to establish legislative and procedural frameworks that reinforce the independence and effectiveness of these institutions. This cooperation acknowledges shared responsibilities in upholding constitutional principles.

4.3 Comparative Study on Federal Election Commission (FEC) in the United States of America

Politically neutral, professional and committed electoral Commissions play an important role in strengthening the electoral process.²³⁵ Electoral Commissions play an important role in shaping the success or failure of long-term efforts to improve electoral integrity. Electoral Commissions play an important role in shaping the success or failure of long-term efforts to enhance electoral integrity. An electoral Commission is expected to maintain non-partisanship, refraining from favoring any political party in its decisions or actions. The perceived non-partisanship of an electoral Commission significantly contributes to its credibility, which, in turn, directly influences the perceived electoral integrity.²³⁶

The credibility of an electoral Commission comprises two main elements: firstly, the independence and performance, with performance constituting capacity and governance. Key aspects of electoral

²³⁵ Nic Cheeseman and UK Jørgen Elklit, 'Understanding and Assessing Electoral Commission Independence: a New Framework' (2020) *WFD* https://www.wfd.org/sites/default/files/2022-01/WFD_A-new-framework-for-understanding-and-assessing-electoral-comission-independence.pdf accessed on 27th September, 2023.

²³⁶ Nic Cheeseman and UK Jørgen Elklit, 'Understanding and Assessing Electoral Commission Independence: a New Framework' (2020) *WFD* https://www.wfd.org/sites/default/files/2022-01/WFD_A-new-framework-for-understanding-and-assessing-electoral-comission-independence.pdf accessed on 27th September 2023.

Commission independence encompass having a robust legal foundation that shields it from political pressures, an appointments process ensuring credible Commissioners free from party affiliations, job security for Commissioners to make unpopular decisions without fear, autonomy in crucial areas like staffing, budget, and election-related materials procurement, and the authority to declare election results without external approval.²³⁷

The Federal Election Commission (FEC) is established under section 306 of the Federal Election Campaign Act of 1971. It is composed of the Secretary of the Senate and the Clerk of the House of Representatives who are *ex officio* members. It is also composed of six (6) other Members appointed by the President, by and with the advice and consent of the Senate, with not more than three members affiliated with the same political party.

4.3.1 Comparative Study on the Appointment of Members to the Federal Election Commission and Term of Office in the United States of America

Members of the Commission are appointed on the basis of experience, integrity, impartiality and good judgment. Further, at the time of appointment, the individuals must not be elected or appointed officers or employees in the executive, legislative or judicial branch of the Federal Government. They are also not allowed to engage in any other business, vocation or employment.

Members of the Commission, other than the Secretary of the Senate and the Clerk of the House of Representatives are eligible to serve for a single term of six years. The Commission is also required to elect its Chairperson and Vice Chairperson from among its members, other than the Secretary of the Senate and the Clerk of the House of Representatives, for a term of one (1) year. The Chairperson and the vice Chairperson are required not to be affiliated with the same political party. Further, a member may only serve as a Chairperson once during any term of office to which the member is appointed.

4.3.2 Comparative Study on the Powers of the Federal Election Commission in the United States of America

The Federal Election Campaign Act of 1971 permits any person who believes that a violation of the Act has occurred, to file a written, signed and sworn complaint with the Commission. The

²³⁷ Nic Cheeseman and UK Jørgen Elklit, 'Understanding and Assessing Electoral Commission Independence: a New Framework' (2020) WFD https://www.wfd.org/sites/default/files/2022-01/WFD_A-new-framework-for-understanding-and-assessing-electoral-comission-independence.pdf accessed on 24th September, 2023.

Commission may require any person to submit written reports and answers as the Commission may prescribe, and to administer oaths and affirmations. It may also require by subpoena, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties.

The Commission is required to administer, seek to obtain compliance with and formulate policy with respect to the Federal Election Campaign Act. It has the exclusive jurisdiction with respect to the civil enforcement of the Act. The Commission may also render a written advisory opinion concerning the application of the Federal Election Campaign Act upon request by any person with respect to a specific transaction or activity by the person.²³⁸

Further, section 309 of the Act empowers the Commission to receive complaints of violation of the Federal Election Campaign Act. Such complaints must be in writing, signed and sworn by the person filing the complaint, notarized and made under penalty of perjury. The Commission is required to notify any person adversely mentioned in the complaint and accord such person an opportunity to demonstrate to the Commission that no action should be taken against the person on the basis of the complaint.

4.3.3 Comparative Study on the Decisions and Operations of the Federal Election Commission in the United States of America

The decisions of the Commission with respect to the exercise of its duties and powers under the Act are made by majority vote of the members of the Commission. The Commission is required to meet at least once every month and also at the call of any member of the Commission.

In carrying out its responsibilities under the Federal Election Campaign Act, the Commission is required to avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. In that regard, the Act requires the heads of such agencies and departments to avail such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

²³⁸ Federal Election Campaign Act, 1971, 308.

4.3.4 Lessons for Kenya from the United States of America on Institutions that Support Democracy

From the foregoing, a politically impartial or non-partisan and professional electoral Commission plays an important role in enhancing the electoral process and electoral integrity. Such a Commission is important in depoliticizing election-related matters and ensuring credibility in the eyes of the public. Further, the credibility of an Electoral Commission hinges on two main elements: independence and performance. Independence is rooted in legal foundations that shield the Commission from political influence, a credible appointment process, job security for Commissioners, and autonomy in crucial operational areas. Performance encompasses capacity and governance, emphasizing the need for efficient and well-governed Commission operations.

The Federal Electoral Commission, established under the Federal Election Campaign Act, comprises *ex officio* Members from the Senate and the House of Representatives and six other members appointed by the President with Senate approval. Importantly, no more than three members can be affiliated with the same political party, reinforcing the bipartisan nature of the Commission. The members of the FEC are expected to possess experience, integrity, impartiality, and good judgment. They must not hold elected or appointed positions in the Federal Government and are prohibited from engaging in other business or employment activities. Members, excluding *ex officio* members, serve single six-year terms.

The Commission elects a Chairperson and Vice Chairperson from among its members for one-year terms, and these leaders must not be affiliated with the same political party. Additionally, a member can only serve as a chairperson once during their term of office.

The FEC has the authority to investigate alleged violations of the Federal Election Campaign Act. It can require written reports, administer oaths, issue subpoenas, and compel the attendance of witnesses and the production of evidence. The Commission holds exclusive jurisdiction over civil enforcement of the Act and can provide advisory opinions on its application. It also receives and assesses complaints regarding Act violations. Decisions within the Federal Electoral Commission are reached through majority votes by its members. The Commission is mandated to meet at least once a month and convene at the request of any member. This frequent interaction underscores the importance of ongoing oversight.

The Federal Electoral Commission is empowered to collaborate with other U.S. agencies and departments, utilizing their personnel and facilities as needed. These agencies and departments are obligated to provide such assistance, with or without reimbursement, as requested by the FEC, highlighting a networked approach to fulfilling its responsibilities.

4.4 Comparative Study on National Security and Intelligence Review Agency (NISRA), Canada

The National Security and Intelligence Review Agency (NISRA) is established in section 3 of the National Security and Intelligence Review Agency Act, 2019 (the NISRA Act). It was established to review any activity carried out by the Canadian Security Intelligence Service or the Communications Security Establishment. It also reviews any activity carried out by a department that relates to national security or intelligence.

4.4.1 Comparative Study on the Appointment of Members to National Security and Intelligence Review Agency in Canada

The Agency consists of a Chairperson and at least three but not more than six other members appointed by the Governor in Council on recommendation of the Prime Minister.²³⁹ However, the Prime Minister can only make recommendations to the Governor in Council after consultation with the Leader of the Government and Opposition in the Senate, the Leader of every recognised party or Parliamentary group in the Senate, the Leader of Opposition in the House of Commons, and the Leader of each party having at least twelve members in the House of Commons.²⁴⁰

Members of NISRA are appointed to hold office during good behaviour for a term not exceeding five years, renewable once. Section 4(5) and (6) of the NISRA Act requires the Governor in Council to designate the Chair and Vice-Chair of the Agency from among the members on recommendation of the Prime Minister. While all other members of the Agency hold office on part time basis, the Chair and the Vice-chair may be designated to hold office on a full-time or part-time basis.²⁴¹

²³⁹ National Security and Intelligence Review Agency Act, 2019, s 3.

²⁴⁰ National Security and Intelligence Review Agency Act, 2019, s 4.

²⁴¹ National Security and Intelligence Review Agency Act, 2019, s 4(7).

4.4.2 Comparative Study on Powers of the National Security and Intelligence Review Agency in Canada

In the course of its reviews, section 8(3) of the NISRA Act empowers the Agency to make any finding or recommendation that it considers appropriate, including findings and recommendations relating to a department's compliance with the law and any applicable ministerial directions, and the reasonableness and necessity of a department's exercise of its powers.

In relation to its reviews, section 9(1) of the Act entitles the Agency to have access in a timely manner to any information that is in the possession or under control of any department. In that regard, the Agency is entitled to have access to information that is subject to any privilege under the law of evidence, advocate-client confidentiality or litigation privilege.²⁴²

Further, the Agency has the power to summon and enforce the appearance of witnesses and to compel them to give oral or written evidence on oath and to produce documents and materials required for the full investigation and consideration of the subject matter.²⁴³ The Agency may receive and accept evidence and other information as it may require, notwithstanding the admissibility of such evidence before a court of law.

4.4.3 Comparative Study on Enforcement of the Recommendations of the National Security and Intelligence Review Agency in Canada

On completion of an investigation in relation to a complaint, the Agency is required to provide the appropriate Minister and the Director with a report containing the findings and any appropriate recommendations.²⁴⁴ It is further required to report the findings and recommendations to the complainant as it thinks fit.

4.4.4 Lessons for Kenya from the National Security and Intelligence Review Agency in Canada on Institutions that Support Democracy.

The process of appointing members to NISRA involves a thorough consultation mechanism that includes input from various political leaders, both in the Government and opposition. This approach promotes a balanced and non-partisan composition of the agency, emphasizing the importance of diverse perspectives in the oversight of national security and intelligence activities.

²⁴² National Security and Intelligence Review Agency Act, 2019, s 9(2).

²⁴³ National Security and Intelligence Review Agency Act, 2019, s 27(a).

²⁴⁴ National Security and Intelligence Review Agency Act, 2019, s 29(1).

Further, NISRA members are appointed for fixed terms of up to five years, with the possibility of renewal once. This structure ensures a degree of continuity while allowing for the introduction of fresh expertise and perspectives over time. It also contributes to the stability and effectiveness of the agency's operations.

The NISRA Act grants the agency significant powers to fulfill its oversight responsibilities effectively. These powers include the ability to make findings and recommendations, access to privileged information, and the authority to summon witnesses and compel evidence. These powers enable NISRA to conduct thorough and impartial reviews. NISRA's requirement to provide reports containing findings and recommendations to the appropriate Minister, the Director, and complainants underscores the importance of transparency and accountability in the oversight of security and intelligence activities. This practice ensures that relevant stakeholders are informed and can take appropriate actions based on NISRA's assessments.

The agency's role in reviewing national security and intelligence activities necessitates a delicate balance between oversight and safeguarding national interests. The NISRA Act outlines procedures for obtaining access to sensitive information while respecting legal privileges and confidentiality. This balance is crucial for ensuring both effective oversight and national security imperatives. NISRA's ability to make recommendations and report findings is backed by mechanisms for enforcing its recommendations. This includes the power to summon witnesses and require evidence, which ensures that its oversight is not merely advisory but carries the potential for concrete action.

The agency's commitment to reporting findings and recommendations to complainants fosters public trust and confidence in its work. This transparency reinforces the agency's role as a credible and impartial oversight body, ultimately contributing to greater accountability in the realm of national security and intelligence. Overall, the NISRA model highlights the importance of a well-structured oversight agency with a clear mandate, diverse membership, robust powers, and mechanisms for transparency and accountability in maintaining the delicate balance between safeguarding national security and ensuring effective oversight of security and intelligence activities.

4.5 Conclusion and Recommendations on Measures meant for Safeguarding Democratic Principles

In conclusion, the comparative study presented in this chapter offers valuable insights into the establishment, functioning, and lessons learned from three distinct institutions that play crucial roles in safeguarding democratic principles. These institutions, that is the State Institutions Supporting Constitutional Democracy in South Africa, the Federal Election Commission (FEC) in the United States, and the National Security and Intelligence Review Agency (NISRA) in Canada, serve as essential components of their respective countries' governance structures.

The case of *South Africa's State Institutions Supporting Constitutional Democracy* highlights the evolution of constitutionalism within a nation and the need for specialized oversight bodies to uphold democratic principles. These institutions emphasize the importance of independence, impartiality, and adaptability, setting a precedent for a commitment to constitutional mandates across the political spectrum. The Federal Election Commission (FEC) in the United States demonstrates the critical role of politically neutral and professional electoral Commissions in ensuring electoral integrity. The FEC's credibility hinges on independence, performance, and cooperation with other agencies, underlining the significance of an impartial and capable electoral oversight body. Canada's National Security and Intelligence Review Agency (NISRA) showcases the delicate balance between oversight and national security in reviewing security and intelligence activities. NISRA's appointment process, access to privileged information, and enforcement of recommendations serve as crucial mechanisms to ensure accountability without compromising national interests.

For Kenya and other nations seeking to strengthen their democratic foundations, several essential lessons emerge from these international examples. These include the importance of diverse and impartial oversight bodies, structured appointment processes, robust powers to fulfill oversight responsibilities, and the need to strike a delicate balance between safeguarding national interests and ensuring effective oversight. These lessons underscore the critical role of these institutions in upholding democratic principles and promoting transparency and accountability in government activities.

In this Chapter, we have established that in a world where democratic values and institutions face ongoing challenges, the experiences of these institutions offer valuable guidance for shaping

governance structures that foster trust, uphold constitutional principles, and serve the interests of the people they represent. As nations continue to evolve and adapt their governance frameworks, these lessons serve as a beacon for building and maintaining strong democratic foundations.

The next Chapter offers a summary of findings, conclusion and recommendations on the effectiveness, independence and accountability of Commissions and Independent Offices in Kenya.

CHAPTER 5

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS ON THE EFFECTIVENESS, INDEPENDENCE AND ACCOUNTABILITY OF COMMISSIONS AND INDEPENDENT OFFICES IN KENYA

This paper set out to analyze the effectiveness, independence and accountability of Commissions and Independent Offices in Kenya, and make recommendations. The Commissions and Independent Offices, otherwise referred to as the “fourth arm of government” are entrenched in the Constitution of Kenya, 2010 as read along with the establishing statute. The functions, roles and powers of Commissions and Independent Offices, being mainly Commissions are succinctly outlined in the relevant Acts of Parliaments. In the discharge of their mandates, the institutions are Constitutionally envisaged to be effective, independent and accountable.

However, contrary to the above, this study has established that the institutions are not as effective, accountable and independent as would be desired. More precisely, the study as identified lack of independence as the main challenge confronting the institutions thus undermining their effectiveness and minimizing their level of accountability. Since the promulgation of the Constitution of Kenya in 2010, Commissions and Independent Offices have and continue to suffer political interference.

Moreover, issues as to appointment to and constitution of the Commissions and Independent Offices has proved to be the other challenge undermining their effectiveness. Often, the process of appointment tends to be politicized thus resulting in otherwise incompetent persons assuming the leadership of very critical “independent” Commissions and Independent Offices. Additionally, lack of financial independence attributable to delays in remittance of inadequate funds also undermine the efficiency of Kenya’s independence institutions. The totality of the above challenges creates huge impetus for both short and long-term legal, policy and institutional recommendations to enhance efficiency, transparency and accountability of the institutions.

5.1 Research Objectives on the Effectiveness, Independence, and Accountability of Commissions and Independent Offices in Kenya

The general objective of the study is to assess the effectiveness, accountability and independence of the fourth arm of government.

The specific objectives are three (3):

First, to analyse the historical perspective and legal basis of Independent Commissions and offices in Kenya;

Second is, to examine the effectiveness, independence and accountability of the fourth arm of government in Kenya.

Third is, to make recommendations for possible reforms on how to enhance the effectiveness, independence and accountability of Commissions and Independent Offices from a comparative study of South Africa, United States of America and Canada.

5.2 Research Questions on the Effectiveness, Independence, and Accountability of Independent Institutions in Kenya

The research has attempted to answer the following three questions:

First, what is the historical perspective and legal basis of the Commissions and Independent Offices in Kenya?

Second, what is the effectiveness, independence and accountability of the fourth arm of Government in Kenya?

Third, what kind of reforms, meant to enhance the effectiveness, independence and accountability of Commissions and Independent offices can Kenya borrow, from a comparative study of South Africa, United States of America and Canada?

5.3 Findings of the Study on the Effectiveness, Independence, and Accountability of Commissions and Independent Offices in Kenya

The First Chapter of the study provided a comprehensive overview of the context, background, research problem, objectives, questions, hypotheses, literature review, and methodology for the study on the effectiveness of Commissions and Independent Offices in Kenya. It set the stage for a detailed examination of the role and performance of these institutions in Kenya's governance landscape.

Throughout the Chapter, the research explored the historical development of Commissions and Independent Offices in Kenya, tracing their origins and the constitutional foundations that underscore their independence and importance in safeguarding democracy, rule of law, transparency, and human rights. The Chapter also discussed the challenges and controversies surrounding the abidingness of their recommendations and the extent of their independence from other governmental bodies.

The Chapter outlined the research objectives, questions, and hypotheses to guide our investigation into the structure, composition, and modalities of Independent Commissions and Offices, as well as their effectiveness in fulfilling their roles as the ‘fourth arm of government.’ Additionally, the Chapter outlined South Africa, United States of America and Canada as for comparisons with South Africa and Australia to gain insights for potential improvements in Kenya's Independent Commissions and Offices.

The Second Chapter of the study delved into the legal and institutional framework of Commissions and Independent Offices in Kenya, primarily focusing on their establishment, functions, and the crucial dimensions of their independence. The promulgation of the 2010 Constitution marked a significant turning point in Kenya's history, ushering in an era of enhanced checks and balances on governmental powers through the establishment of independent institutions.

The Constitution of Kenya, 2010, introduced these Independent Offices and Commissions and with the explicit aim of safeguarding democratic values, principles, and constitutionalism while protecting the sovereignty of the people. These institutions are fortified against interference through the "independence clause," which prohibits external direction or control.

The three dimensions of independence—structural, administrative, and financial—play pivotal roles in ensuring that these institutions can operate effectively. Structural independence necessitates transparent and merit-based appointment processes, free from political influence. Administrative independence ensures that these bodies operate solely under the constitution and the law, free from external interference. Financial independence is critical to provide these institutions with the necessary resources to fulfill their mandates and prevent external manipulation.

The perception of independence is equally important, as it fosters public confidence in these institutions. When these Commissions and offices are seen as insulated from attempts to weaken their authority, they can carry out their roles more effectively. However, the challenges of undermining independent institutions by certain branches of government have been evident, posing a hurdle to cooperative governance.

Fundamentally, Commissions, and Independent Offices along with the Judiciary, are technically the custodians of democracy. They have powers to initiate investigations and handle complaints, but the effectiveness of their roles depends on the enforceability of their findings and recommendations.

Collaboration and consultation with other state organs are essential, as independence does not imply isolation. These institutions must coordinate their activities with other branches of Government, ensuring a harmonious and cooperative approach to governance.

Among the various Commissions in Kenya, the Salaries and Remuneration Commission (SRC) stands out as a key player in governance and Public Service administration. It is tasked with setting and reviewing the remuneration and benefits of state officers while also advising Governments on the compensation of public officers. The SRC's role in ensuring fiscal sustainability, attracting and retaining skilled personnel, and recognizing productivity is critical to the efficient functioning of the public service.

The Independent Electoral and Boundaries Commission (IEBC), for instance, is responsible for overseeing elections and referenda, and its independence is crucial for ensuring the integrity of the electoral process. Similarly, the Public Service Commission plays a vital role in promoting transparency and meritocracy in the public service, while the Judicial Service Commission (JSC) is tasked with safeguarding the independence of the judiciary.

The National Land Commission (NLC) addresses historical land injustices and seeks to provide solutions to long-standing land-related problems in Kenya. The Kenya National Commission on Human Rights and the National Gender and Equality Commission work tirelessly to protect human rights and promote gender equality.

The Ethics and Anti-Corruption Commission (EACC) is on the frontline in the fight against corruption, a vice that has the potential to undermine the very foundations of the state. The EACC's role in investigating and recommending prosecutions for acts of corruption is vital in upholding transparency and accountability in public office.

These Commissions, each with its unique mandate and responsibilities, serve as checks and balances within the Kenyan governance structure. They help ensure that government institutions and public officials adhere to constitutional principles, uphold the rule of law, and serve the best interests of the Kenyan people.

The roles and mandates assigned to these Commissions have created a sophisticated governance structure, designed to curb the potentially overreaching powers of the political branches of government. As outlined in this chapter, there exists a distinct and clear demarcation of the constitutional responsibilities of these Commissions and offices.

Article 228 and 229 of the Constitution established positions of the Auditor General and the Controller of Budget, both of which play vital roles in ensuring financial transparency, accountability, and oversight at the national and county government levels. These offices serve as guardians of public funds and play a pivotal role in maintaining fiscal discipline.

Furthermore, the institutional framework for Commissions and Independent Offices, as detailed in Article 250(1), has set specific parameters for their composition, appointments, and terms of office. The President's role in appointing the Chairpersons of these Commissions, subject to National Assembly approval, ensures a degree of executive influence balanced by parliamentary oversight.

The provisions also emphasize the importance of adhering to national values, principles of governance, regional balance, and ethnic diversity when making appointments, thereby promoting inclusivity and diversity in these crucial institutions.

Moreover, the limited, non-renewable six-year terms for Commissioners, except for *ex-officio* Members, guarantee a measure of stability while preserving their independence. The stringent grounds for removal, as outlined in the Constitution, serve as a safeguard against arbitrary dismissal, reinforcing their security of tenure.

In examining specific Commissions such as the Salaries and Remuneration Commission, Parliamentary Service Commission, Independent Electoral and Boundaries Commission, Judicial Service Commission, National Land Commission, Kenya National Commission on Human Rights, Ethics and Anti-Corruption Commission, National Gender and Equality Commission, and the Public Service Commission, we observe the diverse roles and structures tailored to each Commission's unique functions.

Each of these Commissions and Independent Offices play a critical role in upholding the values and principles enshrined in the Constitution. They contribute to the realization of good governance, accountability, and transparency in Kenya's democratic system.

The Constitution of Kenya 2010 has established a comprehensive framework of independent offices and Commissions, carefully designed to ensure that the nation's governance is characterized by accountability, inclusivity, and adherence to the rule of law. These institutions, with their specific mandates and safeguards, are vital pillars of Kenya's democratic foundation, and their effective functioning is essential for the nation's progress and development.

The Third Chapter on the other hand, delved into a critical examination of the effectiveness of Commissions and Independent Offices in Kenya, with a particular focus on their mandate and authority, autonomy and independence, political interference, composition, appointment, and security of tenure. These institutions were established with the noble objectives of promoting good governance, transparency, accountability, and safeguarding human rights within Kenya's political landscape. However, their effectiveness has been a subject of debate and scrutiny.

The effectiveness of these Commissions and Independent Offices in Kenya is intricately tied to the clarity and strength of their mandates and the extent of their authority. Commissions with clear responsibilities, broad powers, and strong legal backing tend to perform better in fulfilling their roles. However, there is a considerable variation in the authority granted to these institutions, leading to differences in their impact, accountability mechanisms, and ability to influence policy.

The most significant challenges facing these institutions is political interference. Elected officials, who should be subject to oversight by these Commissions, often perceive them as threats to their interests. This perception can lead to attempts at undermining the independence and effectiveness of these Commissions, thereby compromising their ability to hold officials accountable.

Another critical aspect is the composition, appointment, and security of tenure of Commissioners. The appointment process has faced scrutiny for its potential political influence, leading to the selection of Commissioners who may not always prioritize independence and effectiveness over political interests. Ensuring that these appointments are transparent, free from political influence, and based on qualifications is essential for maintaining the integrity and impartiality of these institutions.

Additionally, financial autonomy is crucial for Independent Commissions and Offices to operate effectively. While there have been efforts to enhance their financial independence, challenges in securing adequate funding from the government persist, forcing these institutions to rely on donor funding, which can compromise their autonomy.

Further, Chapter 3 shed light on the critical aspect of compliance and implementation within the context of Independent Commissions and Offices in Kenya. Compliance, a cornerstone of effective governance, encompasses the processes and mechanisms that enable organizations and public institutions to adhere to regulations, rules, and expectations. Independent Commissions and Offices have a vital role to play in establishing clear rules, guidelines, and advisories, as well as monitoring and enforcing compliance within their respective domains.

However, the effectiveness of compliance efforts has faced challenges, as highlighted by the experiences of the SRC and EACC. The enforceability of recommendations made by these bodies has been a subject of concern. For instance, the SRC's efforts to manage the wage bill and promote equity in public service remuneration have been hampered by the lack of enforcement of its recommendations by relevant institutions. Similarly, the EACC's recommendations for prosecution in corruption and economic crime cases have faced obstacles, resulting in a relatively low success rate and public skepticism.

Several factors contribute to these challenges, including judicial decisions, lenient penalties, the absence of robust enforcement mechanisms for regulatory breaches, public apathy toward governance issues, and the politicization and ethnicization of the fight against corruption.

Addressing these challenges is crucial for ensuring that Independent Commissions and Offices can effectively promote compliance and uphold the principles of good governance, transparency, and accountability. Furthermore, enhancing the enforceability of recommendations and promoting a

culture of compliance is essential for building public trust and confidence in these institutions and their ability to fulfill their mandates. It is incumbent upon both the institutions themselves and public officers to work collaboratively to foster a culture of compliance that strengthens risk management and governance practices in Kenya.

The Fourth Chapter of the study provided a comprehensive overview of three distinct institutions from South Africa, the United States, and Canada, shedding light on their constitutional foundations, structures, powers, and the lessons they offer. These institutions, each with its unique mandate, play pivotal roles in safeguarding democratic principles, electoral integrity, and oversight of national security and intelligence activities.

South Africa's State Institutions Supporting Constitutional Democracy exemplify the evolution of constitutionalism and the need for specialized oversight bodies. These institutions underscore the importance of independence, impartiality, and adaptability in upholding democratic values. They serve as intermediaries between citizens and the government, bridging the gap with integrity.

The Federal Election Commission (FEC) in the United States illustrates the significance of politically neutral and professional electoral Commissions in promoting electoral integrity. The FEC's credibility hinges on its independence, performance, and cooperation with other agencies, emphasizing the importance of impartial and capable electoral oversight.

Canada's National Security and Intelligence Review Agency (NISRA) exemplify the intricate balance between oversight and national security in reviewing security and intelligence activities. NISRA's appointment process, access to privileged information, and enforcement of recommendations uphold accountability while safeguarding national interests.

For Kenya and other nations aspiring to bolster their democratic foundations, these case studies offer invaluable lessons. Key takeaways include the importance of diverse and impartial oversight bodies, structured appointment processes, robust powers to fulfill oversight duties, and the delicate equilibrium between safeguarding national interests and ensuring effective oversight. These lessons emphasize the pivotal role of these institutions in upholding democratic principles, transparency, and government accountability.

In a world where democratic values face continuous challenges, the experiences of these institutions serve as guiding beacons for the construction and maintenance of strong democratic foundations. As nations adapt their governance structures to meet evolving needs, these lessons remain essential in fostering trust, upholding constitutional principles, and serving the best interests of their populations. Ultimately, the success and credibility of these institutions are vital for the health and sustainability of democratic systems worldwide.

5.4 Recommendations on The Effectiveness, Independence and Accountability of Commissions and Independent Offices in Kenya

5.4.1 Need for a Structured Appointment Processes in Commissions and Independent Offices in Kenya

It is imperative that Kenya adopts a structured appointment process for Members of the oversight bodies. These processes should involve consultations with various political leaders, both from the Government and opposition, to ensure a balanced and non-partisan composition. This will help prevent any perception of bias and promote transparency in appointments.

5.4.2 Need for Robust Powers for Oversight in Commissions and Independent Offices in Kenya

Provide these oversight bodies with robust powers, including the authority to investigate, make findings, and enforce recommendations, as seen in the case of Canada's NISRA. These powers should allow them to effectively fulfill their oversight responsibilities without undue interference from other state actors.

5.4.3 Need for a Balance Between Oversight and National Interests within the Commissions and Independent Offices in Kenya

Kenya should carefully balance the need for oversight with national security concerns, as demonstrated by NISRA in Canada. Oversight bodies must have mechanisms to access sensitive information while respecting legal privileges and confidentiality to ensure national interests are safeguarded.

5.4.4 Transparency and Accountability in Commissions and Independent Offices in Kenya

There is need to emphasize transparency and accountability in the functioning of oversight bodies. These institutions should regularly report their findings and recommendations to relevant stakeholders, including the government, to foster public trust and confidence in their work.

5.4.5 Ensure Public Engagement from Commissions and Independent Offices in Kenya

It is important that Independent Institutions promote public engagement through these oversight bodies, as they can serve as intermediaries between citizens and the government. Ensure that they provide a platform for citizens to express their concerns and needs in a non-partisan context.

5.4.6 Adaptability and Evolution of Commissions and Independent Offices in Kenya

It is important to recognize that governance structures must evolve with the changing constitutional landscape. Be prepared to adapt legislative, policy, administrative, and budgetary frameworks to align with new constitutional mandates, as seen in South Africa's example.

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