

The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya

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Abstract

One of the concerns that animated the search for a new constitution in Kenya was how to build more effective mechanisms for accountability. Towards this end, the 2010 Constitution of Kenya establishes constitutional commissions and independent offices in an attempt to dismantle and democratize the Kenyan state. This paper proceeds on the basis that what determines whether an independent institution ends up as an effective force for accountability in governance is its institutional design. The paper thus interrogates the constitutional and statutory design of the regime meant to effectuate the independence, accountability, and effectiveness of these independent institutions to determine whether they can deliver on their mandate.

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1. Introduction

The central place of constitutional commissions and independent offices (independent institutions) in the post-2010 constitutional order in Kenya can only be appreciated if one interrogates their emergence in the light of Kenya's constitutional history. The historical context within which the 2010 Constitution of Kenya (the Constitution) emerged can be traced to post-independence Kenya and the evil of authoritarianism that bedevilled this period.¹ At independence in 1963, Kenya enacted the Independence Constitution whose makers had the 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.'² Thus the mischief that the Independence Constitution was to reform was the oppressive colonial system.³

That Constitution was aimed at ensuring that the government which replaced the colonial government was limited: it did not have too much power concentrated in one branch as had been under the undemocratic colonial government.⁴ It provided for the traditional three arms of government: the Executive, the Legislature and the Judiciary.⁵ This scheme of separation of powers was strengthened by a quasi-federal structure of government and the provision for independent offices, i.e. the office of the Attorney-General and the office of the Controller and Auditor-General.⁶

Sadly, the Independence Constitution underwent many amendments aimed at strengthening the institution of the Presidency at the expense of other institutions of governance. The High Court of Kenya in *Njoya & 6 Others v Attorney-General & 3 Others*, observed:⁷

¹ See generally YP Ghai & JPWB McAuslan *Public Law and Political Change in Kenya: a Study Of The Legal Framework of Government From Colonial Times to The Present*. (Nairobi: London, New York, Oxford University Press, 1970).

² 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.

³ AW Munene 'The Bill of Rights and Constitutional Order: A Kenyan Perspective' (2002) 2(1) *African Human Rights Law Journal* 141. See also ML Dudziak 'Working Towards Democracy: Thurgood Marshall and the Constitution of Kenya' (2006) 56(1) *Duke Law Journal* 721-780.

⁴ W Kaguongo 'Introductory Note on Kenya' <http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf> accessed on 6th March 2019.

⁵ The Independence Constitution, Schedule 2 of the Kenya Order in Council, Legal Notice No. 718 of 1973 (Independence Constitution).

⁶ Sections 86 and 128 of the Independence Constitution.

⁷ *Kenya Law Reports*, 1 (2004) 298-299, See also G Muigai 'Overhaul or Amend? A Discourse on the Future of Constitutional Change in Kenya' (2006) 4 *East African Journal of Human Rights & Democracy* 10.

Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from Parliamentary to a presidential system of executive governance, abolition of bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969, by Act. No. 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution

Of relevance to this paper, the Constitution of Kenya (Amendment) Act No. 14 of 1986 abolished the post of the Chief Secretary, which position was occupied by the head of the public service, and removed the security of tenure of the offices of the Attorney-General and the Controller and Auditor-General. Subsequently, the Constitution of Kenya (Amendment) Act No. 4 of 1988 removed security of tenure for the Commissioners of the Public Service Commission, the High Court Judges and the Court of Appeal Judges.⁸ The import of these and other amendments was the centralization of power in the President and the evisceration of the ethos of accountability in governance.⁹

These amendments led to a structure of government that was unaccountable and a situation where the President exercised unlimited powers contrary to the tenets of constitutionalism.¹⁰ This is the background that informed the quest for a new constitutional order in Kenya. It has been argued that the reasons for constitutional

⁸ The Constitution of Kenya (Amendment) Act No 2 of 1990 restored the security of tenure to the judges.

⁹ B Sihanya 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism' (2010) 6(1) *The Law Society of Kenya Journal* 24.

¹⁰ The High Court in *Joseph Kimani Gathungu v. The Attorney-General & 5 Others, Mombasa High Court Constitutional Reference Application Number 12 of 2010* observed thus: 'Prior to the 27th August, 2010 Kenya's governance was based on the Constitution of 1969, which incorporated sweeping amendments effected over a five-year period, to the original Independence Constitution of 1963. I take judicial notice that, whereas the 1963 Constitution was an elaborate document marked by delicate checks-and-balances to public power, the 1969 Constitution had trimmed off most of these checks-and-balances, culminating in a highly centralized structure in which most powers radiated from the Presidency, stifling other centres of power, and weakening their organizational and resource base, in a manner that deprived the electorate of orderly and equitable procedures of access to civil goods. Judicial notice is taken too of the fact that the Constitution of 2010 derived its character, by a complex and protracted law-making process, from the history of popular grievance associated with the limitations of the earlier Constitution.' See also JB Ojwang 'Constitutional Trends in Africa – the Kenyan case', (2000) 10 *Transnational Law & Contemporary Problems* 536; JB Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (1990) 19-39, 75-107.

reforms in Kenya that resulted into the promulgation of the Constitution were that the often-amended Independence Constitution was outmoded, undemocratic, not human rights friendly, not attuned to the demands for good governance including the fight against corruption, and the need to enhance rule of law which would aid in the fight against impunity.¹¹

It should be noted that Kenya does not walk a lone path in this regard, Yash Ghai has observed that ‘many states have adopted new constitutions in the belief that the Constitution would solve complex problems facing modern societies, strengthen state institutions, ensure integrity and accountability of governments, promote human rights and social justice, and lead to renewal of society and the affirmation of its values’.¹² On his part, Fombad argues that the enactment of new constitutions in the African continent is aimed at ushering in an era of constitutionalism.¹³

The Constitution perceived by many as the basis for the transformation of law, politics, and economics in Kenya, has at its core the promise of imposing checks and balances on the discharge of governmental powers.¹⁴ It seeks to bring to an end the enormous and unfettered powers that had been the hallmark of the Presidency and the Executive branch in general in the post-independence dispensation.¹⁵

¹¹ M Hansungule ‘Kenya’s Unsteady March Towards the Lane of Constitutionalism’, (2003) 1 *University of Nairobi Law Journal* 41. See also OD Juma ‘Constitution Making and Democratization Trends in Africa: The Kenyan case’ ((2004) 1 *East African Law Journal* 21; SA Dersso, ‘More than Enacting a Just Constitution: Lessons from Kenya on the Challenges of Establishing a Rule-Based Democratic Politics,’ in J de Visser *et al* (eds) *Constitution – Building in Africa* (2015) 271.

¹² YP Ghai ‘Creating a New Constitutional Order: Kenya’s Predicament’ in G Elizabeth *et al* (eds) *Governance, Institutions and the Human Condition* (2009) 13-14.

¹³ CM Fombad ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects’ (2011) 59 *Buffalo Law Review* 1007.

¹⁴ C Murray ‘Kenya’s 2010 Constitution’ Available at: https://www.academia.edu/2391874/Kenya_2010_Constitution (Accessed on 6th March 2019). See also YP Ghai & JC Ghai, *Kenya’s Constitution: An Instrument for Change* (2011) at *iii*, have observed thus in respect of the promise of the Constitution: ‘The Constitution aims at the equal rights of all Kenyans, especially for women, the disabled, and those marginalized in other ways. It promises everyone the basic necessities of life, such as food, health care, housing, water and clean environment, by their own efforts and with the assistance of government. It makes the government accountable to the people – the source of all sovereign power. Ministers and other state officials, even the President, are there to serve the people; observe high standards of integrity and avoid corruption and favouritism.’

¹⁵ The High Court in *Luka Kitumbi & 8 Others v. Commissioner of Mines & Geology, Mombasa High Court Civil Case Number 190 of 2010* thus observed: ‘I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two (1963 and 1969) earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralised (Presidential) authority, the new Constitution not only departs from that theme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the judiciary.’

Towards this end, the Constitution establishes Constitutional Commissions and Independent offices.¹⁶ The commissions are: the Kenya National Human Rights and Equality Commission;¹⁷ the National Land Commission; the Independent Electoral and Boundaries Commission; the Parliamentary Service Commission; the Judicial Service Commission; the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission; and the National Police Service Commission.¹⁸ In addition, the Constitution provides that Parliament must enact a legislation creating an Ethics and Anti-Corruption Commission.¹⁹ The independent offices are: the Auditor –General; and the Controller of Budget.²⁰

This paper proceeds from the foundation that independent institutions are the vehicles for delivering values and aspirations of the people such as respect for human rights and engendering a culture of accountability in governance and respect for constitutionalism. In order to deliver on their mandate, which is basically to provide checks and balances over the other arms of government, the independence and accountability of these bodies is crucial.²¹ This informs the focus of this paper on the independence, accountability, and effectiveness of independent institutions. Moreover, it is a reality that the entrenchment of new institutions in a constitution does not guarantee that constitutional aspirations will be realised.²² Yet respect for and facilitation of the functioning of these independent institutions is crucial if they are to play their constitutionally designated roles.²³ This paper thus seeks

¹⁶ See generally Chapter 15 of the Constitution.

¹⁷ Article 59 (4) provides that Parliament legislation may restructure the Kenya National Human Rights and Equality Commission into two or more separate commissions. Pursuant to this provision, Parliament has enacted legislation to create three Constitutional Commissions. These commissions are: The Kenya National Human Rights Commission, The National Gender and Equality Commission, and the Commission on Administrative Justice. See the Kenya National Commission on Human Rights Act, Number 14 of 2011; The National Gender and Equality Commission Act, Number 15 of 2011; and the Commission on Administrative Justice Act, Number 23 of 11.

¹⁸ Article 248(2) of the Constitution.

¹⁹ Articles 79 and 88 of the Constitution; see CM Fombad, 'The Diffusion of South African – Style Institutions? A Study in Comparative Constitutionalism,' in R Dixon and T Roux, *Constitutional Triumphs, Constitutional Disappointments* (2018) 359,369 observing that: "there is no obvious reason why the basic framework for such an important commission was not provided for in the Constitution itself."

²⁰ Article 248(3) of the Constitution.

²¹ B Ackerman 'Good-bye, Montesquieu' in S Rose-Ackerman & PL Lindseth *Comparative Administrative Law* (2010) 128.

²² CM Fombad 'The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression' (1998) 42(2) *Journal of African Law* 175.

²³ JB Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Strathmore University Press, 2013) 39.

to interrogate how constitutional commissions and independent offices in Kenya have been designed and whether they have functioned as mechanisms for enforcing accountability in governance.

Section one of this paper has provided an overview of the post-colonial governance set up in Kenya that informed the promulgation of the Constitution of Kenya, 2010. Section two of this paper interrogates the rationale for the emergence of independent institutions and their place under the Kenyan constitutional order. This is followed by section three of the paper that is focused on the institutional design for the independent institutions. Section four interrogates the institutional design for accountability of the independent institutions. Section five critiques the effectiveness of the independent institutions with particular attention paid to the legal status and consequences attached to the decisions and remedial directives issued by these bodies. Section six is the conclusion that teases out the lessons to be drawn from the study.

2. Emergence of Independent Institutions under Kenya's post-2010 Constitutional Order

The emergence of independent institutions within government is a means of checking the problem of 'accountability deficit' in governance. Sajó traces the rise of independent institutions to the fact that traditional democracy is about spoils. The abuse of power and the maximisation of spoils by the political majority resulted in a legitimacy crisis in government. Thus the creation of independent institutions is a reaction to the need for an alternative to the exploitation of the state machinery by the political majority.²⁴ Therefore independent institutions are expected to provide a new and effective check on the behaviour of the elected branches of government.²⁵

Creation of independent institutions in the Kenyan context should be viewed as part of institutional restructuring associated with democratic transitions. It is an attempt to dismantle and democratize the state. The Executive, the Legislature and

²⁴ A Sajó 'Concepts of Neutrality and the State' in R Dworkin *et al* (eds) *From Liberal Values to Democratic Transition* (2004) 107: See also A Sajó 'Constitution without the Constitution Moment: A View from the New Member States' (2005) 3 *International Journal of Constitutional Law* 255.

²⁵ FK Vibert *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press, 2007). See also EL Rubin *Beyond Camelot: Rethinking Politics and Law for the Modern State* (2005).

Judiciary in Kenya had, in the pre-2010 dispensation, been blamed for widespread authoritarianism, abuse of human rights, maladministration, and corruption. A widespread perception prevailed that under the repealed Constitution, government officials were not subjected to adequate oversight control. In such circumstances, independent institutions ought to be established to ensure an accountable political and administrative system.²⁶

This informed the desire by Kenyans for the constitutional entrenchment of 'bodies that were separate from government and capable of applying and protecting the constitution'.²⁷ This desire speaks to the realisation that constitutionalism, being the idea of a limited and accountable government, is only achievable where institutions, principles, and mechanisms that can be used to compel the government to operate within the stipulated limits are constitutionally entrenched.²⁸ Beyond the separation of powers between the three arms of government, the Executive, the Legislature and the Judiciary, the constitutional entrenchment of independent institutions whose avowed goal is to promote accountability and uphold constitutional democracy is a good practice for infusing constitutionalism into a polity.²⁹

It is therefore arguable that the emergence of independent institutions in Kenya is largely driven by discontent with the functioning of the accountability system in the governance scheme and represents an effort to find a way to tackle the roots of the accountability deficit.³⁰ This animating idea is also evident in other new democracies where the rise of independent institutions is often pursuant to attempts to find innovative ways to enforce accountability beyond electoral politics.³¹

²⁶ Y Ghai 'A Journey around Constitutions: Reflecting on Contemporary Constitutions' (2004) 122(4) *The South African Law Journal* 815.

²⁷ See Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review*, (2010) 52.

²⁸ CM Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 5 *The American Journal of Comparative Law* 6.

²⁹ CM Fombad 'The Constitution as a Source of Accountability: The Role of Constitutionalism' (2010) 2 *Speculum Juris* 58; CM Fombad 'Taming Executive Authoritarianism in Africa: Some Reflections on Current Trends in Horizontal and Vertical Accountability,' (2019) 11 *Hague Journal on the Rule of Law* 1–29.

³⁰ For a similar argument in the Latin American context, see B Crisp *et al* 'The Accountability Deficit in Latin America' in S Mainwaring & C Welna (eds) *Democratic Accountability in Latin America* (2003) 79.

³¹ JM Ackerman 'Understanding Independent Accountability Agencies' in S Rose-Ackerman & PL Lindseth *Comparative Administrative Law* (2010) 265.

Thus Kenya's constitutional commissions and independent offices are not an aberration in contemporary constitutionalism. Increasingly, through either constitutional or statutory entrenchment, states are creating what may be dubbed the 'fourth branch of government' beyond the traditional three arms of government (the Executive, the Legislature and the Judiciary) to deal with issues of enforcement of human rights, enforcement governmental accountability, and to improve governmental decision-making.³² However, the Supreme Court of Kenya has rejected the idea of a fourth branch of government. The Court stated in this respect:³³

The wording of Chapter 15 of the Constitution, in our perception, does not signal the vesting of the sovereign power of the people in commissions and independent offices. This is not to say that commissions and independent offices are excluded from exercising public power. Indeed, as State organs, they are part of Government, and one of their core mandates is to protect the sovereignty of the people; so they ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature derive their authority: hence the depiction 'people watchdogs' or 'constitutional watchdogs'. They are to be distinguished from the three arms of Government through the functions they discharge.

The 2010 Constitution establishes independent institutions to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles, and promote constitutionalism.³⁴ They are structural constraints aimed at protecting fundamental human rights³⁵ and regulating the exercise of state power.³⁶ The common mandate of these independent institutions is to check government thus ensure accountability in governance. They serve the

³² D Olowu 'Good Governance and Development Challenges in the South Pacific: The Promise of Ombudsmanship' (2004) 8 in LC Reif (ed) *The International Ombudsman Yearbook* 94-95; LC Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1-3.

³³ See *In the Matter of the National Land Commission [2015] eKLR*. See also *Nedermar Technology BV Ltd v Kenya Anti-corruption Commission & Another Petition Number 390 of 2006 p. 11*. However, given the emphasis on the independence of these agencies and their watchdog role, it is conceptually troubling for them to be treated as part of the traditional three arms of government. See JJ Spigelman 'The Integrity Branch of Government' Available on: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809582 (accessed 9 March 2019); See also B Ackerman 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 691-694.

³⁴ Article 249(1) of the Constitution of Kenya, 2010.

³⁵ See article 59 of the Constitution.

³⁶ K Govender 'The Reappraisal and Restructuring of Chapter 9 Institutions' (2007) 22 *South African Public Law* 190; C Murray 'The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 9 (2) *Potchefstroom Electronic Law Journal* 122; LWH Ackerman 'The Obligations on Government and Society in our Constitutional State to Respect and Support Independent Constitutional Structures' (2000) 3(1) *Potchefstroom Electronic Law Journal* 4.

purpose of ensuring that constitutionalism becomes a way of life in all institutional structures. The independent institutions are also expected to enhance democracy and accountability through the roles they play in monitoring and oversight of governmental functions.³⁷ They also provide an avenue for citizens to channel their grievances to governmental functionaries.³⁸ Thus the aim for their establishment is that of balancing-out the powers of the State and to address the runaway abuse of power by public officers that characterised the replaced constitutional dispensation.

Before the promulgation of the Constitution, Kenya had statutory commissions but these were not entrenched in the constitution.³⁹ Due to this anomaly, these commissions were viewed as beholden to the executive and thus not independent.⁴⁰ Political patronage informed appointment to these bodies and they depended on the treasury for financial support. This state of affairs led to their being ineffective and thus they did not meaningfully contribute to good governance.⁴¹ The constitutional entrenchment of constitutional commissions and independent offices in the 2010 Constitution is thus informed by historical lessons.

However, independent institutions operate with different degrees of success. This would imply that the institutional framework of these independent institutions must meet certain benchmarks to guarantee that they can deliver on their mandate. In an attempt to formulate guiding principles that must be adhered to for effectiveness of independent institutions, Fombad identifies four guiding principles:⁴²

the constitutional recognition of independence and that the independent institutions should be subject only to the constitution and law; other organs of

³⁷ Justice Njoki Ndung'u in her Separate Opinion *In the Matter of the National Land Commission [2015] eKLR*, held thus at paragraph 357: "The watchdog role is therefore so basic to the nature of constitutional commissions, that it cannot be understated or undermined through legislative and policy initiatives or practice. Acts of Parliament, and subsidiary legislation ought to be aligned to, and in harmony with the constitutional provisions; and interpretation of such laws must pay fidelity to the form and the vision of the Constitution". See also Ojwang (n 23 above) 55.

³⁸ Kaugongo (n 4 above).

³⁹ See BR Dinokopila and RI 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; See also K Kindiki 'On the Independence of the Kenya National Commission on Human Rights: A Preliminary Comment' (2004) 2(2) *The East African Journal of Human Rights and Democracy* 121.

⁴⁰ *In the Matter of the National Land Commission [2015] eKLR*, paragraph 158.

⁴¹ PLO Lumumba & Luis Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (Strathmore University Press 2014) 19.

⁴² Fombad (n 13 above) 1040-1041. See also: Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (The Paris Principles, 1993), UN. Doc. A/RES/48/134 (1993).

the state should assist and protect these institutions; no person or organ of the state should interfere with the functioning of these institutions; and the institutions should be accountable to Parliament.

Thus the independent institutions have to operate as independent sites for oversight, supervision and enforcement of constitutionalism.⁴³

Given that the fundamental idea of constitutionalism is that the constitution should not become a sham,⁴⁴ the independent institutions must be effective. For these institutions to be effective they must operate independently in the discharge of their mandate and they must also be accountable. It is these concerns that are the subject of the subsequent sections of this paper.

3. The Independence of Constitutional Commissions and Independent Offices

Without a considerable degree of independence, constitutional commissions and independent offices cannot hold neither the legislature nor the executive accountable nor contribute to open and democratic governance. If these institutions are regarded as part of government,⁴⁵ it would be difficult for them to act without fear, favour or prejudice and to fulfil their functions effectively.⁴⁶ This is due to the reality that these institutions are supposed to act against those in power.

Fombad and Hatchard *et al* argue that developing independent institutions that can guarantee accountable governance is a considerable challenge.⁴⁷ It

⁴³ Fombad (n 13 above) 1020.

⁴⁴ See generally CM Fombad 'Strengthening Constitutional Order and Upholding the Rule of Law in Central Africa: Reversing the Descent Towards Symbolic Constitutionalism' (2014) 14 African Human Rights Law Journal 412-448.

⁴⁵ The South African Constitutional Court in *Independent Electoral Commission v Langeberg Municipality, 2001 (9) BCLR 883 (CC)* endorsed the view that although Chapter 9 institutions in South Africa are organs of the state, they cannot be said to be departments over which cabinet exercises authority. Their independence refers to independence from the government.

⁴⁶ P de Vos 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' in D Chirwa & L Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (United Nations University Press, 2012) 166.

⁴⁷ J Hatchard *et al* *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004); CM Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on some Current Challenges and Future Prospects' (2011) 59 Buffalo Law Review 1007; CM Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 5 The American Journal of Comparative Law 6.

requires a legal framework that explicitly protects these institutions' independence and impartiality. They note that these institutions must also enjoy operational independence. Therefore, to guarantee the independence of these institutions, the constitution must require certain actions and prohibit others to ward of interference by other actors.⁴⁸

The 2010 Constitution duly designates constitutional commissions and independent offices as independent bodies. They are accorded constitutional protection to enable them achieve the objectives for their establishment.⁴⁹ The Constitution provides that they are subject only to the Constitution and the law, and they are independent and not subject to the direction or control by any person or authority.⁵⁰ This textual recognition of the independence of these institutions is important.⁵¹ But what determines whether an independent institution ends up as an effective force for accountable governance is its institutional design, and whether the designed independence is sustained in day-to-day political dealings.⁵²

It is a reality that the enforcing of accountability discharged by independent institutions is a threat to powerful interests that consequently often make a

⁴⁸ K Govender 'Power and Constraints in the Constitution of the Republic of South Africa 1996' (2013) *13 African Human Rights Law Journal* 82.

⁴⁹ The Supreme Court of Kenya in *Re The Matter of the Interim Independent Electoral Commission, Constitutional application Number 2 of 2011* remarked thus: '[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".'

⁵⁰ Article 249(2) of the Constitution.

⁵¹ See CM Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) *59 Buffalo Law Review* 1007, 1040; CM Fombad 'The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act' (2001) *27 Journal of South African Studies* 77 he remarks: 'For these institutions to operate optimally, they must be constitutionally entrenched. It is only constitutional entrenchment that can protect these institutions from being abused and manipulated by the government.'

⁵² J Yeh 'Experimenting with Independent Commissions in a New Democracy with a Civil Law Tradition: The Case of Taiwan' in S Rose-Ackerman & PL Lindseth *Comparative administrative law* (2010) 262.

concerted effort to weaken their power and influence.⁵³ In response to this state of affairs, the law and institutional design must separate independent institutions from the President and block any room for control by the Executive branch over the agenda and operations of the independent institutions.⁵⁴ The mechanisms and processes of appointments must prevent unwarranted political interference in appointments in order to enhance the legitimacy and independence of these institutions.⁵⁵ These bodies must also maintain a distance from Parliament, which is equally likely to be the object of scrutiny.⁵⁶

The constitutional and statutory design of the regime meant to effectuate the principle of independence of these institutions must promote the intention of securing independence. This is premised on the fact that institutional design is supposed to diminish partisan influence since where institutional design is not properly conceived then partisan interests can twist the law to serve political or private interests thus defeating the aim of entrenching these independent institutions.⁵⁷ Furthermore, the social and political context and legal tradition in Kenya are of significance in determining whether the textual guarantee of the independence of these independent institutions are supported by Kenyan realities.

To realise the goal of attaining independence for these institutions, the Supreme Court has recognised five factors as necessary to ensure institutional independence:⁵⁸ Functional independence, operational independence, financial independence, perception of independence, and collaboration and consultation with other State organs. It is these factors that will be discussed in the rest of this section.

3.1 *Functional Independence*

Functional independence implies that independent institutions should enjoy administrative independence namely being subject to the constitution and the law

⁵³ JM Ackerman 'Understanding Independent Accountability Agencies' in S Rose-Ackerman & PL Lindseth *Comparative Administrative Law* (2010) 271.

⁵⁴ PL Strauss 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84(3) *Columbia Law Review* 594.

⁵⁵ J Sarkin 'Reviewing and Reformulating Appointment Processes to Constitutional (Chapter Nine) Structures' (1999) 15 *South African Journal on Human Rights* 588.

⁵⁶ Strauss (n 54 above) 594.

⁵⁷ A Sajó 'Neutral Institutions: Implications for Government Trustworthiness in East European Democracies' in J Kornai & S Rose-Ackerman (eds) *Building a Trustworthy State in Post-Socialist Transition* (2004) 37.

⁵⁸ *In the Matter of the National Land Commission [2015] eKLR*, paragraph 184.

only.⁵⁹ They should not be directed or controlled by any interests or person external to these bodies but only subject to legally prescribed channels of accountability.⁶⁰ It means that the independent bodies exercise their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies.

Functional independence is in line with the general functions and powers of commissions, as provided under Articles 252 and 253 of the Constitution. The effect of these constitutional provisions is that other state organs cannot usurp and purport to discharge the functions vested in a given independent institution.⁶¹ Functional independence is further given effect through article 255(1)(g) of the Constitution, which provides that amendment of the Constitution in matters dealing with the independence of the commissions and independent offices must be approved in a referendum. Thus the limiting of the independence of an institution must be done only with the approval of the people and not of the bodies that are supposed to be held accountable by the institution.

This protection of functional independence of independent institutions has played out with respect to the National Assembly's attempts to interfere with the mandate of the Salaries and Remuneration Commission (SRC). SRC came under attack from the National Assembly for regulating the salaries of state officers.⁶² The SRC published the remuneration of various categories of state officers. Gazette Notice Number 2886 provided for remuneration of members of Parliament (senators and members of the national assembly), aggrieved by the terms of set for them by the SRC, the members of the national assembly pursued a two pronged attack on the SRC: first, they passed a resolution to nullify all the notices contained in the Special Gazette Issue;⁶³ and second, they also sought to amend the constitution to remove members of Parliament, county assemblies and judges and magistrates from the list designating state officers who come under the authority of the SRC.

⁵⁹ Article 249(2)(a) of the Constitution.

⁶⁰ Article 249(2)(b) of the Constitution.

⁶¹ But see *Okiya Omtatah Okioti 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.

⁶² Article 230 of the Constitution provides that the mandate of the SRC is to: set and regularly review the remuneration and benefits of all state officers; and advise the national and county governments on the remuneration and benefits of all other public officers.

⁶³ See the case of *Okiya Omtata and Others v Attorney General and Others, Petition Numbers 227, 281 and 282 2013 (consolidated)* para 13-14 where the nullification of the Gazette was challenged.

These attempts to neuter the SRC show the lengths to which other bodies are willing to go to protect themselves from independent institutions 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 its constitutional mandate must be approved in a referendum.⁶⁴ Subsequently, the High Court held that the National Assembly exceeded its mandate by purporting to annul the Gazette Notices issued by the SRC.⁶⁵ 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.

In 2019, the Parliamentary Service Commission awarded Members of Parliament monthly housing allowance without the approval of concurrence of the SRC. When SRC moved to the High Court to challenge the constitutionality and legality of payment of housing allowance to MPs, Parliament initiated several retaliatory measures against the SRC. These measures included: MPs threatened to amend the Salaries and Remuneration Act so that SRC commissioners are employed on part-time rather than full-time basis, they also threatened to review downwards the sitting allowances paid to the SRC commissioners, and slash the budgetary allocation for the SRC.⁶⁶

3.2 Operational Independence

Operational independence speaks to the need to ensure that independent institutions are shielded from political interference and manipulation. This can be guaranteed by ensuring that constitutional commissions and independent offices alone have control over the day –to –day running of their affairs in execution of their mandate.⁶⁷ Thus the day –to-day running of the affairs of these independent bodies should be in their hands. Independence, in this context, refers to the

⁶⁴ See *the case of Commission for the Implementation of the Constitution v the National Assembly of Kenya and Others*, Petition Number 496 of 2013 challenging the constitutionality of the process of constitutional amendment.

⁶⁵ See *Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others* [2014] eKLR.

⁶⁶ See D Mwere, ‘MPs Plot to Slash Pay for Salaries Regulator to Sh 16,000 monthly,’ Available at: <https://mobile.nation.co.ke/news/MPs-plot-to-slash-pay-for-salaries-regulator-to-Sh16-000-monthly/1950946-5151102-ocpqyvz/index.html> (Accessed on 20th June 2019).

⁶⁷ The South African Constitutional Court in *New National Party of South Africa v Government of the Republic of South Africa 1999 (5) BCLR 489 (CC)* held that the Department of Home Affairs could not tell the Electoral Commission how to conduct voter education or whom to employ.

ability to make decisions free from governmental interference and to having the organisational infrastructure required to function efficiently and effectively.

The first aspect of administrative control implies that neither the legislature nor the executive may interfere with employment, procurement, investigations, or similar operations.⁶⁸ It means that the other branches of government may not intrude in the running of these independent bodies in a manner that removes final control over the administration from the independent institution or that interferes with its effective functioning.

The application of operational independence of independent institutions can be illustrated through a dispute related to the mandate of the Auditor General, an independent office established under article 229 of the Constitution. The National Assembly enacted the Public Audit Act, 2015 in December 2015. Sections 4(2) and 8 of the Public Audit Act provided that the Auditor General's staff could be delegated from other state organs and the Public Service Commission, in contravention of Article 252(1)(c) of the Constitution which empowers each Commission and Independent Office to recruit their own staff. This had the effect of giving the executive branch some measure of control over an independent office holder by forcing the Auditor General to appoint staff that he or she had not chosen. In a further attempt to whittle away the operational independence of the Auditor General, sections 25, 26 and 27 of the Public Audit Act, 2015 created and gave the Audit Advisory Board power to advise the Auditor General on the performance of his duties. The High Court adjudicated on a dispute relating to the constitutionality of these provisions and declared them unconstitutional for violating article 249(2)(b) of the Constitution that envisages that independent institutions are not subject to the direction or control by any person or authority.⁶⁹

The second aspect of administrative control is safeguarded by ensuring that the procedure of the appointments of commissioners, the composition of the independent bodies, and procedures of the commissions are not politicised.⁷⁰ The appointment procedures must guarantee that patronage is not used to gain

⁶⁸ See *Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi* [2019] eKLR.

⁶⁹ *Transparency International (TI Kenya) v Attorney General & 2 others* [2018] eKLR; see also *Judicial Service Commission v Salaries and Remuneration Commission & another* [2018] eKLR, where the High Court held that the Salaries and Remuneration Commission does not have the mandate to limit the number of remunerable meetings that a constitutional commission can have.

⁷⁰ CM Fombad, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa,' in CM Fombad (ed.) *The Separation of Powers in African Constitutionalism* (2016) 325, 331.

influence in these institutions to avoid the risk of state capture of these bodies by political interest groups. If the commissioners are appointed by the President, acting alone or on the recommendations or with the approval of Parliament, because of the domination of Parliament by the ruling party,⁷¹ this effectively enables the President to appoint people likely to be sympathetic to his line of thinking. To ensure independence, commissioners must be non-political and the recruitment process must be transparent and be based on merit uninfluenced by political or other irrelevant factors. Moreover, once appointed, the commissioners should enjoy security of tenure, with clear legal provisions on removal.⁷²

In principle and in constitutional logic, the Constitution envisages that commissioners are impartial and independent. The process of appointing commissioners is carefully designed to ensure that the most ably qualified persons are selected.⁷³ It is also a constitutional imperative that independent bodies reflect regional, ethnic, and gender composition of Kenya.⁷⁴ This has ensured that independent bodies are composed in a manner that ensures representativeness and guarantees institutional independence.

The controversy relating to appointment of commissioners relates to attempts to shore up the executive's control of the Judicial Service Commission (JSC). The President in 2018 purported to submit the name of the elected Court of Appeal's representative to the JSC, Justice Mohamed Warsame, to the National Assembly for Parliamentary approval. This purported requirement for Parliamentary vetting of a judge elected by judges of the Court of Appeal to represent the court in the JSC violates article 171(2)(c) of the Constitution.⁷⁵ The Constitution does not

⁷¹ W Khobe 'The State of Judicial Independence in Kenya –Reflections from the 2017 Elections' in Gondi J. (ed.) *Reflections on the 2017 Elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya* (2019) 5, 15; See also S Choudhry, 'He had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy', (2009) 2 Constitutional Court Review 1. See also S Issacharoff, 'The Democratic Risk to Democratic Transitions' (2013) 5 Constitutional Court Review 1.

⁷² Article 251 of the Constitution provides an elaborate removal process. The grounds for removal are stipulated to be: violation of the Constitution or any other law, gross misconduct, physical or mental incapacity to perform functions of office, incompetence, or bankruptcy.

⁷³ Article 250(2) and (3) of the Constitution of Kenya 2010.

⁷⁴ Articles 10, 27 (8), 250(4) of the Constitution of Kenya 2010. But see W Khobe 'The Chimera of Constitutionally Entrenched Gender Quotas: The Case of Kenya' (2015) 46 *The Zambia Law Journal* 53-83 for a critique of the difficulty in complying with article 27(8) of the Constitution on equity in gender representation in public bodies.

⁷⁵ See F Olick, 'State Wants JSC Picks to be Vetted by Parliament,' Available at: https://www.the-star.co.ke/news/2018/04/23/state-wants-jsc-picks-to-be-vetted-by-Parliament_c1747653 (Accessed on 25th March 2019).

impose Parliamentary vetting as a prerequisite for a representative of the judges to assume office in the JSC.⁷⁶ When this irregular process was challenged in court, the High Court held that the Constitution does not require Parliamentary approval for elected representatives of judges and lawyers to the JSC. This is due to the fact that the Constitution explicitly provides such a requirement for the representatives of the public to the JSC.⁷⁷ If the constitution makers wanted to provide such a requirement for the elected representatives of the judges and lawyers, they would have said it openly, as they did regarding representatives of the public appointed by the President.⁷⁸

In an earlier attempt to whittle away the operational independence of the JSC, Parliament enacted Statute Law (Miscellaneous Amendment) Act, 2015 which replaced section 30(3) of the Judicial Service Act.⁷⁹ The new section 30(3) of the Judicial Service Act required the JSC to forward to the President three nominees for appointment to the positions of Chief Justice and Deputy Chief Justice. However, this controversial amendment was struck down as unconstitutional by the High Court which held that selection for judicial office was an exclusive mandate of the JSC.⁸⁰

3.3 Financial Independence

It is necessary that the financial autonomy of constitutional commissions and independent offices is protected, in order to avoid the budget process being used to prevent them from fulfilling their mandate. They should be resourced with enough funds to discharge their functions. Where independent institutions are under-resourced, they end up overwhelmed and thus unable to discharge their mandate leading to loss of public confidence. Besides, failure to secure financial independence for these independent bodies can be exploited to frustrate and punish them.

⁷⁶ The High Court temporarily barred the National Assembly's intended vetting of Justice Warsame. See A. Wambulwa, 'Court Bars MPs from Vetting Justice Mohamed Warsame for JSC Post' Available at: https://www.the-star.co.ke/news/2018/03/26/court-bars-mps-from-vetting-justice-mohamed-warsame-for-jsc-post_c1736580 (Accessed on 15th March 2019).

⁷⁷ See article 171(2)(h) of the Constitution.

⁷⁸ *Law Society of Kenya & another v National Assembly of the Republic of Kenya & 3 others* [2018] eKLR. See also *Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another; (Interested Parties)* [2019] eKLR where it was held that it is a violation of the Constitution for the President to unreasonably delay to appoint a person elected as a commissioner of in an independent institution.

⁷⁹ Number 1 of 2011.

⁸⁰ *Law Society of Kenya v Attorney General and National Assembly*, Petition No. 3 of 2016.

To secure financial independence for independent institutions, the executive branch should not have absolute control over their funding. Were the executive to have absolute control over the funding of independent institutions, these institutions would not be able to function and exercise their mandate without fear, favour or prejudice. This also means that funds to these bodies should not come from the executive branch but should be expressly allocated by Parliament after the independent institutions have been afforded an opportunity to defend their budgetary requirements before Parliament.

The Constitution makes an attempt to ensure financial autonomy of these institutions. This has been done by imposing a constitutional obligation on Parliament to allocate adequate funds that would sustain the operations of these bodies.⁸¹ This makes it a constitutional imperative for Parliament to ensure that independent institutions are sufficiently resourced in order to perform their functions. In practice, this works out by the National Assembly considering the request for funding by independent institutions in good faith in the light of competing national interests. Therefore, the National Assembly must afford the independent institutions adequate opportunity to defend their budgetary requirements. Moreover, resourcing of independent institutions 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.

The question of adequacy of budgetary allocation for independent institutions for the conduct of their functions arose following the annulment of the August 8th 2017 presidential election by the Supreme Court. The executive and legislative branches made a decision to slash the budgetary allocation for the judiciary and a number of independent constitutional offices, including the Judicial Service Commission, Kenya National Human Rights Commission, the National Land Commission, the office of the Auditor General, and the office of the Controller of Budget.⁸² The government rationalized this reduction of budgetary allocation on the basis that it needed money for the repeat presidential elections and to enhance free day secondary education. As an illustration, the JSC, an independent

⁸¹ Article 249(3) of the Constitution 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."

⁸² W Menya, 'Treasury CS Raids Judiciary Coffers to Fund Presidential Poll,' *Daily Nation* (Nairobi, 1 October 2017) Available at: <https://www.nation.co.ke/news/Treasury-CS-raids-Judiciary-coffers-to-fund-election/1056-4119008-e5wttec/index.html> (Accessed on 16th June 2019).

commission that plays a crucial support role to the judiciary, had its budget slashed by 62.6 per cent. The JSC's allocation was reduced from shillings 490.2 million to shillings 183.5 million. The slashing of the funds after the annulment of the August 8th 2017 elections shows that independent institutions can be punished through resource allocation when they are deemed to be a threat to the vested interests of the political branches of government.

In addition, 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.⁸³ The *raison d'être* for this provision is to remove the issue of commissioners' remuneration from the political sphere and avoid the use of remuneration as a bargaining tool to reward or punish commissioners.

3.4 Perception of Independence

It is important that there be public confidence in the workings of these independent bodies. An independent institution enjoys perception of independence when the body is viewed as independent from the objective standpoint of a reasonable and informed person.⁸⁴ This is 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 question.

Public undermining of independent institutions has been a significant challenge. Antagonism from Parliament towards the Salaries and Remuneration Commission and attacks on the Judicial Service Commission by the executive branch has been a significant impediment to their work, particularly where cooperative governance is necessary. Although, cooperative governance is explicitly mentioned in the Constitution in the devolution context of inter-governmental relations between National and County Governments, its spirit is palpable in institutional relations throughout the Constitution.⁸⁵ The impact of such political attacks on the ability of independent institutions to actively and effectively carry out their mandates may be considerable, although this may in some respects be preferable to an approach which simply delegitimizes a body through partisan appointments. Nevertheless, these attempts at publicly undermining independent

⁸³ Article 250(7) of the Constitution of Kenya 2010.

⁸⁴ de Vos (n 46 above) 165.

⁸⁵ See article 6(2) of the Constitution; See also JM Kangu, *Constitutional Law of Kenya on Devolution*, (Strathmore University Press 2015) chapter 9 generally.

institutions pose a significant impediment to the development of robust and effective independent institutions.

It should be noted that perception of independence is also an internal institutional responsibility. Independent institutions should not be seen to be doing the bidding of other arms of government and not acting independently. For example, the Teachers Service Commission (TSC) has often been seen to be working in fear and taking precaution not to act contrary to the wishes and desires of the executive branch of government.⁸⁶ Similarly, the Independent Electoral and Boundaries Commission (IEBC) is perceived by members of the public to be beholden to sectarian interests. The perception that the IEBC commissioners are close to members of the political class compromises their ability to be or to be seen to be neutral arbiters in elections.⁸⁷

3.5 Collaboration and Consultation with other State Organs

A key structural feature of the Constitution is the way in which power is both distributed and integrated in a system of governance that is designed to not only avoid the paralysis of a rigid separation of powers, but also ensure that there are multiple avenues for democratic and legal contestation. This combination of distributed and integrated power extends from the system of cooperative government to the allocation of constitutional authority between distinct institutions whose task is to ensure that essential elements of good governance is maintained at all levels of government.

The combination of the independence and the specialised expertise of constitutional commissions and independent offices has the potential to add considerable value in shaping governance.⁸⁸ In keeping with the cooperative governance goals, there is scope for incorporating the knowledge and aptitude of the independent institutions for the purpose of improving service delivery. This is

⁸⁶ See K Makasembo, 'Teachers Service Commission has Failed to prove its Independence,' Available at: <https://www.standardmedia.co.ke/ureport/story/2000175834/teachers-service-commission-has-failed-to-prove-its-independence> (Accessed on 16th June 2019).

⁸⁷ W Wanyoike, 'The Rationale for the Existence of Independent Constitutional Commissions,' (2016) Katiba Institute Available at: <http://www.katibainstitute.org/the-rationale-for-the-existence-of-independent-constitutional-commissions/> (Accessed on 16th June 2019).

⁸⁸ See F Mohamed, 'The Fourth Branch: Challenges and Opportunities for a Robust and Meaningful Role for South Africa's State Institutions Supporting Democracy,' in D Bilchitz and D Landau, (eds.) *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar Publishing Limited, 2018) 177, 193.

in keeping with the desired goal of the Constitution that independent institutions should seek collaborative relationship with other state organs for the purpose of supporting good governance. However, collaboration and consultation does not imply that these independent institutions are under an obligation to co-operate with the government of the day at any cost. If this were the case, it would be difficult for these bodies to act without fear, favour or prejudice and to fulfil their functions effectively.

Moreover, the independence of constitutional commissions and independent offices must be understood against the countervailing constitutional imperatives requiring cooperation between the independent institutions and other state organs. The fact that independent institutions are autonomous and independent from the primary powers of the other branches of government does not mean they are not part of the Kenyan state, as their primary mission lies in addressing relevant needs of both the state and society in general, constituting themselves as new agencies that are on a par with the traditional branches of government. In addition, the oversight role played by the independent institutions must be viewed as complementary to the legislature's own watchdog function. They thus support and aid the legislature in its oversight function by providing it with information that is not derived from the executive branch.⁸⁹

In contrast to this idealistic requirement for cooperative and collaborative relationship between the independent institutions and other state organs, in practice such a collaborative approach has not been forthcoming. This is majorly due to the fact that institutions have histories, processes, and individual participants that together shape their relationship with other state organs. Moreover, such a cooperative relationship is reliant on a receptive audience in the other state organs.

If we take the National Land Commission (NLC) as a key example, it has been frustrated by the executive branch and this has derailed any expected hopes of a collaborative relationship between the Ministry of Lands and the NLC.⁹⁰ The Ministry of Land resisted yielding its powers and responsibilities and worked to retain the mandate of the NLC within its control. The Ministry and the executive branch battled the NLC in every conceivable way, including by failing to turn over relevant information, blatant obstructionism, and openly defying constitutional and

⁸⁹ de Vos (n 46 above) 165.

⁹⁰ C Boone, *et al*, 'Land Law Reform in Kenya: Devolution, Veto Players and the Limits of an Institutional Fix,' (2019) *African Affairs* 1-23; see also A Manji, 'The Politics of Land Reform in Kenya 2012', (2014) 57(1) *African Studies Review* 115-130.

legal provisions that mandated a transfer of power to the NLC. Critically, between 2013 and 2016, the NLC was not able to get access to inventories of public land or land registries. This meant that it could not identify titles or allotment letters issued for holdings on public land and was thus unable to investigate the many past land allocations that were suspected to have been illegal or irregular. It was also blocked from regularizing the allocation and titling process on smallholdings, especially in settlement schemes, even though taking up this responsibility was another core objective of those who had backed land administration reform in Kenya for many years.⁹¹

4. The Accountability of Constitutional Commissions and Independent Offices

Independence and accountability appear to be two contradictory features of institutional design at first blush. Given the emphasis on the independence of constitutional commissions and independent offices, one of the problems they pose is the question of their accountability. There is the possibility that the independent institutions may engage in rent seeking or pursue partisan interests rather than public interest.⁹² In addition, given that these institutions are mandated to carry out vital functions and, like any other state organ that is run by state resources, they must be held accountable.⁹³ Just as the autonomy of the independent institutions is important, their accountability is also crucial given that it is accountability that confers legitimacy on state institutions.⁹⁴

⁹¹ E Basset, 'Reform and Resistance: The Political Economy of Land and Planning Reform in Kenya,' (2019) *Urban Studies* 1-20.

⁹² JB Wiener & A Alemanno 'Comparing Regulatory Oversight across the Atlantic: The Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU' in S Rose-Ackerman & PL Lindseth *Comparative Administrative Law* (2010) 310. See also W Khobe 'The Judicial Service Commission, Independence of Judges and Enforcement of Human Rights in Kenya' (2013) 2 *Young Africa Research Journal* 1-20.

⁹³ The Supreme Court in *the Matter of Interim Independent Electoral Commission* [2011] eKLR, at para 60 held thus: "... These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the 'independence clause' does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law."

⁹⁴ RE Kapindu 'A Comparative Analysis of the Constitutional Frameworks of Democracy Building Institutions in Malawi and South Africa' (2008) 2(2) *Malawi Law Journal* 239.

Moreover, there is also the need for political accountability. In a democracy, all parts of government ought to be accountable to the people.⁹⁵ This is driven by the reality that out of the social contract, government in theory is an agent of the citizenry in a democracy. This raises a valid concern of the need for accountability to democratically elected officials to give independent institutions legitimacy.

The Supreme Court has held that the principle of checks and balances applies to all State organs including constitutional commissions and independent offices to avoid abuse of power.⁹⁶ The Supreme Court proceeded to delineate three mechanisms of accountability exercised over constitutional commissions and independent offices: horizontal accountability (accountability to the executive, legislature, and judicial branches of government), vertical accountability, and accountability by counterpart independent institutions.⁹⁷ It is these mechanisms of accountability that will be discussed in the rest of this section.

4.1 Accountability to Parliament

The Constitution prescribes that Parliament represents the will of the people and exercises their sovereignty.⁹⁸ The National Assembly does this by, among others, scrutinising and exercising an oversight mandate over other state institutions and organs.⁹⁹ Article 254(1) of the Constitution provides that independent institutions must report to Parliament every financial year. Further, article 254(2) of the Constitution envisages that both the National Assembly and the Senate may require a commission to submit a report on a particular issue.

The requirement of submission of reports to Parliament envisages that the reports will enable Parliament to detect and prevent abuse, arbitrary behaviour or illegal and unconstitutional conduct on the part of an independent institution, and to hold the independent institution to account in respect of how money allocated to the commission is used. The presentation of reports may also contribute to

⁹⁵ This argument is adapted from German constitutional theory. The idea of a 'chain of legitimation' is a central thought in German constitutional theory. In representative democracy, all political decisions ultimately need to be traced back to the people, for these decisions to carry democratic legitimacy. See for example, F. Nullmeier, and T. Pritzlaff, 'The Great Chain of Legitimacy: Justifying Transnational Democracy,' (2010) *TranState Working Papers* 123, University of Bremen, Collaborative Research Centre 597: Transformations of the State. Available at: <https://www.econstor.eu/bitstream/10419/36686/1/628599471.pdf> (Accessed on 12th May 2019).

⁹⁶ *In the Matter of the National Land Commission [2015] eKLR* at paragraph 201.

⁹⁷ *Ibid* paragraphs 202-205.

⁹⁸ Article 94 of the Constitution of Kenya, 2010.

⁹⁹ *Ibid* Art95(5)

improve the transparency of the operations of independent institutions and thus enhance public trust in the institution.¹⁰⁰

There is no explicit obligation on Parliament to debate the reports submitted by independent institutions. This is an unsatisfactory state of affairs as it means that these reports can be ignored. Indeed, these fears have been confirmed given that Parliament has failed to debate these reports for the last eight years. For an effective Parliamentary scrutiny system, there should be a legal obligation for Parliament to debate the submitted reports within a stipulated timeframe. The commissioners of independent institutions should also be required to appear before the relevant Parliamentary committee to discuss the report and the independent institution's performance.¹⁰¹ Such a forum would also ideally involve presentation of 'shadow reports' and presentations by the civil society on their assessment of the independent institution's performance. It is also worth exploring the establishment of a Committee of the National Assembly on Constitutional Commissions and Independent Offices that can function as a port of call for oversight and scrutiny over constitutional commissions and independent offices.¹⁰²

The constitutional requirement for the independent institutions to present their budget to the National Assembly for approval also provides an avenue for further checks on the independent institutions. Article 249(3) of the Constitution requires Parliament to allocate adequate funds to enable each constitutional commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote. The National Assembly can through this mechanism ensure that an independent institutions' proposed budget reflects policy priorities and hold the commission accountable for its performance. Thus the involvement of the National Assembly in the approval of the independent institution's budget is aimed at promoting good governance, fiscal transparency and ensuring that the commission adheres to fiscal discipline.

The other means through which Parliament may exercises oversight over the independent institutions is through the process of removal of a commissioner of an independent institution from office. Article 251 of the Constitution provides that a member of an independent institution may be removed from office for serious

¹⁰⁰ W Khobe 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Ghai JC (eds) *Judicial Accountability in the New Constitutional Order* (ICJ- Kenya, 2016) 47, 67.

¹⁰¹ Harchard *et al* (n 47) 219.

¹⁰² Khobe (n 100) 47, 68.

violation of the constitution or any other law, gross misconduct, physical or mental incapacity to perform the functions of office, incompetence or bankruptcy. The Constitution assigns the National Assembly a crucial function in the removal process. It has the exclusive power of considering any petition for removal of a commissioner to determine whether the petitioner has shown sufficient grounds for removal, and then recommending the formation by the President of a tribunal to investigate the matter.

Despite the laudable benefits of Parliamentary oversight over the independent institutions, it is worth pointing out that the exercise of this mandate by Parliament has been faced with challenges. Concern has arisen that the exercise of oversight powers has been used as a mechanism for interfering with the independence of the Judicial Service Commission (JSC) for ulterior motives. The JSC initiated a process to remove the then Registrar of the Judiciary, Ms. Gladys Boss Shollei, attracting the attention of the National Assembly, which attempted to intervene in the disciplinary process. The National Assembly initiated a parallel investigation and summoned commissioners of the JSC to appear before the National Assembly's Committee on Justice and Legal Affairs. When the Commissioners declined to appear, the National Assembly embarked on a process of removal of some of the Commissioners of the JSC. This was only stopped by the High Court which ruled that Parliament's oversight role did not permit it to make 'haphazard or un-coordinated incursions of inquiry into the mandate of another state organ or independent commission or office.'¹⁰³

4.2 Accountability to the Executive Branch

As noted earlier, the Constitution seeks to strike a balance between the independence of the independent institutions on the one hand and the independent institution's accountability to the executive on the other hand. Article 254 of the Constitution imposes an obligation on independent institutions to submit a report to the President annually, and to report on a particular issue if requested by the president and the report has to be published and publicised. The presentation of the reports enables the President to hold the independent institutions to account in respect to implementation of policies of the national government.¹⁰⁴ However, one weakness that is noteworthy is that the Constitution

¹⁰³ *Judicial Service Commission v Speaker of the National Assembly and 8 Others*, Petition Number 518 of 2013 paragraph 200.

¹⁰⁴ Khobe (n 100) 47, 71.

does not explicitly specify in any detail what is to be included in the reports or action that should follow after the President has received the reports.¹⁰⁵

4.3 Accountability to the Judicial Branch

The Constitution is supreme and every state organ and institution is subject to the constitution and rule of law.¹⁰⁶ Thus the courts being the custodians of the Constitution and the law are mandated to intervene if it is alleged that an independent institution has acted in breach of either the Constitution or the law. Article 165 of the Constitution confers on the High Court power to intervene where it is alleged that the constitution has either been violated or threatened with violation. This imprimatur conferred on the courts to supervise the constitutionality and legality of the acts of the independent institutions has been affirmed in several judicial determinations.¹⁰⁷

4.4 Vertical Accountability

There exists also a kind of vertical accountability, which speaks to the interaction between the independent institutions and the people in general. Article 254(3) of the Constitution requires every commission or independent office to publish and publicise its reports. The obligation imposed on the independent institutions is that of publication of their reports and the implementation of recommendations contained in the independent institution's reports. This is a check-and-balance mechanism, as well as an exercise of inclusivity, accountability, transparency, good governance and integrity-as recognised under the national values and principles of governance.¹⁰⁸ It is also a mode of promoting constitutionalism, as required by Article 249(1) of the Constitution.

¹⁰⁵ S Seema, 'Electoral Integrity' (2019) 16(1) *Awaaz Magazine* 27, 28.

¹⁰⁶ Article 2 of the Constitution.

¹⁰⁷ In *Judicial Service Commission v Mbalu Mutava & another*, Civil Appeal 52 of 2014 the Court of Appeal affirmed that courts have a supervisory mandate over the JSC's discharge of its function of recommending the formation of a tribunal to consider removal of a judge. In *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another*, Petition 314 of 2016 & Judicial Review 306 of 2016 (Consolidated) the High Court held that it has the jurisdiction, the mandate and power to investigate claims of unconstitutionality, illegality and irrationality on the part of the JSC. The court allowed a challenge to the process of recruitment of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court reasoning that the decision of the Commission to summarily reject applications, where the candidates clearly satisfied constitutional qualifications, before the stage of interview was unsupported by the law and was tainted with procedural irregularity.

¹⁰⁸ Article 10(2) of the Constitution.

4.5 Accountability to other Independent Institutions

The Constitution also envisages oversight responsibilities over independent institutions by counterpart constitutional commissions and independent offices.¹⁰⁹ For example, article 229(4)(d) of the Constitution vests the Auditor General with providing financial checks on other independent institutions. The Commission on Administrative Justice established pursuant to article 59(4) of the Constitution has a role in investigating administrative shortcomings in the workings of all state organs including the independent institutions.¹¹⁰

The need for oversight over these independent bodies has been emphasised in this section given the reality that when any state organ is left unchecked then it can run amok and thus perpetrate the same ills it is mandated to curb. However, the exercise of accountability should not be used to usurp the operational autonomy over other independent institutions. The possibility of this happening is illustrated through a dispute between the Salaries and Remuneration Commission and the Judicial Service Commission over the capping of the latter's commissioners' sitting allowances by the former. The SRC capped the number of sittings that the JSC commissioners could hold per month pursuant to its responsibility of setting and regularly reviewing the remuneration and benefits of all state officers. The JSC challenged this action by the SRC in court. The High Court held that the SRC does not have the mandate to limit the number of remunerable meetings that a constitutional commission can have as this would violate the independence of the JSC.¹¹¹

5. Effectiveness of the Constitutional Commissions and Independent Offices

Among the significant roles played by constitutional commissions and independent offices are their investigative and complaints handling functions. A number of the independent institutions are enabled, through the Constitution or legislation, to investigate areas of concern and handle complaints that fall

¹⁰⁹ 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.

¹¹⁰ Section 8 of the Commission on Administrative Justice Act, No. 23 of 2011.

¹¹¹ See *Judicial Service Commission v Salaries and Remuneration Commission & another* [2018] eKLR.

within their ambit.¹¹² In addition, other independent institutions like the Salaries and Remuneration Commission are vested with the role of setting and regularly reviewing the remuneration and benefits of state officers, and advising government on the remuneration and benefits of public officers.¹¹³ The effectiveness of the discharge of these functions implicates the enforceability of the findings of these bodies.

A significant concern that has arisen on numerous occasions relates to the ability of the independent institutions to issue ‘binding’ recommendations or to prescribe ‘binding’ remedial action. Put differently, a question that has arisen repeatedly is whether an individual, organisation, public officer, state officer, or state organ may simply ignore the findings, or recommendations made by the independent institutions. Clearly, this has implications for the ability of these bodies to perform the role for which they were established.

In order to ensure the effectiveness of independent institutions, their findings, decisions, recommendations, and conclusions should be binding and must be complied with.¹¹⁴ It makes little sense to create independent institutions and fund them using taxpayers’ money and then ignore the outcome of their work. Certainly, robust independent institutions require that they are not routinely ignored.¹¹⁵ This helps in addressing the criticism that the independent institutions are ineffective and a waste of public funds.

¹¹² See for example: 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.

¹¹³ Article 230(4) of the Constitution.

¹¹⁴ South Africa’s Supreme Court of Appeal in *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156 held in similar circumstances that powers of an independent institution, the Public Protector, ought to bind state organs. The court noted thus: “The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of s.182(1) (c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation”.

¹¹⁵ See the decision by South Africa’s Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (Economic Freedom Fighters)* [2016] ZACC 11; See also H Klug, ‘Corruption, the Rule of Law and the Role of Independent Institutions’ in R Dixon and T Roux, *Constitutional Triumphs, Constitutional Disappointments* (2018) 108; S Woolman, ‘A Politics of Accountability’ (2016) 8 Constitutional Court Review 155.

The debate over the effectiveness of remedial action and recommendations made by independent institutions arose with respect to the powers of the Salaries and Remuneration Commission and the Commission on Administrative Justice (CAJ). The Court of Appeal affirmed that the powers of the SRC under article 230(4)(b) of the Constitution to ‘advise the national and county governments on the remuneration and benefits of all other officers’ was binding.¹¹⁶ The court argued that to grant state organs discretion on whether to comply with the advice of the SRC would render the institution ineffective and irrelevant.

Subsequently, a dispute arose over the status of the remedial action taken by the Commission on Administrative Justice. However, in a departure from the Court of Appeal’s approach, the High Court held that remedial action by CAJ are not binding on state organs.¹¹⁷ It is important to note this finding raises the question on whether the findings by the Commission on Administrative Justice will be implemented by public agencies and the effectiveness of that commission. The CAJ’s findings should be legally binding so that government agencies would take maladministration seriously.¹¹⁸ In any case, a public body dissatisfied with the findings of CAJ can challenge them in court.

6. Conclusion

The constitutional entrenchment of constitutional commissions and independent offices in Kenya was a key means by the drafters of the 2010 constitution to reconfigure and distribute power within the Kenyan state and democratize governance. This paper has shown that these independent institutions can play a significant role in consolidating Kenya’s progress toward a credible culture of constitutionalism and accountability in governance. However, this can only be realised if the independence, accountability, and effectiveness of independent institutions is respected in the manner elaborated in this paper.

¹¹⁶ *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others* [2015] eKLR.

¹¹⁷ See *Republic v Kenya Vision 2030 Delivery Board and another ex-parte Engineer Judah Abekab*, JR No. 223 of 2014. At the time of writing this paper, an appeal from this decision by the High Court was pending before the Court of Appeal.

¹¹⁸ See W Khobe, ‘Defanging the Ombudsman: The High Court and the Binding Nature of Remedial Powers of the Commission on Administrative Justice,’ (2018) 33 *The Platform* 42-48; See also C Beyani, ‘High Court Ignored Constitution on the Powers and Duties of Ombudsman,’ *Daily Nation* (25 march 2015) <https://mobile.nation.co.ke/blogs/-High-Court-Constitution-Ombudsman-Beyani/-/1949942/2665506/-/format/xhtml/-/buah4u/-/index.html> (Accessed on 6th April 2019).

