

**Constitutional Commissions in Kenya  
Experiences, Challenges and Lessons**

**Prof Ben Sihanya, JSD (Stanford)**

Scholar, Intellectual Property, Constitutionalism & Education Law  
University of Nairobi Law School; &

Professor-in-residence, Public Intellectual & Advocate

Innovative Lawyering & Sihanya Mentoring, Nairobi & Siaya

Email: [sihanya@sihanyamentoring.com](mailto:sihanya@sihanyamentoring.com); [sihanya@innovativelawyering.com](mailto:sihanya@innovativelawyering.com);  
[sihanyamentoring@gmail.com](mailto:sihanyamentoring@gmail.com)

Url: [www.innovativelawyering.com](http://www.innovativelawyering.com); [blogspot:http://www.innovativelawyering.com/blogs](http://www.innovativelawyering.com/blogs)

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# Constitutional Commissions in Kenya

## Experiences, Challenges and Lessons Problem statement

Prof Ben Sihanya, JSD (Stanford)<sup>1</sup>

### 1. Problem statement

Why haven't the Constitutional Commissions delivered on the constitutional promise of popular sovereignty, liberty, service delivery and constitutional democracy? Why does tribal colonization and tyranny persist in elections, appointments, tenders, contracts, service delivery and manipulation and intimidation especially in public service in spite of the bureaucracy commissions?

This paper assesses the utility of the Commissions, their operational mandates and the challenges they face in service delivery and their interactions with the other arms of government, the private sector and civil society (organizations).

### 2. Research questions and arguments

This paper seeks to review the performance of constitutional commissions, the challenges they have faced so far, the lessons Kenyan's can learn and prospects for the future. It seeks to answer the following three related research questions:

- i) First, what are Constitutional Commissions? What functions do they perform and what services do they deliver? What typology do they fall under and how can they be distinguished one from another?
- ii) Second, how efficient and equitable are the Commissions in service delivery under the Constitution of Kenya 2010?
- iii) Third how efficient and effective are the Commissions in promising popular sovereignty including liberty and limiting power? To what extent have they advanced Constitutional democracy by limiting presidential imperialism or tribal colonization or tyranny, a rogue or despotic Parliament, and judicial arrogance or incompetence?

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<sup>1</sup> Scholar, Intellectual Property, Constitutionalism & Education Law, University of Nairobi Law School; & Professor-in-residence, Public Intellectual and Advocate, Sihanya Mentoring & Innovative Lawyering email: [sihanya@innovativelawyering.com](mailto:sihanya@innovativelawyering.com); [sihanya@sihanyamentoring.com](mailto:sihanya@sihanyamentoring.com); url: [www.innovativelawyering.com](http://www.innovativelawyering.com); blogspot: <http://www.innovativelawyering.com/blogs>. Presentation for the Conference on State Implementation of the Constitution since 2010, at Laico Regency, November 20, 2013. My gratitude for research assistance goes to Mr Mbori Otieno, Mr Erick Naibei and Ms Irene Mukumu all of Innovative Lawyering & Sihanya Mentoring.

### 3. Typology of Constitutional Commissions

Proponents of classical or strict limitation of powers proponents of strict separation of powers envisioned a neat typology of three arms of government, i.e. parliament, executive and judiciary. From the 1980s, there has been an argument for a fourth arm of government in Kenya's constitutional framework.<sup>2</sup> Significantly, it was always that the executive and especially the imperial President presided by Jomo Kenyatta (1963-78), Daniel ArapMoi (1978-2002) and MwaiKibaki (2002-2013) was the greatest threat to liberty, service delivery and constitutional democracy.

Article 248 of the Constitution establishes ten(10) commissions and two(2) independent offices. These commissions differ from previous commissions under the 1969 Constitution. These have an express provision outlining their independence from other arms of Government, and are supposed to be administratively and financially delinked from the executive, parliament and judiciary.<sup>3</sup>

The commissions and independent offices are expected to check presidential and public authority at two levels. First, the general constitutional mandate of all commissions under Article 249 is to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles, and promote constitutionalism.

Second, the constitutional commissions have been mandated with specific constitutional powers that, under the 1969 Constitution, were presidential powers, or were statutory powers usurped by the President. These include powers to constitute and abolish offices in the public service, powers to alter administrative boundaries, powers on revenue allocation, and financial and administrative powers over Parliament and the Judiciary.<sup>4</sup>

What are these Commissions? To what extent have they applied the principles of New Public Management (NPM), of technical efficacy, popular participation, and judicial due process?

### 4. Ethics and Anti-Corruption Commission (EACC)

The EACC is the only constitutional Commission that is not specifically located in chapter Fifteen of the Constitution. And its composition and aspects of its mandate are specifically statutory.

Subject to the provisions of Article 79 of the Constitution, the Ethics and Anti Corruption Commission was established by the Ethics and Anti-Corruption Commission Act 2011. It replaced the Kenya Anti-Corruption Commission (KACC) after the adoption of the Constitution

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<sup>2</sup>Ben Sihanya (2011) "The Presidency and public authority in Kenya's new constitutional order", Constitutional Working Paper No.2, *Society for International Development (SID)* pp 23.

<sup>3</sup>*ibid*

<sup>4</sup>*ibid*

2010.<sup>5</sup>The Commission under section 13 of the EACC Act has the powers to conduct investigations on its own initiative or on a complaint made by any person.

#### 4.1 Effectiveness and service delivery by EACC

Two years after its establishment and restructuring, the Ethics Anti-Corruption Commission remains inconspicuous in handling serious corruption cases.<sup>6</sup> It has been argued that the Anti Corruption and Economic Crimes Act (ACECA) was diluted by Parliament in a designed scheme to cushion MPs and their friends interested in vying for political seats. This is because the Act allows those with pending court cases to contest in elective seats. Yet Art.10, Chapter six, Art. 260 and the High Court in *Mutemu*<sup>7</sup> are clear that State officers include elected officials and they cannot hold or use for office if they have pending integrity matters.

The Commission on Implementation of the Constitution (CIC) instituted a suit to oppose the watering down of the Act by parliament. In *The Commission for the Implementation of the Constitution v. Parliament of Kenya & Another* [2013] Eklr, CIC argued that the powers of the EACC had been clipped. It submitted that the Act paves way for those with pending court cases to vie for elective positions. The Act also undermined the mandate of the EACC in so far as it fails to provide procedures and mechanisms for it to use in the enforcement of the Act. The High court dismissed the petition claiming that the enforcement mechanisms were adequate.

The Commission also remains ineffective as it can only deal with corruption cases touching on public officers but not state officers.<sup>8</sup>The ACECA captures the conduct of public officials but fails to cover those of state officers under the Constitution of Kenya 2010.<sup>9</sup>

Without prosecutorial powers the EACC cannot fully implement its roles.<sup>10</sup>They have argued that some agencies like IEBC, ACA and NEMA have prosecutorial powers. **IEBC did not seek these powers nor have they utilized them. Yet EACC which has sought and needs the powers doesn't have them.**<sup>11</sup>

If corruption is to be fought effectively, it will be necessary for EACC to be empowered. The elimination of corruption is a task requiring well thought through steps that are primarily

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<sup>5</sup> Parliament disbanded KACC on August 4, 2011 in line with the requirements for change under the Constitution 2010. See <http://www.eacc.go.ke/default.asp?pageid=2> (accessed 20/11/2013).

<sup>6</sup> EACC was established on September 5, 2011.

<sup>7</sup> *MumoMatemuv. Trusted Society of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012

<sup>8</sup> Sec 39 of Anti-Corruption and Economic Crimes Act.

<sup>9</sup> "State Officer" is defined in Article 260 as a person who holds a state office. There are several state offices e.g. the president, deputy president, cabinet secretary, member of parliament, judges and magistrates, members of commission under Chapter fifteen, member of county assembly, governor or deputy governor or any other member of the executive committee of the county government, attorney-general, Director of public prosecutions, secretary to cabinet, principal secretary, chief of the KDF.

<sup>10</sup> Ben Sihanya (2013) "The United Nations Convention against Corruption Implementation Review on Kenya-2013 Omnibus Assessment Checklist" Presentation at Brackenhurst Conference Hotel, Limuru on November 7 & 8 2013

<sup>11</sup> Dalmás Okendo, Ivy Muriungi & Oyesanmi Alonge (2013) "Anti-Corruption Agencies and Prosecutorial Power: Which Way for Kenya?" Transparency International blog at <http://www.tikenya.org/index.php/blog/220-anti-corruption-agencies-and-prosecutorial-power-which-way-for-kenya> (accessed 11/11/2013).

longterm. It cannot be fought by grand gestures. The solution lies in reviewing policy and administrative framework.

## **5. Independent Electoral and Boundaries Commission (IEBC)**

The Independent Electoral and Boundaries Commission (IEBC) is created by the Constitution of Kenya 2010 and the Independent Electoral and Boundaries Commission Act 2011. It is a crucial commission whose role is so fundamental in shaping the present and the future of Kenya. The Interim Independent Electoral Commission of Kenya (IIEC) had previously been formed on May 2007 to replace the disbanded Electoral Commission of Kenya (ECK). ECK had been widely blamed for the election violence after the 2007 General Elections.<sup>12</sup> IEBC came into force upon the promulgation of the Constitution 2010.

The Independent Electoral and Boundaries Commission (IEBC) is made up of the Chairperson and eight (8) other members appointed in accordance with article 250 (4) of the Constitution. Its mandate includes:<sup>13</sup>

- (a) the continuous registration of voters and revision of the voter's roll
- (b) the delimitation of constituencies and wards
- (c) the regulation of political parties process
- (d) the settlement of electoral disputes arising out of nominations
- (e) voter education

### **5.1 Effectiveness and efficiency of IEBC**

IEBC has not proven to be a robust and effective electoral institution capable of promoting credible elections on a continuous and sustainable basis. After presiding over the 2013 General elections and the evidenced irregularities that ensued, it is difficult to find IEBC an effective, efficient and credible commission worth a second chance.

### **5.2 Management of elections by IEBC**

After the promulgation of the Constitution 2010 and the establishment of IEBC, the hope among most Kenyans to have free and fair elections rested in IEBC's palms. Kenyans were optimistic to see a new order in the electoral process with the technological advances made in preparation for the 2013 General Elections. Before the General Elections, IEBC had presided over by-elections in different electoral units and it gave a good impression that the process was under reform.

IEBC was in charge of the implementation of technology in the 2013 electoral process. This would entail use of (BVR) kits in registration, and Electronic Voter Identification (EVID) and Results Transmission Service (RTS)

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<sup>12</sup>Independent Review Committee (IREC) (the Kriegler Report).

<sup>13</sup> Article 88(4) of the constitution of Kenya 2010

Even after the registration of voters in December 2012, the system failed on elections day and the manual system was resorted to. IEBC has since been faulted for flouting the procurement process in tendering and acquiring the machinery for conducting the 2013 General Elections. IEBC's bias is attributed to the resolution to go manual in the electoral process, on verification, lack of transparency and the consequent delays in releasing the presidential results in the 2013 elections. Was it predetermined that the system would fail?

In the Raila Odinga presidential election petition,<sup>14</sup> the IEBC was accused of massive electoral fraud and malpractice that apparently resulted in the technological failure which had a bearing on the electoral results. Despite the evidence adduced at the Supreme Court, the court took a casual approach as to the responsibility of IEBC in technological failure. The Supreme Court shielded IEBC from responsibility by referring the crucial accusations against it to the Director of Public Prosecutions (DPP) for investigations. And any form changes have been charged, yet the IEBC made most of the procurement and related decisions in plenary meetings that included commissioners. Why are some commissioners being shielded? Is it because of their affiliations to the beneficiaries of IEBC's fraudulent management of the 2013 elections?

### **5.3 Nomination disputes under IEBC**

The power to hear and determine complaints relating to nominations is donated to the IEBC by Article 88(4) (e) of the Constitution.<sup>15</sup> During the political parties nomination exercise in 2013, IEBC handled over 600 cases involving nomination disputes among members of different political parties. Additionally, the Commission has dealt with numerous nomination disputes that related to the National Assembly, Senate and Gubernatorial seats.

A Dispute Resolution Committee that consisted of three commissioners of the IEBC was established to hear the case that challenged the eligibility of Kethi Kilonzo to contest in the Makueni Senatorial by elections of 2013. In what appeared to be political mischief, IEBC barred Kethi Kilonzo from contesting on the ground that she was not a registered voter hence not an eligible candidate.

If Kenya is to ever have free, fair, transparent and verifiable elections, IEBC has to be thoroughly restructured and the Commissioners replaced. Once Kenyans have raised doubts and genuine concerns over the operation of such a crucial commission, nothing will restore their confidence unless a new commission is established or at least there is a replacement of the commissioners and the relevant purveyors of electoral impunity and lawlessness.

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<sup>14</sup>*Raila Odinga v. The Independent Electoral and Boundaries Commission and 3 Others* Supreme Court Petition Number 5 of 2013 as consolidated with Petitions 3 of 2013 and 4 of 2013.

<sup>15</sup> That power is also found in Section 74 of the Elections Act and Regulation 99 of the Regulations.

## 6. The Parliamentary Service Commission (PSC)

The (PSC) is established under Article 127 of the Constitution of Kenya 2010. It was previously established through an amendment to the 1969 Constitution in 1999, via the Oloo Aringo Bill.<sup>16</sup>

The Parliamentary Service Commission is expected to provide a certain level of checks and balances in parliament. Basically, it forms and runs the bureaucratic administration of both Senate and the National Assembly. The commission's roles under Article 127(6) of the Constitution are:

- a) providing services and facilities to ensure the efficient and effective running of Parliament
- b) constituting offices in the parliamentary service, and appointing and supervising office holders;
- c) preparing annual estimates of expenditure of the parliamentary service and submitting them to the National Assembly for approval, and exercising budgetary control over the service;
- d) undertaking, singly or jointly with other relevant organisations, programmes to promote the ideals of parliamentary democracy; and
- e) performing functions necessary for the well-being of the members and staff of Parliament.

The Parliamentary Service Commission is the only constitutional commission whose Chairperson is not appointed by the President.<sup>17</sup>

### 6.1 Effectiveness in limiting Parliament's power

The Parliamentary Service Commission has not played a major role in limiting powers of the legislature. Instead, it has generally protected the interests of the Members of Parliament especially on tax and salary increment.<sup>18</sup> The PSC is expected to liaise with other commissions in discharging its functions. PSC has used this opportunity to cushion the welfare of the Members of Parliament at the expense of the common citizens' rights.

Moreover, the PSC has appeared to overstep its mandate by interfering with other commissions and purporting to act as check and balance on them.

If PSC cannot effectively check Parliament and keep the citizen's interests at the forefront in parliament, where does it derive the mandate *or locus standi* to ignore situations when some parliamentary committees and some MPs accuse, criticize and summon JSC members for interrogation?<sup>19</sup> Why was it so political and accusatory in summoning JSC members over the

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<sup>16</sup>The Speaker of the National Assembly the first Thursday. And Oloo Aringo the Dept.

<sup>17</sup> The speaker of the National Assembly is the automatic chair of PSC (Article 127 of the Constitution).

<sup>18</sup> Cf the debate and conflict with the Salaries and Remuneration Commission in 2013 where majority of PSC members and other parliamentarians threatened to disband SRC if it would not yield to their demands.

<sup>19</sup>Cf Gladys Boss Shollei saga and the dispute with JSC members.

dispute between the JSC v. Gladys Boss Shollei? Why has it been quite when the MPs and officers have been intimidated?

## **7. Commission for the Implementation of the Constitution (CIC)**

The Commission for the Implementation of the Constitution (CIC) is established under Section 5 (6) of the Sixth schedule of the Constitution. The mandate of CIC is stipulated in section 5 (of the same schedule and of The Commission for the Implementation of the Constitution Act, 2010. The functions of CIC are to:

1. monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;
2. co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement this Constitution;
3. report every three(3) months to the Constitutional Implementation Oversight Committee on:
  - i. progress in the implementation of this Constitution; and
  - ii. any impediments to its implementation; and
4. work with each Constitutional Commission to ensure that the letter and spirit of this Constitution is respected and;
5. exercise such other functions as are provided for by the Constitution or any other written law.

Article 249 of the Constitution further amplifies these roles.

### **7.1 Monitoring and checking Government Organs**

CIC's key role is to monitor the implementation of the system of devolved government effectively. It has played a role in guiding the implementation process as Kenya transitioned from the 1969 Constitution to the Constitution 2010. The nine (9) member commission under the Chairman Charles Nyachae has been credited for continuous interventions on matters touching devolution and constitutional implementation.

In particular, CIC has been at the forefront in commenting on how Parliament handles the relevant bills. It has challenged parliamentary decisions through the media outlets through media conferences, briefings and paid ads. CIC has also taken some matters to court.<sup>20</sup>

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<sup>20</sup> Cf CIC's suit in the High Court to stop Parliament from passing a bill that would allow them to control their salaries, opposition to the passing of the "draconian" media bill among others.



## **8. Kenya National Human Rights and Equality Commission (KNHREC)**

KNHREC is established by the Kenya National Commission on Human Rights Act, 2011. It is a successor to the KNHCR established by an earlier Act of Parliament in 2002. The original KNCHR became operational from July 2003. Following the promulgation of the Constitution 2010 in August 27, 2010, it was legally reconstituted as the Kenya National Human Rights and Equality Commission.

The core functions of this commission include:<sup>21</sup>

- (1) Promote respect for human rights
- (2) Promote gender equality and equity
- (3) Promote the protection and observance of human rights in public and private institutions;
- (4) Receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated....

Article 59(4) of the Constitution states that, Parliament shall enact legislation to restructure the Commission into separate commissions. It gives authority for the establishment of the KNHREC and successor Commissions.

Pursuant to this provision, the Commission was restructured into three related commissions: First, the enactment of the Kenya National Commission Human Rights Act led to the establishment of the Kenya National Commission on Human Rights.<sup>22</sup> KNHREC has faced major problems from the Executive, especially as it seeks to recruit the Chair. Second, the enactment of the National Gender and Equality Commission Act 2011 established the National Gender and Equality Commission.<sup>23</sup> The Gender Commission is chaired by Ms OsimboLichumba.

Third, the enactment of the Commission on Administrative Justice Act 2011 established the Commission on Administrative Justice.<sup>24</sup> CAJ is chaired by Mr OtiendeAmolo. It has intervened in some matters requiring the Ombudsperson to address maladministration.

Roles which should have otherwise been performed by KNHREC are now performed by the three commissions. These commissions are very crucial if the Bill of Rights in Chapter 4 of the Constitution is to be promoted and protected to the uttermost.

## **9. The National Land Commission (NLC)**

This is an independent government Commission established under the National Land Commission Act No. 5 of 2012.

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<sup>21</sup> Article 59(2) of Constitution of Kenya 2010

<sup>22</sup> Part II of the Kenya National Human Rights Act 2011

<sup>23</sup> Part II of the National Gender and Equality Commission Act 2011

<sup>24</sup> Part II of the Commission on Administrative Justice Act 2011

The mandates of the constitution as espoused in Article 67(2) of the Constitution of Kenya, 2010 are:

- i. to manage public land on behalf of the national and county governments
- ii. to recommend a national land policy to the national Government.
- iii. to advise the national Government on a comprehensive programme for the registration of title in land throughout Kenya; and
- iv. to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

The Commission may also perform any other functions prescribed by national legislation, as stipulated in Article 67(3) of the Constitution of Kenya 2010.

NLC was established amidst a lot of controversy. First, there was a standoff between the former President Mwai Kibaki and former Prime Minister Raila Odinga. The heart of the disagreement was the move by the acting Head of Public Service and Secretary to the Cabinet, Francis Kimemia, to replace a nominee who had been agreed on by the two principals. The move angered the Prime Minister who recorded his displeasure in Parliament.<sup>25</sup>

Even after the members were approved by Parliament in August 2012, the names were not published even after Justice D. Majanja of the Kenyan High Court directed the President to release the names by February 11, 2013.<sup>26</sup>

Due to delays in appointing the commissioners some land transactions stalled, especially the acquisition of land for construction of infrastructure like Ngong Road.<sup>27</sup> This “delay” was a calculated move by the executive, especially the President and his affiliates, to stiffen the operation of the NLC, perhaps for fear of revocation of illegally acquired title deeds, or to facilitate land grabbing.

The Commission for Implementation of the Constitution faulted NLC over powers to prepare and sign title deeds and instead said the powers lay with the Land Registrar, who should be appointed by the Public Service Commission. The Constitution Implementation Commission (CIC) argued that sections 23 and 24 of the Land Act do not grant powers to NLC to register,

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<sup>25</sup>Allan Kisia and Peter Opiyo (2012) “Standoff may delay formation of land commission”, *Standard Digital News* at [http://www.standardmedia.co.ke/?articleID=2000063087&story\\_title=Standoff-may-delay-formation-of-land-commission](http://www.standardmedia.co.ke/?articleID=2000063087&story_title=Standoff-may-delay-formation-of-land-commission) (accessed 19/11/2013).

<sup>26</sup>Lucianne Limo (2013) “High Court orders Kibaki to gazette land team officials”, *Standard Digital News* at <http://www.standardmedia.co.ke/?articleID=2000076645> (accessed 19/11/2013).

<sup>27</sup> Emma Nzioka (2012) “Appoint National Land Commission, Kibaki and Railatold ”, *Daily Nation*.

issue or sign titles and therefore, the National Lands Commission should be barred from signing title deeds.<sup>28</sup>

The NLC's operations have been stifled by underfunding. Parliament proposed to allocate the National Land Commission just 4% of its desired budget for the next (2013/2014) fiscal year which is too little to spur much-needed land and land tenure reforms.<sup>29</sup> There has also been interference from the Executive including the Ministry of Lands....

### **9.1 Proposed reforms**

There should be on-going civic education since property related information is new in the Constitution and the enacted land laws have not been disseminated adequately.

The Presidency and the Executive generally should respect the Constitution and let NLC perform its functions.

### **10. The Judicial Service Commission (JSC)**

The Judicial Service Commission (JSC) of Kenya is established under Article 171 of the Constitution of Kenya, 2010. JSC is chaired by the CJ who is also the President of the Supreme Court.

It is responsible for ensuring that the Judiciary has adequate and motivated staff for efficient service delivery. JSC is expected to handle all matters relating to human resource management and development.<sup>30</sup>

The former President Mwai Kibaki nominated Justice Albasir Visram as the new Chief Justice on January 29, 2011, without involving the former Prime Minister Raila Odinga and the Judicial Service Commission. The nomination was rejected by, among others, the JSC. The Courts, Parliament, Speaker Kenneth Marende, Politicians, policy makers, administrators, scholars and legal experts were of the view that the Judicial Service Commission should have been fully involved in the nomination process. President Kibaki withdrew the nomination and deferred the matter to the JSC.<sup>31</sup>

Some of the notable events carried out by the newly appointed JSC under the Constitution include public interviews for the Chief Justice and Deputy Chief Justice positions in

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<sup>28</sup>Patrick Beja and Philip Mwakio (2013) "CIC says National Land Commission should not sign land title deeds", *Standard Digital News* at [http://www.standardmedia.co.ke/?articleID=2000096440&story\\_title=cic-says-national-land-commission-should-not-sign-land-title-deeds&pageNo=1](http://www.standardmedia.co.ke/?articleID=2000096440&story_title=cic-says-national-land-commission-should-not-sign-land-title-deeds&pageNo=1) (accessed 19/11/2013).

<sup>29</sup> Rajab Ramah (2013), "Under-funding Kenyan land commission could set back reforms", at [http://sabahionline.com/en\\_GB/articles/hoa/articles/features/2013/05/30/feature-01](http://sabahionline.com/en_GB/articles/hoa/articles/features/2013/05/30/feature-01) (accessed 19/11/2013).

<sup>30</sup> Article 172 (1) of the Constitution of Kenya, 2010

<sup>31</sup> Ben Sihanya (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, Occassional Paper, No 5 pp 23- 24, at \_\_\_\_\_

May 2011. JSC nominated lawyers Dr Willy Muniyoki Mutunga and Nancy Baraza for the positions of Kenya's Chief Justice and Deputy Chief Justice, respectively. The names were forwarded to President Mwai Kibaki, who then submitted them to Parliament after consultation with the Prime Minister Raila Odinga: the CJ and DCJ were approved by Parliament and then appointed.<sup>32</sup>

However, other than the unjust outcome in the Raila Odinga presidential election and petitions, there are other problems at the JSC. Dispute between the JSC v Gladys Boss Shollei, has eroded confidence and trust in the Judiciary. The JSC, in a meeting in Mombasa (while Gladys Boss Shollei was away in a trip in Canada) resolved to commence investigations into complaints and allegations touching on financial management and governance issues in the Judiciary. The Commission asked, Mrs Gladys Boss Shollei, to take 14 days' leave and appointed the Deputy Chief Registrar to act in her place. The JSC sacked Mrs Gladys Boss Shollei, with 87 allegations touching on financial and human resource mismanagement, irregularities and illegalities in procurement, and misbehaviour.<sup>33</sup>

Members of the Judicial Service Commission are drawing millions of shillings monthly in sitting and travel allowances. The commissioners earn KES 80,000 per sitting, meaning that a commissioner could easily earn KES 1 million in allowances within a month.<sup>34</sup>

## **10. The Commission on Revenue Allocation (CRA)**

The Commission on Revenue Allocation (CRA) is an independent commission set up under Art. 215 and 216 of the Constitution of Kenya. As its name suggests, its core mandate is to recommend the basis for equitable sharing of revenue raised nationally between the National and the County Governments; and sharing of revenue among the County Governments.<sup>35</sup>

The law requires that at least 15% of the national revenue collected by National Government be shared equally among the 47 counties. Already there is debate on the allocation of the funds to the 47 County Governments, with division emerging between the National Assembly and the Senate on what amount needs to be allocated to the devolved units.<sup>36</sup>

In addition, the Commission on Revenue Allocation (CRA) came up with some indicators that are used to allocate funds to counties. These indicators are population, poverty levels, county land area, prudential financial management or performance index, and fund equalization index. The issue of population, however, has been met with mixed feelings.

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<sup>32</sup> Daily Nation (2011) "Lawyer Mutunga nominated for CJ post".

<sup>33</sup> GalgaloFayo (2013), "Shollei hits back over sacking by Judicial Service Commission", *Business Daily*.

<sup>34</sup> Kipchumba Some (2013) "Judicial Service Commission members mint millions every month from sittings", *Standard Digital News* at <http://www.standardmedia.co.ke/?articleID=2000094444> (accessed 19/11/2013.)

<sup>35</sup> Article 216 (1) of the Constitution of Kenya.

<sup>36</sup> Article 203 (2) of the Constitution of Kenya 2010. See Sihanya ed (2013) "Devolution and Education Law and Policy in Kenya," *LSK fund*

According to the Kenya National Bureau of Statistic, Nairobi's population stands at 3.1 million, followed by Kakamega whose population stands at 1.7 million, Bungoma's 1.63 million, Kiambu 1.62 million while Nakuru follows closely with 1.6 million people. Therefore, the Commission indicates that the higher the population of a country, the higher the funds it is going to be allocated. If approved by Parliament, Nairobi, Kakamega, Bungoma, Kiambu and Nakuru will get a lion's share of funds due to their large populations.<sup>37</sup> Yet that money should help develop infrastructure which is the most costly in the development process. And Kiambu has the best infrastructure after Nairobi in terms of roads, water, hospitals, (National) schools....

### **11. The Public Service Commission (PSCK)**

The Public Service Commission of Kenya (PSCK) is an Independent government Commission established under the Constitution of Kenya to manage human resources in the Kenya Civil Service and the Local Authorities. Other functions of the Commission include:<sup>38</sup>

(a) subject to the Constitution and legislation—

(i) establish and abolish offices in the public service; and  
(ii) appoint persons to hold or act in those offices, and to confirm appointments;

(b) exercise disciplinary control over and remove persons holding or acting in those offices;  
(c) promote the values and principles referred to in Articles 10 and 232 throughout the public service;

(d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;

(e) ensure that the public service is efficient and effective, and many other functions.

A parliamentary committee questioned directors of a commercial bank that gave Erad Supplies a performance contract worth KES 80 million to enable it import maize for the National Cereals and Produce Board (NCPB). The NCPB Scandal has paralysed operations of the strategic corporation and has left farmers are decrying.<sup>39</sup> What has PSC done about illegal establishment of offices and irregular and tribal appointment by President Kenyatta II (Kenyatta 'Plus') e.g. Joseph Kinywa, Kagutti, Mututho, Gitau....and numerous positions in State House? These are not advertised, not competitive....duplicative....evidence of tribal tyranny....

### **12. The Salaries and Remuneration Commission (SRC)**

The Salaries and Remuneration Commission is a Kenya government Commission established under the Salaries & Remuneration Commission Act, 2011. The functions of the commission as defined in the act that established it are:

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<sup>37</sup> Daniel Kamande(2012)"Financial Aspects of a devolved system" *The Star*.

<sup>38</sup> Article 234 of the Constitution of Kenya 2010.

<sup>39</sup> Rawlings Otieno and Roselyne Obala (2013), "Damning verdict on NCPB maize import scandal" *The Standard*.

- i) Inquire into and determine the salaries and remuneration to be paid out of public funds to State officers and other public officers
- ii) Keep under review all matters relating to the salaries and remuneration of public officers;
- iii) Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector
- iv) Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;
- v) Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;
- vi) Make recommendations on matters relating to the salary and remuneration of a particular State or public officer; and
- vii) Make recommendations on the review of pensions payable to holders of public offices.

The Salaries and Remuneration Commission (SRC) declared illegal the hefty exit package that MPs had awarded themselves in the 10<sup>th</sup> Parliament (2008-13). SRC promised to consider moving to court to block it. Commission chairperson Sarah Serem condemned the move saying it is unconstitutional. She said such payments can only be effected by the Commission.<sup>40</sup>

### **13. The Teachers Service Commission (TSC)**

The Teachers Service Commission (TSC) of Kenya is an Independent government Commission established under the Constitution of Kenya to manage human resource within the education sector.<sup>41</sup>

One major setback that TSC has experienced was when teachers went on strike in early 2013 over pay that had been pending for 15 years since President Moi made the commitment in 1992. The teachers depended on an agreement that was reached between the Government and teachers five years ago in which teachers were promised higher salaries and allowances over a 10-year period.<sup>42</sup>

TSC, SRC, and President Kenyatta (K+) intimidated KNUT and KUPPET, including through the Industrial Court. KNUT leaders were arrested, fined and the President ordered them to implement controversial laptops for toddlers.

### **11. The National Police Service Commission (NPSC)**

The National Police Service Commission of Kenya is an independent government Commission established under the Constitution of Kenya to ensure smooth functioning of the National Police Service of Kenya. The commission's roles include:<sup>43</sup>

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<sup>40</sup> “MPs' Sh2bn exit package illegal, Salaries and Remuneration Commission declares” (2012), *Daily Nation*.

<sup>41</sup> Article 237 of the Constitution.

<sup>42</sup> “Cotu backs teachers’ bid to hold strike” at <http://www.knut.or.ke/index.php/news-events/37-cotu-backs-teachers-bid-to-hold-strike> (accessed 19/11/2013).

<sup>43</sup> Article 246 Of the Constitution of Kenya 2010.

Recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service.

Observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service.

When a man, Joshua Karianjahi Waiganjo, was arrested after allegedly pretending to be an Assistant Commissioner of Police for five years (from about 2007), the NPSC was directed by President Kibakito commence a probe on the incident. This was allegedly to establish who recruited Mr Waiganjo and his conduct. After investigations and findings, Rift Valley PPO John M'Mbijiwe, the Commandant of Anti-Stock Theft Unit, Michael Rimi Ngugi, and Njoro OCPD Peter Njeru Nthigawere interdicted over the scandal.<sup>44</sup>

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<sup>44</sup>"Waiganjo's probe team wants Mbijiwe, Ngugi sacked". The Standard. 31 January 2013.

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