THE UNIVERSITY OF NAIROBI

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STRENGTHENING CORPORATE GOVERNANCE AT THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ("IEBC")

BY

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Supervisor

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Declaration

I, Wilson Mwihuri Ndung'u, declare that this thesis is my original work and has not presented to any other institution for the purpose of obtaining a degree.

Signed .... Date 12th November 2020

Wilson Mwihuri Ndung'u

This thesis has been submitted with my approval as a University of Nairobi School of Law supervisor.

Signed .... Date November 12, 2020

Prof Kiarie Mwaura

Professor of Law, & Dean

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Dedication

For my wife, Claire, and the wonder of her unconditional love

Acknowledgement

I wish to express my gratitude to my supervisor, Prof Kiarie Mwaura. His patience, careful guidance, his astute and pithy comments enabled me to complete this study. His thoughtful insights enabled me to see new perspectives in every draft that I prepared. Thank you for your support and for enabling me to learn the art of research and writing.

Thanks are also due to my family, now expanded with the addition of the Mwangi family, for the constant encouragement while undertaking this pursuit. I am eternally grateful.

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LIST OF ABBREVIATIONS

AFRICOG	Africa Centre for Open Governance
BBI	Building Bridges Initiative
CBK	Central Bank of Kenya
CEO	Chief Executive Officer
CMA	Capital Markets Authority
DHA	Department of Home Affairs
ECG	Electoral Commission of Ghana
ECK	Electoral Commission of Kenya
EMB	Electoral Management Body
IEBC	Independent Electoral and Boundaries Commission
IEC	Independent Electoral Commission
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IPPG	Inter Party Parliamentary Group
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KAU	Kenya African Union
NSE	Nairobi Stock Exchange
PPARB	Public Procurement Administrative Review Board
SCAC	State Corporations Advisory Committee
SEC	Securities and Exchange Commission

LIST OF CASES

1. Capital Markets Authority –v- Alnashir Popat & 8 others [2019] eKLR
2. HCCC 392 of 2016 – Imperial Bank Limited (in receivership) and 2 Others –v- Alnashir Popat and Others
3. Imperial Bank Limited (In Receivership) & 2 others -v- Alnashir Popat & 17 others [2017] eKLR
4. Katiba Institute & 3 others –v- Attorney General & 2 others [2018] eKLR
5. Public Procurement Administrative Review Board decision in Review No. 59/2012 of 19th November 2012, No. 61/2012 of the 20th November 2012 and No. 62/2012 of the

21st of November 2012; Avante International Technology Inc and Others –v- IEBC (2012)

6. Raila Amolo Odinga & another –v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR
7. Republic –v- Attorney General and 2 others *exparte* the Consumers Federation of Kenya (COFEK) [2012] eKLR

LIST OF KENYAN LEGISLATION

1. Constitution of Kenya (Amendment) Act No 5 of 1969
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4. Constitution of Kenya (Amendment) Act No 9 of 1997
5. The Independent and Electoral Boundaries Act, Act No 9 of 2011
6. The Elections Act, Act No 24 of 2011
7. The Companies Act, Act No 17 of 2015
8. The Penal Code, Cap 63, Laws of Kenya
9. The State Corporations Act, Cap 446, Laws of Kenya
10. The Banking Act, Cap 488, Laws of Kenya

LIST OF FOREIGN LEGISLATION

1. English Companies Act of 1948
2. Ghanaian Companies Act, 1963, Act 179 of the Laws of Ghana
3. Independent Electoral Commission Act of South Africa, Act 150 of 1993
4. Electoral Commission Act of Ghana, 1993, Act 451 of the Laws of Ghana
5. Electoral Commission Act of South Africa - Act No 51 of 1996
6. Public Finance Management Act of South Africa - Act No 1 of 1999
7. Political Parties, Elections and Referendums Act 2000 of the United Kingdom

LIST OF LEGAL AND GAZETTE NOTICES

1. Gazette Notice No 3362 of 14^{th} of May 2002 - Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya
2. Legal Notice No 93 of 2004 - State Corporations (Performance Contracting) Regulations, 2004
3. Gazette Notice No 1982 of 14^{th} March 2008 – Kenya Gazette Special Issue: Appointment of Commission of Inquiry
4. Gazette Notice Number 1420 of 15^{th} December 2015 - Code of Corporate Governance Practices for the Issuers of Securities to the Public 2015
5. Gazette Notice No 5154 of 24^{th} May 2018 - Establishment of Taskforce on Building Bridges to Unity Advisory

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ABSTRACT

The 2010 Constitution seems to have created commissions that are not sufficiently checked by the other arms of government. Of interest among these commissions is the Independent Electoral and Boundaries Commission (IEBC) that is currently facing a grave corporate governance challenge. This is demonstrated by the fact that there are two centres of power at the commission: one led by the CEO, and the other by the chairman.

There is no oversight over the secretariat and evidence shows that such lack of oversight may have led to wanton corruption in procurement of vital election materials at the IEBC. It will be demonstrated in this study that the secretariat often denies commissioners crucial information on operations at the IEBC, exacerbating the already tenuous relationship between the commissioners (the governing body) and the secretariat (management).

A major part of corporate governance entails the design of checks and balances to constrain selfish behaviour by the insiders of an organisation. This study aims to interrogate the corporate governance structure of the IEBC and to ascertain whether these checks and balances exist. In addition, the study will investigate whether the IEBC Act demarcates the roles and responsibilities between the commissioners and the secretariat; and also, whether the corporate governance structure at the IEBC ensures that commissioners have access to relevant, timely, accurate and adequate information regarding the operations of the IEBC.

From the research undertaken, it is recommended that, *inter alia*, the IEBC Act be amended to ensure that the IEBC has an independent body, separate and independent of management that will be responsible for governance. A code of corporate governance should also be implemented which, *inter alia*, mandates information sharing, and also specifically details the roles and responsibilities of the commissioners *vis a vis* the secretariat to provide the crucial checks and balances required at the commission. Provisions should also be included in statute to ensure that failure to comply with corporate governance principles will lead to severe penalties on the responsible officers.

CHAPTER 1 - INTRODUCTION

1.1 Background to the study

This study will interrogate corporate governance at the Independent Electoral and Boundaries Commission ('IEBC') by examining how power is exercised at the institution.[1] The IEBC is the constitutional body established under Article 88 of the Constitution of Kenya to, *inter alia*, conduct elections in Kenya. Mr Ezra Chiloba, who was the Chief Executive Officer (CEO) of the IEBC during the 2017 election cycle, is on record as stating that:

> Governance is at the heart of IEBC's woes. The IEBC has a governance problem embedded in a weak institutional design. If there is still no clarity in roles between the commissioners and the secretariat, it does not matter who takes over from me as CEO, or who is appointed to serve as the commission chair.[2]

Mr Chiloba's statement is indeed worrying. The very essence of governance is to ensure that those in power are held accountable for their actions.[3] As the then CEO of the IEBC, Mr Chiloba's statement cannot be taken as mere idle talk. At his vantage position at the helm of the secretariat of the IEBC, his statement is credible as to the governance problem facing the IEBC, thereby implying that there is a serious lack of accountability at the institution. As shall become clear in due course, the lack of an adequate corporate governance framework at the IEBC exposes it to interference by political interests in the performance of its duties.[4]

The IEBC, as provided for by Section 13 of the IEBC Act[5], is a corporate entity. In this study, it shall be demonstrated that the way power is exercised at the IEBC is not very well defined and there are clear abuses that hinder the effective performance of its functions. The lack of a defined structure in how power is exercised confirms that the corporate governance structure at the IEBC is lacking, as '…essentially, corporate governance is about the way power is

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[1] Bob Tricker, *Corporate Governance: Principles, Policies, and Practices* (International Third Edition, Oxford University Press 2015) 4.

[2] Patrick Langat, 'Governance is at the heart of IEBC's woes, says Ezra Chiloba' (2018) <https://www.nation.co.ke/news/Governance-at-heart-of-IEBC-woes--says-Ezra-Chiloba/1056-4653256-l97lvh/index.html> accessed 29th November 2018.

[3] Ismail Eturk, Julie Froud, Sukhdev Johal and Karel Williams, 'Corporate Governance and disappointment' (2004) Review of International Political Economy <https://www.academia.edu/802871/Corporate_governance_and_disappointment?auto=download> accessed 28th April 2019, 683.

[4] Africa Policy Institute, 'Kenya decides: The Electoral Commission and stability in the 2017 Presidential election' (2016) <https://www.africapi.org/kenya-decides-the-electoral-commission-and-stability-in-the-2017-presidential-election/> accessed 21st February 2019.

[5] Act No 9 of 2011.

exercised over corporate entities.'[6] In this case, the corporate entity being discussed is the organisation that organises and administers elections in the country; hence exposing it to enormous pressure from political actors for whom having an influence in decision-making at the IEBC would be extremely beneficial. This is where corporate governance becomes crucial, as there are various bodies that provide a check on the decisions being made in an organisation, and which bodies would hold the decision makers accountable for their decisions.

In most jurisdictions, a national election is the single largest activity that is ever organised. It is an administrative task that is extremely complex and which is carried out in a politically charged atmosphere.[7] 'When it is done well, it may attract little comment. **When it is not done well, or when it is undermined, the effects can be catastrophic**.'[8] With this fact in mind, it is reasonable to assume that corporate governance at the IEBC would be impeccable. However, the predecessors of the IEBC, or the legislators who pass the relevant legislation, seem not to have appreciated the magnitude of the responsibility that the IEBC faces.

The Electoral Commission of Kenya (ECK) was one such predecessor that organised and conducted the highly disputed 2007 general elections.[9] It is judicially noticed that Kenya almost collapsed into civil war after the disputed 2007 general elections,[10] demonstrating the effects of an election that is not properly organised and carried out. Retired president Mwai Kibaki appointed an independent commission of inquiry to, *inter alia,* 'inquire into all the aspects of the general election held on 27th December 2007, in Kenya, with particular emphasis on the presidential election.'[11]

The report of the independent review commission on the general elections held in Kenya on 27th December 2007, often referred to as the Kriegler report, found, *inter alia*, that the 2007 elections were so shoddily organised, that it was almost impossible for anyone to derive any

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[6] Bob Tricker (n 1).

[7] International Institute for Democracy and Electoral Assistance, 'Electoral Management Design' (2014) <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf> accessed 23rd February 2019, 1.

[8] ibid.

[9] Patrick Vidija, 'Are Kenya's electoral agencies cursed? A look at events since the ECK' (2018) <https://www.the-star.co.ke/news/2018/04/16/are-kenyas-electoral-agencies-cursed-a-look-at-events-since-the-eck_c1744439> accessed 24th December 2018.

[10] Independent Review Commission, 'The Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007' (2008) <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf> accessed 7th October 2017, 2.

[11] Gazette Notice No 1982 of 14th March 2008 - Kenya Gazette Special Issue: Appointment of Commission of Inquiry.

accurate or reliable results.[12] Concerning the structural organisation of the IEBC, the Kriegler report found that there was no clear delineation of roles between the commissioners and the secretariat, thereby hampering the operations of the electoral body.[13]

In 2017, during a parliamentary hearing of the Public Accounts Committee, the then CEO of the IEBC had intimated that a board charter would be developed to address 'the conflict between the roles of the secretariat and the commissioners.'[14] Clearly, this board charter was never developed. As far back as 17th September 2008 when the Kriegler Report was being presented to then president Mwai Kibaki, it had been recognized that there were structural weaknesses in the relationship between the commissioners of the ECK and the secretariat, which eventually resulted in tensions between the commissioners and the management of the electoral body. It would not be too far-fetched to argue that had these deficiencies been rectified, the Supreme Court of Kenya may not have ordered a repeat presidential election in August 2017,[15] an issue that will be addressed in due course.

The 2007 post-election violence led to a flurry of law reform activities that included disbanding the ECK.[16] The climax of these law reform activities was the passage of the 2010 Constitution of Kenya that mandates the IEBC to ensure at Article 86, *inter alia*, that the voting method that will be used will be simple, accurate, verifiable, secure, accountable and transparent. Such a system can only be put in place by a credible institution that has the faith of the electorate and the cooperation of political parties and other stakeholders.[17] It is the intention of this study to make pragmatic proposals that will result in such an institution that has legitimacy and is accepted by the electorate as being competent to deliver credible results.

Dr Roselyn Akombe was a commissioner of the IEBC who resigned a few weeks to the 2017 repeat presidential election that had been ordered by the Supreme Court of Kenya.[18] Dr

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[12] Independent Review Commission (n 10) 10.

[13] Independent Review Commission (n 10) 47.

[14] The National Assembly, 'Report on the examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the year ended 30th June 2017' (2019) <http://www.parliament.go.ke/sites/default/files/2019-04/IEBC%20Report%202016-2017%20-%20As%20Amended%20and%20Adopted.pdf> accessed 20th September 2019, 65.

[15] Raila Amolo Odinga & another –v- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

[16] Patrick Vidija (n 9).

[17] United Nations Development Programme, 'Electoral Management Bodies as Institutions of Governance' (2000) <http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/electoral_systemsandprocesses/electoral-management-bodies-as-institutions-of-governance.html> accessed 24th December 2018, 3.

[18] John Ngirachu, 'Roselyn Akombe resigns from poll agency' (2017) <https://www.nation.co.ke/news/IEBC-commissioner-Roselyn-Akombe-resigns/1056-4144480-7lyoqhz/index.html> accessed 29th November 2018.

Akombe resigned and fled to the United States of America from where she released her end of session report.[19] Dr Akombe's report makes for interesting reading. This study will focus on the part of the report titled *institutional issues*. Dr Akombe confirms what the Kriegler report had concluded in 2008; that the structural weaknesses in the organisational structure of the IEBC would hamper the delivery of credible elections. Her findings merit extensive quotation:

> **There are two centres of power at the Commission. One led by the CEO and the other by the Chairman.** In such a situation, political actors have a convenient way of pitting one centre of power against the other, to their own benefit….**Although the commissioners preside over the various committees that correspond to the existing directorates of the Commission within the secretariat, they have no real power or control over the work of the directorates. This makes the committees perfunctory procedures where a commissioner sits and approves management papers**. **Attempts to have substantive discussions with the various heads of directorates were often rebuffed by some directors and the CEO as interference with the work of the secretariat**.[20]

From Dr Akombe's report, it would appear that there was a deliberate attempt to ensure commissioners simply endorsed secretariat decisions by denying commissioners relevant information and presenting minutes of board meetings for approval months after the actual meeting occurred.[21] It will be seen later in this study that the IEBC has the unenviable reputation as the Kenyan electoral commission with the most glaring acts of corruption, especially in procurement matters that were discussed at the board level.[22] The intention of delaying transmission of minutes of board meetings to commissioners may have been an attempt to ensure that procurement malpractices were not easily picked up.

These revelations by Dr Akombe reveal an institution that is fraught with corporate governance problems. From the website of the IEBC, a strategic plan was published on 9th July 2015 that contains the organisation structure of the IEBC.[23] From this plan, commissioners are required

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[19] The Elephant, 'End of Assignment Report of Former IEBC Commissioner Roselyn Akombe' (2017) <https://www.theelephant.info/documents/end-of-assignment-report-of-former-iebc-commissioner-roselyn-akombe/> accessed 29th November 2018.

[20] ibid 13 to 14.

[21] ibid 14 to 15.

[22] Africog, 'State Capture: Inside Kenya's Inability to Fight Corruption' (2019) <https://www.theelephant.info/documents/africog-state-capture-inside-kenyas-inability-to-fight-corruption/> accessed 21st September 2019, 28.

[23] Independent Electoral and Boundaries Commission, 'Strategic Plan 2015 to 2020' (2015) <https://www.iebc.or.ke/uploads/resources/strategicplan20152020.pdf> accessed 27th December 2018.

to provide oversight over the secretariat through the various established committees.[24] It is clear that the strategic plan prepared by the IEBC is only good on paper and does not reflect the reality inside the commission. In reality, the commissioners have no real power or control over the work of the directorates.[25]

The statement by Dr Akombe further reveals the need for a clear governance structure at the IEBC. 'Board members rely on information provided by management to inform their decisions,'[26] and if the CEO himself can rebuff the requests of commissioners for information, how are the commissioners supposed to provide direction to the commission?

In its judgment in the Raila Odinga case, the Supreme Court of Kenya was scathing in its findings against the IEBC. The Supreme Court found, for a fact, that there was a systemic institutional problem with the IEBC, and that the administrative arrangements put in place by the IEBC were wanting.[27] This finding by the highest court in the land confirms what has been stated by Mr Chiloba[28] and Dr Akombe.[29] It is abundantly clear that the finding by the Supreme Court that the IEBC had a systemic institutional problem was justified.

The tensions described in the Kriegler report, and confirmed by Mr Chiloba and Dr Akombe, are relevant in determining the machinery for organising and administering elections. The current structure of the IEBC may have been designed to enable political stakeholders, as alluded to by Dr Akombe,[30] gain influence over the operations of the IEBC. In chapter 3, we will consider a report by Africog where it was found that everything the IEBC procured for the 2013 elections was corruptly purchased,[31] lending credence to Dr Akombe's observation that the operations of the IEBC are influenced by outsiders. However, whether inadvertent or by design, the governance structure of the IEBC requires urgent overhaul.

The negative effects of having an electoral management body which has infighting between the commissioners and the secretariat are immense and cannot be wished away. It has been argued that the failure in the structure of the IEBC was in allowing commissioners to take on

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[24] ibid 9.
[25] The Elephant (n 19) 13 to 14.
[26] Alex Baum, David F. Larcker, Brian Tayan, and Jacob Welch, 'Building a better board book' (2017) Stanford University Working Paper No 68 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047910> accessed 28th April 2019, 1.
[27] Raila Amolo Odinga & another (n 15).
[28] Patrick Langat (n 2).
[29] The Elephant (n 19).
[30] The Elephant (n 19).
[31] Africog (n 22).

full time jobs, essentially converting commissioners into executives in the IEBC.[32] Fundamentally, in doing this, the commissioners become part of the management structure and they do not have a board or independent body above them to offer guidance.[33]

Decision-making at the IEBC therefore becomes crucial. In most jurisdictions, the procedure for decision-making is provided for under the relevant law establishing the electoral management body (hereinafter 'EMB').[34] Unfortunately, the decision making process at the IEBC is not as well defined.

The second schedule to the IEBC Act details the conduct and regulation of the business of the IEBC. Some paragraphs of this second schedule have been declared unconstitutional by the High Court.[35] To the best of the author's knowledge, the decision has not been reversed on appeal. The remaining provisions as to the conduct of the business and affairs of the IEBC contained in the second schedule to the IEBC Act are woefully deficient on details and it lacks the key aspects of decision making as detailed by the International Institute for Democracy and Electoral Assistance.[36]

For instance, paragraph 9 of the second schedule provides that the IEBC may establish committees of its members for any purpose. However, as we have seen, attempts by commissioners to have substantive discussions with the secretariat were often rebuffed.[37] Similarly, paragraph 10 of the second schedule requires the commission to enter minutes of all proceedings of meetings of the IEBC into designated books, presumably within a reasonable period after the board meeting. In reality, minutes of board meeting were often presented to commissioners after such a long time, that the specifics of the meeting could not be recollected.[38] The above instances may be the reason why tensions exist between the commissioners and the secretariat of the IEBC. The lack of a governance structure is evident

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[32] Carol Musyoka, 'Corporate Governance in Constitutional Commissions' (2017) <http://carolmusyoka.com/corporate-governance-in-constitutional-commissions/> accessed 24th December 2018.

[33] ibid.

[34] International Institute for Democracy and Electoral Assistance (n 7) 123.

[35] Katiba Institute & 3 others –v- Attorney General & 2 others (2018) eKLR.

[36] International Institute for Democracy and Electoral Assistance (n 7) 123. These key aspects include the role of the chair; responsibilities for decision-making and the ability to delegate these; methods of calling EMB meetings; frequency of meetings; responsibility for meeting agendas; the processes of decision-making: proposals, rules of discussion, and types of voting and/or requirements for consensus; attendance at meetings and quorums; rights and roles of secretariat staff at meetings; invitations to outsiders to attend EMB meetings; taking, authenticating and issuing meeting minutes; method of issuing EMB policies and directions; methods of suspending or altering standing orders; and responsibilities for media conferences.

[37] The Elephant (n 19) 13 to 14.

[38] The Elephant (n 19) 14 to 15.

from the woefully drafted second schedule and from the evidence of insiders such as Dr Akombe.

It is appreciated that the IEBC is not a state corporation. However, it is important to highlight how boards of directors function in state corporations. This is detailed in Mwongozo, which is the code of governance for state corporations. Fundamentally, Mwongozo requires the board members to exercise objective and independent judgment.[39] In the case of the IEBC, the ability of commissioners to exercise objective and independent judgment is hindered by deliberate efforts of the secretariat to deny commissioners adequate information on the functioning of the commission.[40]

It is against this background that this study will interrogate the corporate governance structure of the IEBC established under the 2010 Constitution, and the IEBC Act. The legal and regulatory framework of the IEBC will be scrutinised to ascertain if the legislative framework is the cause of the corporate governance problems facing the IEBC.

1.2 Statement of the problem

The IEBC Act, as currently framed, does not clearly demarcate the roles between the commissioners (the board or governing body) and the secretariat (management), resulting in tensions between these two organs of the IEBC, thereby hindering effective decision making and the smooth running of the organisation. Further, the chairperson and the commissioners occupy full time positions at the IEBC. This makes it difficult to separate the oversight functions of the commissioners, from the daily, full time executive roles that commissioners perform.[41] In addition, despite occupying full time roles, commissioners are unable to access timely, accurate and relevant information regarding the operations of the commission, thereby hindering them in performing their duties.[42]

Lastly, there is no organ or body that is independent from the management of the IEBC that can provide adequate independent oversight over the activities of the IEBC. The fact that a presidential election was nullified, *inter alia*, because of faulty administrative arrangements

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[39] State Corporations Advisory Committee, 'Mwongozo – The Code of Governance for State Corporations' (2015) <http://www.scac.go.ke/2015-02-16-09-34-58/mwongozo> accessed 26th January 2019, 17.
[40] The Elephant (n 19) 14 to 15.
[41] Carol Musyoka (n 32).
[42] See chapter 1.1 of this study.

put in place by the IEBC and that the Supreme Court found, for a fact, that there was a systemic institutional problem with the IEBC, points to the magnitude of the problem.[43]

As discussed in the Kriegler report[44] in part 1.1 of this chapter, due to the blatant disorganisation at the ECK which conducted the 2007 general elections, Kenya almost collapsed into a civil war after the results were announced. There were 'mass protests, deaths of more than eleven hundred civilians, large scale displacement of people, and threats to the efficacy of the Kenyan state.'[45] The resultant political crisis[46] almost led to economic collapse, not only in Kenya, but also in the region as Kenya was 'the gateway for supplies to many landlocked countries in East and Central Africa.'[47] Therefore, the current faulty governance structure of the IEBC should not be allowed to remain in place as doing so exposes the country to the possibility of having another botched election with the resultant devastating consequences as demonstrated above.

1.3 Justification of the study

Though there is an abundance of material on election laws in Kenya, very little has been written on the corporate governance structure of the IEBC. This may be due to the fact that, when juxtaposed against issues such as constitutional reform, 'rebuilding society and community'[48], the administration of an election is generally not considered to be as important. For a long time, the focus of attention in Kenya has been on issues such as the voter register and electronic voting.[49] In Kenya, reforms at the IEBC are usually aimed at removing the sitting commissioners and replacing them with another group,[50] without any thought being given to reforming the very institution the new commissioners will join.[51] On 27th November 2019, the

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43 Raila Amolo Odinga & another (n 15) 89.

44 Independent Review Commission (n 10).

45 Karuti Kanyinga and James D. Long, 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution' (2012) 55 (1) African Studies Review <https://www.jstor.org/stable/41804127?seq=1> accessed 24th April 2020, 3.

46 Ronan Porhel, 'The Economic Consequences of the Political Crisis' (2008) 38 The East African Review <https://journals.openedition.org/eastafrica/727> accessed 24th April 2020, 2.

47 ibid.

48 Sally Wheeler, 'Fraser and the politics of Corporate Governance' (2002) Journal of Law and Society <https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-6478.00124> accessed 18th April 2019, 1.

49 John Kamau, 'Kenya's long journey to electronic voting system' (2017) <https://www.nation.co.ke/news/politics/Kenya-s-long-journey-to-electronic-voting-system/1064-4051950-mwqfgq/index.html> accessed 12th April 2020.

50 The National Assembly e-News, 'JLAC considers new law to guide recruitment of IEBC commissioners' (2019) <http://www.parliament.go.ke/sites/default/files/2019-07/REVISED%20NA%20E%20NEWS%20ISSUE%20001-5.pdf> accessed 24th November 2019, 4.

51 Daniel P. Tokaji, 'The Future of Election Reform: From Rules to Institutions' (2009) Yale Law & Policy Review <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1586&context=ylpr> accessed 28th

report of the taskforce[52] on Building Bridges to Unity Advisory (BBI) was released. The taskforce, predictably, recommends that the current team of commissioners at the IEBC be replaced, allegedly to regain the confidence of the public.[53] The taskforce also recommends that the duties of the secretary and the CEO be separated, and fundamentally, that the chairman of the commission be the chief executive officer.[54]

The fact that a presidential election was nullified, *inter alia*, due to faulty administrative arrangements put in place by the IEBC and that the Supreme Court found that there was a systemic institutional problem with the IEBC,[55] provides ample justification for the carrying out of this study. Despite the finding of the Supreme Court, the reforms being proposed in the BBI report merely gloss over the problem and propose cosmetic changes that do not resolve the systemic institutional problem at the IEBC, further justifying the need for this study.

It cannot therefore, be argued that electoral management is not a crucial issue in the governance of a state. The 2007 post-election violence in Kenya demonstrated the ease with which a dispute over election results could result in a catastrophic loss of life and property. The 2007 post-election violence was not unique to Kenya as other African countries have faced the destructive effects of disputes over the electoral process.[56] Given the trappings of power and the economic benefits of controlling state machinery, politicians who are unwilling to relinquish or share political power usually manipulate the electoral process to keep themselves in power.[57] The Kriegler report confirmed this unfortunate state of affairs in Kenya.[58] It is with this realisation that the effort to reform the electoral management body becomes crucial.

1.4 Objectives of the research

The main objective of this research will be to discuss the corporate governance structure of the IEBC. The following will be the specific objectives of this research.

November 2019, 126. See also David Machio, 'BBI presents chance to foster unity' (2019) <https://www.standardmedia.co.ke/article/2001348659/bbi-presents-chance-to-foster-unity> accessed 23rd November 2019.

52 Gazette Notice No 5154 of 24th May 2018.

53 Presidential Taskforce on Building Bridges to Unity Advisory, 'A Report by the Presidential Taskforce on Building Bridges to Unity Advisory' (2019) <https://www.bbi.go.ke/> accessed 27th November 2019, 54.

54 ibid 55.

55 Raila Amolo Odinga & another (n 15) 89.

56 George B. N. Ayittey, 'Why Africa is Poor' (2002) <http://ieas.unideb.hu/admin/file_6845.pdf> accessed 18th September 2019, 7.

57 ibid.

58 Independent Review Commission (n 10) 10.

1. To examine the historical background of electoral management in Kenya.
2. To examine whether the IEBC Act demarcates the roles and responsibilities between the commissioners (the governing body) and the secretariat (management).
3. To examine whether the corporate governance structure at the IEBC ensures that commissioners have access to relevant, timely, accurate and adequate information regarding the operations of the IEBC.
4. To ascertain whether the current corporate governance structure of the IEBC results in tensions between commissioners and secretariat of the IEBC.
5. To investigate the corporate governance structures of the electoral management bodies in Ghana, South Africa and the United Kingdom, and the lessons that the IEBC can learn.

1.5 Research questions

In this thesis, I will address the following research questions.

First, how were elections managed in Kenya in the colonial era, the independence era and in the post 2010 era.

Second, how does the IEBC Act, if at all, demarcate the roles between the commissioners (the governing body) and the secretariat (management)?

Third, does the corporate governance structure at the IEBC ensure that commissioners have access to relevant, timely, accurate and adequate information to enable them make informed decisions?

Fourth, does the current corporate governance structure of the IEBC result in tensions between commissioners and secretariat of the IEBC, and if so, what are the effects of this tension?

Lastly, how have Ghana, South Africa and the United Kingdom structured the corporate governance systems in their respective electoral management bodies, and what lessons can the IEBC learn?

1.6 Research methodology

The method to be used to collect information for this study will be qualitative and will primarily include library and internet research. This research will be based on a critical analysis and review of both primary and secondary literature relevant to the subject area. Instances of Kenyan case law on the issue under discussion, if any, will also be examined.

This research will seek to analyse and interpret secondary sources such as scholarly works in the form of textbooks and journal articles on the subject of corporate governance in electoral management bodies in general, and in particular, corporate governance at the IEBC.

1.7 Theoretical framework

In the private realm of commerce and industry, shareholders join to form companies so as to minimize risk and maximise their returns,[59] and corporate governance in the private sphere is tailored with this end in mind. In certain circumstances, it is usually more beneficial to combine a variety of theories to avoid a 'mechanical approach towards corporate governance.'[60] Therefore, this study will adopt this approach as the IEBC is not the typical corporation that exists to maximise returns to shareholders,[61] as it has none, and the standard corporate governance theories may not necessarily be of any relevance.

Law, as eloquently stated by Brian Z. Tamanaha, is 'a social institution shaped by society and, in turn, shaping society.'[62] This definition of law perfectly aligns with the theoretical framework underpinning this study. James Gardner has captured the essence of a sociological jurist in the following manner:

> The sociological jurist has no preference for any particular type of precept but only for that which will do the most effective job. In philosophy, he is generally a pragmatist. **He is interested in the nature of law but only with reference to its use as a tool to serve society, and his examination into the law is always in connection with some specific problem of the everyday work of the legal order**.[63]

In this study, the focus will be on the theoretical framework that will result in excellent corporate governance at the IEBC to ensure its usefulness as an organisation in serving Kenyan society by organising and conducting credible elections. The following two theories will be considered.

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59 Ian B. Lee, 'Is there a cure for corporate "Psychopathy"?' (2005) 42 (1-6) American Business Law Journal <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1714.2005.00014.x> accessed 18th April 2019, 4.

60 Georgescu Cristina Elena, 'Theoretical Framework for Corporate Governance' in Ovidius University Annals, Economic Sciences Series, Vol. 12 (1) (Ovidius University Press 2012) <http://stec.univovidius.ro/html/anale/ENG/cuprins%20rezumate/volum2012p1.pdf> accessed 23rd February 2019, 497.

61 Ian B. Lee (n 59).

62 Brian Z. Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2015) 56 (6) William & Mary Law Review <http://scholarship.law.wm.edu/wmlr/vol56/iss6/6> accessed 28th April 2019, 2241.

63 James A. Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)' (1961) 7 (1) Villanova Law Review <http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1> accessed 28th April 2019, 9.

1.7.1 Agency theory

The agency problem arises whenever the principal contracts with an agent, whereby the agent is to manage the affairs of the principal.[64] The challenge that arises from this relationship is to ensure that the agent performs his duties purely for the interest and for the benefit of the principal.[65] This challenge is intensified by the fact that the agent, who is managing other people's money, is rarely inclined to do so with the same vigilance as if he was managing his own money.[66] This problem also exists in the public sphere. For instance, in parastatals, there are multiple agents such as the government and other public officials, while the electorate itself is the principal.[67]

Unfortunately, directors of parastatals, being political appointees, are often expected to pursue political interests, perhaps to fulfil an election promise to a portion of the electorate.[68] This presents a unique problem in parastatals. The IEBC is not a parastatal, but the explanation offers assistance in understanding who the agent and the principal would be for the IEBC. In the case of the IEBC, the principals are considered to be primarily the Kenyan electorate and all individuals who are affected by the activities of the IEBC, including the political class whose ascendancy to high political office depends on the elections carried out by the IEBC.

Regarding agents, these can be the commissioners, management, secretariat and staff of the IEBC. Agents also include the numerous temporary staff who are employed by the IEBC during elections.[69] Under the agency theory, the fundamental belief is that agents and more so directors cannot be trusted.[70] Therefore, the challenge is to ensure that the commissioner of the IEBC, as an agent, acts in the best interests of the Kenyan public.

It is this lack of trust that mandates that corporate governance structures be strong enough to ensure that agents perform for the interest of the principals of the organisation. The media has reported, with frequent alacrity, the fraud, procurement malfeasance and general disorder at the

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[64] Bob Tricker (n 1) 53.

[65] Georgescu Cristina Elena (n 60) 494.

[66] Adam Smith, *The Wealth of Nations* (1776) <https://eet.pixel-online.org/files/etranslation/original/The%20Wealth%20of%20Nations.pdf> accessed 28th April 2019, 606.

[67] Kiarie Mwaura, 'Constitutional Restructuring of Corporate Governance in State Owned Enterprises: Dynamism or Distraction?' (2011) 1 Mount Kenya University Law Journal, 3.

[68] Kiarie Mwaura, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya' (2007) Fordham International Law Journal <https://ir.lawnet.fordham.edu/ilj/vol31/iss1/1/> accessed 17th April 2019, 7.

[69] Patrick Vidija, 'IEBC seeks to employ 359,000 officials for August polls' (2017) <https://www.the-star.co.ke/news/2017-06-09-iebc-seeks-to-employ-359000-officials-for-august-polls/> accessed 12th April 2019.

[70] Bob Tricker (n 1) 57.

IEBC,[71] thereby lending credence to the observation by Prof Tricker about the nature of man and the distrust inherent in directors.[72] In addition, and from what Carol Musyoka[73] has observed about the corporate governance structure at the IEBC, that there is no board at the IEBC as the commissioners are, in essence, part of the executive team, exacerbating an already tenuous position.

From these and other stories emanating from the IEBC, it is clear that the agency problem is in existence at the IEBC and the dilemma will be how to induce the agents to act in the best interests of the Kenyan public. The agency theory will therefore be a crucial theory underpinning this research.

1.7.2 Stewardship theory

The stewardship theory takes the opposite view from the agency theory which, as we have seen, takes the view that directors cannot be trusted.[74] With the stewardship theory, the fundamental view and belief is that indeed, directors can be trusted.[75] The stewardship theory also recognizes 'the importance of structures that empower the steward and offers maximum autonomy built on trust.'[76]

In the case of the IEBC, one of the top stewards (the CEO) is on record lamenting about the seemingly insurmountable woes at the IEBC brought about by the lack of proper governance structures at the institution.[77] It is clear from Mr Chiloba's statement that the structures that are necessary to empower the steward are lacking or are terribly compromised such that the organisation cannot fulfil its core mandate of delivering credible elections. The stewardship theory will also be useful in deliberating on the necessary corporate governance structure of the IEBC.

[71] Patrick Langat, 'Why all is not well at the IEBC' (2018) <https://www.nation.co.ke/news/politics/Why-all-is-not-well-at-IEBC/1064-4702600-os44bu/index.html> accessed 23rd February 2019. See also Walter Menya, 'Final audit exposes tender rot at IEBC that could have led to loss of billons' (2018) <https://www.nation.co.ke/news/Final-audit-exposes-tender-rot-at-IEBC/1056-4729300-13msrokz/index.html> accessed 23rd February 2019.
[72] Bob Tricker (n 1) 57.
[73] Carol Musyoka (n 32).
[74] Bob Tricker (n 1) 57.
[75] Bob Tricker (n 1) 59.
[76] Georgescu Cristina Elena (n 60) 494-495.
[77] Patrick Langat (n 2).

1.7.3 Stakeholder Theory

The focus of the stakeholder theory is different from the agency and stewardship theories discussed above. The stakeholder theory focuses on non-shareholder groups and aims to 'encourage active corporate engagement in protecting the interests of these groups.'[78] A distinguishing feature of the stakeholder theory is that it 'addresses morals and values explicitly as a central feature of managing organisations.'[79]

When juxtaposed against the Kenyan Constitutional framework, and especially the national values and principles of governance as stipulated under article 10, and the entire Chapter 6 on leadership and integrity, the stakeholder theory takes on an enhanced level of importance at the IEBC. The importance of the stakeholder theory cannot be underestimated as all of these multiple groups who have a stake in how the firm is operated '**merit consideration in managerial decision making**.'[80]

During the discussion in part 1.2 of this study, it was argued that the 2007 post-election violence in Kenya demonstrated clearly that all citizens of the Republic of Kenya, are stakeholders of the IEBC as they are directly affected should elections be conducted in the same haphazard manner as was the case in the 2007 elections.[81]

The stakeholder theory discussed in this part will therefore be crucial in this discussion as it requires that the IEBC to take into consideration the interests of all the stakeholders who may be affected by its decisions. Turning once again to the 2010 Constitution, consideration of the interests of stakeholders can be achieved if the core constitutional principle of public participation, a core component of the principles of good governance that runs throughout the entire architecture of the Kenyan Constitution, is adhered to.

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[78] P. M Vasudev, 'The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward' (2012) 41 (2) Hofstra Law Review <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2698&context=hlr> accessed 22nd June 2020, 1.

[79] Robert Phillips, R. Edward Freeman and Andrew C. Wicks, 'What Stakeholder Theory Is Not' (2003) 13 (4) Business Ethics Quarterly <https://www.jstor.org/stable/3857968> accessed 22nd June 2020, 481.

[80] Robert A. Phillips, 'Stakeholder Theory and A Principle of Fairness' (1997) 7 (1) Business Ethics Quarterly <https://www.jstor.org/stable/3857232> accessed 22nd June 2020, 52.

[81] Ronan Porhel (n 46).

1.8 Literature review

1.8.1 Governance of Independent Commissions under the 2010 Constitution

Under the 1969 Constitution, there were only four commissions that were established. These were the Electoral Commission, the Parliamentary Service Commission, the Judicial Service Commission, and the Public Service Commission. In addition to these constitutional commissions, a majority of the commissions in the pre multi-party era were often established under presidential decree[82] and they were, disparagingly, referred to as an 'uncategorised lot of public bodies'[83] betraying their amorphous nature and how they were viewed by the greater public.

However, in a remarkable increase in terms of numbers, the 2010 Kenyan Constitution establishes ten commissions, among them the IEBC. The 2010 commissions differ from the commissions in the 1969 Constitution because 'they have an express provision outlining their independence from other arms of government, and they are administratively and financially delinked from the executive.'[84] This independence may have mutated into a sphere not contemplated by the drafters of the 2010 Constitution as the question that is now often posed is 'who will regulate the regulators and guard the guardians?'[85] Prof Sihanya argues, forcefully, that

> ...**the 2010 Constitution seems to create constitutional commissions that are not sufficiently checked by the other arms of government.**[86]

This statement is especially relevant considering the IEBC where we have seen reports by competent bodies pointing to the massive corruption prevalent at the institution,[87] confirming that what Prof Sihanya wrote is actually true.

Walter Khoebe introduces another element to this discussion when he argues that the determining factor in whether an independent institution will be accountable or not 'is its

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[82] Jackton B Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (African Centre for Technology Studies (ACTS) Press 1990) 179.

[83] ibid.

[84] Ben Sihanya, 'The Presidency and Public Authority in Kenya's new Constitutional Order' (2011) Constitution Working Paper No 2, Society for International Development <http://sidint.net/docs/WP2.pdf> accessed 30th June 2020, 13.

[85] Ben Sihanya, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' (2012) Friedrich Ebert Stiftung (FES) Kenya Occasional Paper, No. 5 <http://library.fes.de/pdf-files/bueros/kenia/09857.pdf> accessed 30th June 2020, 38.

[86] Ben Sihanya, 'The Presidency and Public Authority in Kenya's new Constitutional Order' (n 84) 13.

[87] Africog (n 22).

institutional design, and whether the designed independence is sustained in day-to-day political dealings.'[88] The institutional design of the IEBC appears to have been haphazardly cobbled together resulting in an institution with a 'systemic institutional problem'[89] as held by the Supreme Court. The issue of institutional design also carries favour with Prof Sihanya when he argues that the IEBC should be 'thoroughly restructured'[90] if Kenya is ever to have free and fair elections.

The 2010 Constitution contains a number of checks 'to guard against presidential discretion and excesses in the exercise of these powers.'[91] Therefore, even at the presidential level, checks have been introduced to guard against the arbitrary use of power. It appears that in the design of the constitutional commissions, these checks were not put in place. Election management bodies exercise far reaching powers 'which have a significant impact on the governance of a country.'[92] These far-reaching powers are often exercised in an arbitrary manner as there are no 'effective procedural mechanisms to circumscribe their exercise.'[93] Prof Migai Akech writes, very poignantly, that:

> **in the absence of effective regulation, law often aids the abuse of power and corruption**.[94]

Whether the 2010 Constitution will enhance accountability 'depends on the extent to which it addresses the problem of arbitrary power'[95] and this can only happen through the passage of relevant legislation which will curtail the exercise of power in an arbitrary manner. We have seen that the second schedule of the IEBC Act that details how the IEBC is to make decisions and perform its duties, is woefully deficient on details, as well as substantial portions of the

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[88] Walter Khobe Ochieng, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) 4 Kabarak Journal of Law and Ethics <https://www.kabarak.ac.ke/downloads/journal%20of%20law%20and%20ethics%20vol%204/The%20Independence,%20Accountability%20and%20Effectiveness.pdf> accessed 30th June 2020, 145.

[89] Raila Amolo Odinga & another (n 15).

[90] Ben Sihanya, 'Constitutional Commissions and Independent Offices in Kenya and Africa: Experiences, Challenges and Opportunities' (2019) <http://www.innovativelawyering.com/attachments/18075.pdf> accessed 30th June 2020, 19.

[91] Joshua M. Kivuva, 'Restructuring the Kenyan State' (2011) SID Constitution Working Paper No 1 <https://www.sidint.net/sites/www.sidint.net/files/docs/WP1.pdf> accessed 30th June 2020, 9.

[92] Migai Akech, *Administrative Law* (Strathmore University Press 2016) 317.

[93] Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution enhance Government Accountability' (2011) 18 (1) Indiana Journal of Global Legal Studies <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1447&context=ijgls> accessed 30th June 2020, 343.

[94] ibid.

[95] ibid 383.

second schedule having been declared unconstitutional.[96] Therefore, the legal framework at the IEBC does not effectively regulate how decisions are to be made, or whether the decision makers will be held accountable for their actions. Commissioners and the secretariat exercise immense powers, but unfortunately, there are no mechanisms governing how this power is to be exercised at the IEBC, and there are no checks and balances to minimise potentially selfish actions by insiders at the commission.

It will be demonstrated in due course, that a substantial portion of corporate governance 'concerns the design of checks and balances to constrain selfish behaviour by insiders.'[97] This study will provide recommendations on how to regulate the immense powers vested in the hands of the commissioners and secretariat at the IEBC, and to provide a level of accountability in the commissions by reducing self-interested behaviour from insiders at the IEBC. Such accountability will be accomplished through the establishment of a corporate governance framework at the IEBC, an issue that will now be considered.

1.8.2 Definition and Scope of Corporate Governance

Historically, corporate governance has been understood as 'the amalgam of responses to the agency problems and legitimacy issues that plague business corporations'[98] therefore connoting that there are a myriad of efforts that have been undertaken through the years to address the said issues. Despite these efforts, there is no universally accepted definition of the term *corporate governance*.[99] However, in this study, the definition of corporate governance that will be used has been borrowed from the Cadbury report that defines corporate governance as '**the system by which companies are controlled and directed**.'[100] This definition is unambiguous and encompasses whichever systems are used in a corporate entity to control its affairs.

[96] Katiba Institute & 3 others –v- Attorney General & 2 others (n 35).
[97] Oliver Hart, 'Corporate Governance: Some Theory and Implications' (1995) 105 (430) The Economic Journal <https://www.jstor.org/stable/2235027> accessed 22nd June 2020, 681.
[98] Mariana Pargendler, 'The Corporate Governance Obsession' (2016) 42 (2) Journal of Corporation Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491088> accessed 23rd June 2020, 369.
[99] Ian M Ramsay, 'The Corporate Governance Debate and the Role of Directors Duties' (1997) in Ian M Ramsay (ed) *Corporate Governance and the Duties of Company Directors* (The Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne, 1997) 2.
[100] The Committee on the Financial Aspects of Corporate Governance, 'The Report of the Committee on the Financial Aspects of Corporate Governance' (1992) <http://www.ecgi.org/codes/documents/cadbury.pdf> accessed 26th April 2019, 14.

At the onset, it will be important to distinguish between governance and management. In essence,

> **governance is the work of the board of directors or other governing body, while management is the work of the executive management team**.[101]

From this definition, it is clear that the board cannot perform the work of the management, and neither can management perform the work of the board. It is therefore easier to appreciate Ezra Chiloba's lamentations discussed earlier in this chapter regarding the lack of clarity in roles between the commissioners (the board) and the secretariat (management).[102]

In addition to providing clarity of roles within the organization, 'corporate governance systems exist to discourage self-interested behaviour'[103] and to ensure that 'insiders take actions that benefit the organisation as a whole and not just themselves.'[104] Checks and balances exist to constrain selfish behaviour by insiders so that they do not pursue their own individual agendas.[105]

With the realisation that 'absolute power tends to corrupt absolutely,'[106] this system of checks and balances has proven useful in control of government actions, and it was adopted to the corporate context in the hope of avoiding concentration of too much power in one body or individual.[107] Corporate governance issues have been the subject of lengthy discussions going back to the conception of the corporate form. It is said that these issues 'are as old as the corporate form itself—and perhaps even older.'[108]

Over time, a strong independent board has been recognised as being a vital tool in this system of checks and balances[109] and with respect to the IEBC, this independence will be vital in the governance of the commission. With respect to this study, we begin the discussion by interrogating the Cadbury report and how it has revolutionised corporate governance globally.

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101 Bob Tricker (n 1) 42.

102 Patrick Langat (n 2).

103 David F. Larcker and Brian Tayan, 'Trust: The Unwritten Contract in Corporate Governance' (2013) <https://www.gsb.stanford.edu/faculty-research/publications/trust-unwritten-contract-corporate-governance> accessed 12th December 2019, 1.

104 ibid.

105 Oliver Hart (n 97).

106 Lord Acton, 'Letter to Archbishop Mandell Creighton' (1887) <https://history.hanover.edu/courses/excerpts/165acton.html> accessed 23rd June 2020.

107 Mariana Pargendler (n 98) 359.

108 Mariana Pargendler (n 98) 369.

109 Mariana Pargendler (n 98) 366.

1.8.3 Pillars of corporate governance

The importance of the Cadbury report[110] to corporate governance cannot be underestimated. After its publication in 1992, the Cadbury report was globally acclaimed and soon served 'as a model for the development of corporate governance codes around the world.'[111] The Cadbury report is the global benchmark and 'has provided a yardstick against which standards of corporate governance in other markets are measured.'[112] In the following discussion, this report will therefore play a crucial role in assessing the corporate governance structures at the IEBC.

At the heart of the recommendations in the Cadbury report is a code of best practice designed to achieve high standards of corporate behaviour[113] through the core principles of openness, integrity and accountability.[114] It is clear that the Cadbury report advocates that companies should be directed and controlled by individuals who practice openness, have integrity and are accountable for their actions.

Over the years, the Cadbury report has been revised and currently, the prevailing code is the United Kingdom corporate governance code[115] which has acquired a 'sterling reputation globally'[116] as being one of the most influential codes on corporate governance.[117] The Cadbury report and the successive updated reports relate mostly to companies engaged in commercial activities. The IEBC, although it is a corporate entity, it is not a commercial enterprise and the standard principles of corporate governance will have to be adapted to the IEBC. However, the core principles of openness, integrity and accountability[118] should be applied as is to the IEBC given their importance and relevance to the institution.

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[110] The Committee on the Financial Aspects of Corporate Governance (n 100) 14.

[111] Brian R. Cheffins, 'The History of Corporate Governance' (2012) ECGI Working Paper Series in Law 184/2012 <https://ssrn.com/abstract=1975404> accessed 22nd June 2020, 19.

[112] ibid.

[113] The Committee on the Financial Aspects of Corporate Governance (n 100) 10.

[114] ibid 15.

[115] Financial Reporting Council, 'The UK Corporate Governance Code' (2018) <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> accessed 28th April 2019.

[116] George Hadjikyprianou, 'The Principle of "Comply or Explain" Underpinning the UK Corporate Governance Regulation: Is There a Need for a Change?' (2015) 7 (81) Corporate Governance Law Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690687> accessed 17th April 2019, 1.

[117] ibid 2.

[118] The Committee on the Financial Aspects of Corporate Governance (n 100) 15.

These core principles of corporate governance have been localised in Kenya by the Private Sector Corporate Governance Trust,[119] the predecessor to the modern day Centre for Corporate Governance.[120] In their publication, the Private Sector Corporate Governance Trust provides that there are four pillars on which corporate governance is framed.[121] This study will focus on the first pillar that requires that there must be an effective body responsible for governance separate and independent of management.

The four pillars in the Private Sector Corporate Governance Trust have been summarised into five basic tenets, to wit: 'accountability, efficiency and effectiveness, integrity and fairness, responsibility, and transparency.'[122] It is clear that the core principles as advocated for by the Cadbury report[123] are substantially similar to what the Private Sector Corporate Governance Trust refers to as the pillars of corporate governance.[124] At the heart of both is the assertion, belief and hope that openness, integrity and accountability should be central to corporate governance.

In this study, an attempt is made to ascertain if indeed, the IEBC abides by these principles, and more particularly, if there is a demarcation of roles between commissioners and the secretariat, and whether commissioners have access to information to enable them carry out their duties.

The IEBC is not the typical corporation as it does not have shareholders, but it can be deemed as having numerous stakeholders given its core mandate of organising elections in Kenya. Due to the extremely large number of stakeholders in the IEBC, the only effective check that the stakeholders have on managers is through the board[125] as historically, the board has been 'conceptualised as the body which supervises management on behalf of shareholders.'[126]

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[119] Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practices for Corporate Governance* (Private Sector Corporate Governance Trust, Nairobi, 2002).

[120] Centre for Corporate Governance, 'Our History' (2019) <https://ccg.or.ke/our-history> accessed 17th April 2019.

[121] Private Sector Initiative for Corporate Governance (n 119) 3-4. The second pillar requires an all-inclusive approach to governance. The third pillar requires governance be conducted in accordance with the mandate granted to it by its founders, while the fourth pillar requires an enabling framework for the organisation's human resource be provided.

[122] Private Sector Initiative for Corporate Governance (n 119) 4.

[123] The Committee on the Financial Aspects of Corporate Governance (n 100) 15.

[124] Private Sector Initiative for Corporate Governance (n 119) 4.

[125] William O. Douglas, 'Directors who do not direct' (1934) 47 (8) Harvard Law Review <https://www.jstor.org/stable/1331256> accessed 13th April 2020, 5.

[126] Paul Davies, 'The Board of Directors: Composition, Structure, Duties and Powers' (2000) <https://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf> accessed 13th April 2020, 6.

Core company law is concerned with addressing, *inter alia*, 'the problems which arise out of the relationships between management and shareholders.'[127] There is a vast amount of literature dedicated to the agency relationship due to the 'problems that arise in trying to induce the agent to act in the best interests of the principal.'[128] The vastness of the literature points to the magnitude of the problems, and also illustrates the importance of the pillars of corporate governance to any organisation. From providing oversight over management to guiding the overall policy direction of the organisation, the pillars of corporate governance under discussion in this study are aptly named, as they are the foundations for the successful operation of any institution.

In most corporations, the principal is the owner or shareholder of the organisation and he appoints directors who sits on the board that sets the framework within which management, or agents, are to act.[129] This framework essentially demarcates the roles and responsibilities between the board and management, an issue that we now consider.

1.8.4 Demarcation of roles and responsibilities

A core function of the board of directors is to set the overall goals for the corporation, and to evaluate senior executives of the organisation with regards to the implementation of the goals set by the board.[130] The board is also required to 'review the major strategies and plans of the organisation as well as providing advice and counsel to top management.'[131]

There has been intense discussion on whether the role of the chair of the board and the CEO of an organisation should vest in one individual.[132] We will discover in Chapter 4 that in Ghana, the chair of their electoral commission is also the CEO of the organisation.[133] However, in most

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127 ibid 2.

128 Patrick McColgan, 'Agency Theory and Corporate Governance: a Review of the Literature from a UK Perspective' (2001) <https://docplayer.net/7395979-Agency-theory-and-corporate-governance-a-review-of-the-literature-from-a-uk-perspective.html> accessed 13th April 2020, 5.

129 Mark S. Mizruchi, 'Who Controls Whom? An Examination of the Relation between Management and Boards of Directors in Large American Corporations' (1983) 8 (3) The Academy of Management Review <https://www.jstor.org/stable/257831> accessed 13th April 2020, 433.

130 Lynne L Dallas, 'The Multiple Roles of Corporate Boards of Directors' (2003) 40 (3) San Diego Law Review <https://heinonline.org/HOL/P?h=hein.journals/sanlr40&i=791> accessed 15th December 2019, 807.

131 Paul H. Zalecki, 'The Corporate Governance Roles of the Inside and the Outside Directors' (1993) 24 (4) University of Toledo Law Review <https://heinonline.org/HOL/P?h=hein.journals/utol24&i=845> accessed 15th December 2019, 848-849.

132 Anjan D. Ghosh, 'Emerging Corporate Board Practices' (2005) 40 (6) Economic and Political Weekly <https://www.jstor.org/stable/4416165> accessed 15th December 2019, 524.

133 United Nations Development Programme, 'Elections in Sub-Saharan Africa: General Trends, Challenges, and Opportunities' (2016) <https://www.undp.org/content/dam/rba/docs/Reports/undp-rba-maendeleo-elections-subsahara-africa-2016.pdf> accessed 30th June 2019, 16.

other jurisdictions, separating the chair and CEO roles 'avoids concentration of power and authority in one individual and clearly differentiates leadership of the board from running of the organisation.'[134]

By separating the positions of the CEO and the chair, an organisation clearly differentiates between the roles of the board and management, and *inter alia*, 'gives the chair clear authority to speak on behalf of the board and to run board meetings.'[135] Separation also allows the CEO to

> focus exclusively on strategy, operations, and organizational issues while the chairman focuses on management oversight, board leadership, and governance-related matters.[136]

Despite the fact that the board 'has the legal power to control the corporation, at most, the board monitors the corporation and influences corporate policy, while control is primarily in the hands of management.'[137] In other words, management 'exercises the day to day operating control, while the board exercises long run policy control.'[138]

Corporate governance, or how companies are controlled and directed, is not a recent historical development and there have been various methods used over the years aimed at controlling executive actions.[139] Over the years, 'corporate failures and systemic crises'[140] have highlighted the importance of corporate governance in organisations. In Kenya, one of the major corporate failures has been Uchumi Supermarkets, 'whose collapse has been attributed to having a dysfunctional board.'[141] In the United Kingdom, the Cadbury committee was convened as a result of a variety of ethical scandals in various businesses in the city of

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134 Anjan D. Ghosh (n 132).

135 David F. Larcker and Brian Tayan, 'Chairman and CEO: The Controversy Over Board Leadership Structure' (2016) <https://www.gsb.stanford.edu/faculty-research/publications/chairman-ceo-controversy-over-board-leadership-structure> accessed 12th December 2019, 1.

136 ibid.

137 Lynne L Dallas (n 130) 809.

138 Mark S. Mizruchi (n 129) 430.

139 Adrian Cadbury, *Corporate Governance and Chairmanship: A Personal View* (Oxford University Press, 2002) 6.

140 Rita Ruparelia and Amos Njuguna, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' (2016) 7 (5) International Journal of Business and Social Science <https://ijbssnet.com/journals/Vol_7_No_5_May_2016/14.pdf> accessed 27th April 2019, 154.

141 Lois Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) International Company and Commercial Law Review <https://www.academia.edu/1524463/The_law_affecting_corporate_governance_in_Kenya_a_need_for_review> accessed 15th May 2019, 10.

London.[142] Perhaps as a result of this unethical conduct, in the Cadbury report, considerable stress is placed on non-executive directors and the role they should play in monitoring the management team in an independent manner.[143] This monitoring role ensures accountability for the actions of management.[144]

In the United States, the directors of Enron failed in monitoring the activities of management by '**mainly relying on explanations from management and by not questioning the information given to them**.'[145] We have seen a similar tendency by commissioners of the IEBC to rely on limited information from the secretariat in the carrying out their responsibilities.[146]

The over reliance by directors on explanations given to them by management in making decisions is an issue which can lead to drastic consequences in any company or organization. Due to their limited exposure to the day-to-day activities of the company and their independence from the business,

> **directors have a less-complete understanding of the company and the market than executives. This is the information gap that exists between management and the board.**[147]

As much as directors should not be overly involved in management affairs, they should also be in a position to question the information being given to them by management. This is a crucial role for commissioners which is lacking at the IEBC as commissioners have no real power or control over the work of the directorates, and they are often rebuffed by the various heads of the directorates when they ask for information on the operations of the IEBC.[148]

142 Colin Boyd, 'Ethics and Corporate Governance: The issues raised by the Cadbury Report in the United Kingdom' (1996) 15 (2) Journal of Business Ethics <https://www.jstor.org/stable/25072743> accessed 24th November 2019, 2.

143 Brian R. Cheffins, 'Corporate Governance in the United Kingdom: Lessons for Canada' (1997) 28 (1) Canadian Business Law Journal <https://heinonline.org/HOL/P?h=hein.journals/canadbus28&i=87> accessed 27th November 2019, 19.

144 ibid 20.

145 Colin Boyd (n 142).

146 See Chapter 1.1 of this study.

147 David F. Larcker and Brian Tayan, 'Netflix Approach to Governance: Genuine Transparency with the Board' (2018) <https://www.gsb.stanford.edu/faculty-research/publications/netflix-approach-governance-genuine-transparency-board> accessed 18th May 2019, 1.

148 The Elephant (n 19) 13 to 14.

In 2001, Enron, a massive energy company in the United States declared bankruptcy and this collapse[149] eventually led to the passing of far reaching legislation that changed the way corporate boards function.[150] The following quote is important to the discussion:

> **The structure of organizations as complex systems of interacting individuals, loosely joined through smaller internal groups, diffuses responsibility**. **The Enron implosion is an illustration of the problems that such diffusion of responsibility can create**, **with directors claiming that officers kept them in the dark, officers blaming their legal counsel and auditors, who in turn blamed directors and officers, leaving shareholders holding the proverbial empty bag**.[151]

The phrase 'diffusion of responsibility' is an apt description for what ails the IEBC. No one wants to take responsibility for the wrongs of the organisation. It was difficult for the Court to state with certainty which officer or department was responsible, pointing to the magnitude of the diffusion of responsibility at the IEBC. The structure of the IEBC is clearly a 'complex system of interacting individuals, loosely joined through smaller internal groups, which eventually diffuses responsibility,'[152] justifying the need for there to be explicit demarcation of roles and responsibilities between the board and the secretariat.

Given the impact that elections have on the Kenyan economy,[153] corporate governance at the IEBC is therefore a crucial element of the wellbeing of the Kenyan economy and its people. If elections are managed well, there will be fewer instances of violence or nullification of elections, and eventually, people will stop dreading elections which have the habit of slowing economic growth in Kenya during every election cycle.[154]

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[149] Vincent Aebi, Gabriele Sabato & Markus Schmid, 'Risk Management, Corporate Governance, and Bank Performance in the Financial Crisis' (2012) 36 Journal of Banking & Finance <https://web.actuaries.ie/sites/default/files/ermresources/80_risk_management_financial_crisis.pdf.pdf> accessed 24th April, 2019, 1.

[150] Erica Beecher, 'Corporate Governance in the Wake of Enron: An Examination of the Audit Committee Solution to Corporate Fraud' (2003) 55 (2) Administrative Law Review <https://www.jstor.org/stable/40712143?seq=1#page_scan_tab_contents> accessed 6th May 2019, 1.

[151] ibid.

[152] International Institute for Democracy and Electoral Assistance (n 7) 1.

[153] John Aglionby, 'Kenyan election rerun puts further damper on economy' (2017) <https://www.ft.com/content/ebebe0bc-a213-11e7-9e4f-7f5e6a7c98a2> accessed 23rd November 2019.

[154] Kevin Mwachiro, 'Kenya's economy slows ahead of election' (2017) <https://www.bbc.com/news/av/business-40684206/kenya-s-economy-slows-ahead-of-election> accessed 9th January 2020.

1.8.5 Transparency, disclosure and access to information

Corporate governance systems should mandate that 'the board has direct access to managers and the operations of the organisation.'[155] Board processes are mainly the decision-making activities of directors of companies[156] and they include activities such as how board members gather, share, use information, and make decisions.[157] Board members have a duty of care to act on a fully informed basis while executing their mandate,[158] and in this regard, they wholly rely on management to access information about the firm.[159] In most instances, non-executive board members 'do not have the same access to information as key managers within the company.'[160] In addition, they may not know the technical aspects of the business due to limited contact with the daily affairs of the firm,[161] therefore confirming the importance of board processes within the organisation.

Board processes are among the internal mechanisms put in place to ensure that insiders, more so directors, have access to company information. It is also important to consider the mechanisms that have been put in place to ensure that outsiders have access to company information. The disclosure of company information to outsiders[162] can be equated to the organisation being transparent to stakeholders in the performance of its duties. In commercial entities, stakeholders and potential investors rely on corporate disclosure to make informed

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155 Ruth V. Aguilera, 'Corporate Governance and Director Accountability: an Institutional Comparative Perspective' (2005) 16 (1) British Journal of Management <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.510.6044&rep=rep1&type=pdf> accessed 13th April 2020, 1.

156 Michael Ayodele Ogunseyin, 'Determinants of Board Processes: Trust in the Boardroom' (PhD Thesis, University of Wolverhampton 2017) <https://core.ac.uk/download/pdf/96708096.pdf> accessed 24th December 2019, 57.

157 ibid.

158 OECD, 'G20/OECD Principles of Corporate Governance' (OECD Publishing 2015) <https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1593062745&id=id&accname=guest&checksum=D4471BF7E64894741982D347D685AA9F> accessed 24th December 2019, 48.

159 Zinat S. Alam, Mark A. Chen, Conrad S. Ciccotello, Harley E. Ryan and Jr., 'Does the Location of Directors Matter? Information Acquisition and Board Decisions' (2014) 49 (1) The Journal of Financial and Quantitative Analysis <https://www.jstor.org/stable/43303872?seq=1> accessed 13th April 2020, 1.

160 OECD, 'Using the OECD principles of Corporate Governance: A Boardroom Guide' (2008) <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/40823806.pdf> accessed 24th December 2019, 90.

161 Mark S. Mizruchi (n 129) 433.

162 Etienne Farvaque, Catherine Refait-Alexandre, Dhafer Saïdane, 'Corporate disclosure: A review of its (direct and indirect) benefits and costs' (2011) 128 International Economics <https://www.sciencedirect.com/science/article/abs/pii/S2110701713600013> accessed 25th April 2020.

decisions[163] and the entity itself is 'more likely to achieve better results when the corporate governance practices of transparency and disclosure'[164] are adhered to.

Stakeholders are a varied group and include 'employees, the general public, the media, related firms, the government, private regulators, shareholders and debt holders'[165] among others. This was discussed earlier in part 1.7.3 on the stakeholder theory. As details about a corporation become available to these stakeholders, 'they are able to hold management more accountable for their performance and the choices they make, ultimately increasing performance.'[166] The board of directors also plays a part in holding management accountable by empowering itself 'to have access to information…pertaining to its oversight responsibility.'[167]

Disclosure, transparency and access to the company's information are therefore crucial mechanisms to ensure that both directors and management are accountable to stakeholders for their actions, and such accountability results in better performance for the organisation which is beneficial for all stakeholders.

Of all the companies researched for this study, none is as transparent on information sharing as Netflix, a media company headquartered in the USA, which is completely focused on 'increasing transparency among the CEO, executive team and the board.'[168] Netflix requires its board members to 'periodically attend senior management meetings, but in an observing capacity only.'[169] For Netflix, board memos are analytical with online 'access to all data and information on the company's internal shared systems, while they are sent to the directors at least seven days before the board meetings.'[170]

Monitoring the activities of management is a crucial function of the board which can only be accomplished where the board has access to information concerning the operations of the

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[163] Benjamin Fung, 'The Demand and Need for Transparency and Disclosure in Corporate Governance' (2014) 2 (2) Universal Journal of Management <http://www.hrpub.org/journals/article_info.php?aid=1243> accessed 24th April 2020, 1.

[164] ibid 2.

[165] Gaizka Ormazábal, 'The Role of Stakeholders in Corporate Governance: A View from Accounting Research' (2018) CEPR Discussion Paper No. DP12775 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138837> accessed 25th April 2020, 1.

[166] Iñaki Albisu Ardigó and Nieves Zúñiga, 'Corporate transparency: Overview of issues and literature review' (2019) <https://www.jstor.org/stable/resrep20480#metadata_info_tab_contents> accessed 25th April 2020, 3.

[167] D N Ghosh, 'Corporate Governance and Boardroom Politics' (2000) 35 (46) Economic and Political Weekly <https://www.jstor.org/stable/4409950> accessed 25th April 2020, 3.

[168] David F. Larcker and Brian Tayan, 'Netflix Approach to Governance: Genuine Transparency with the Board' (n 147).

[169] ibid.

[170] ibid.

organization. At Netflix, the directors have been amply empowered to do such monitoring as they have unhindered access to relevant information regarding the organization. For the IEBC, it should be remembered that commissioners were often rebuffed by the directors of the secretariat and the CEO himself when they attempted to have substantive discussions on the activities of the commission.[171]

Despite the constant rebuffing by the secretariat, the commissioners themselves had a duty of care to ensure that appropriate information sharing and reporting systems exist to provide them with accurate and adequate information.[172] Clearly, these systems have not been put in place at the IEBC thereby making it difficult for stakeholders, both internal and external, to hold the secretariat and the commissioners accountable. The opaqueness in the operations of the IEBC led to the problem of diffusion of responsibility which will be discussed in due course.[173] This diffusion of responsibility was a major problem which contributed to the invalidation of a presidential election by the Supreme Court in the Raila Odinga case[174] discussed earlier.

It is the intention of this study to propose such systems to ensure that commissioners have the required access to relevant information on the activities of the IEBC to enable them hold the secretariat accountable, and also, to enable the commission perform its core mandate of organizing credible elections. In this endeavour, lessons will be learnt from corporate disclosure in the private sphere of commerce and industry so as to strengthen the corporate governance structure at the IEBC.

1.8.6 Conclusion

The conduct and regulation of the business and affairs of the IEBC is as provided for in the second schedule to the IEBC Act. The commission is also allowed to regulate its own procedure as provided for in Section 8 of the IEBC Act. The second schedule has been discussed elsewhere[175] in this study and it is clear that there are no firm guidelines on how decision making is to be done at the IEBC, how the commissioners are to supervise the secretariat and fundamentally, how the commissioners are to have access to management information so as to be in a position to provide effective guidance and direction to the organisation.

[171] The Elephant (n 19) 13 to 14.
[172] Assaf Hamdani and Reinier Kraakman, 'Rewarding outside directors' (2007) 105 (8) Michigan Law Review <https://www.jstor.org/stable/40041563> accessed 13th April 2020, 11.
[173] See part 3.2.1.2 in Chapter 3 of this thesis.
[174] Raila Amolo Odinga & another (n 15).
[175] See part 1.1 of this chapter.

The core principles of corporate governance are 'openness, integrity and accountability.'[176] From the literature reviewed, there are no mechanisms to ensure that commissioners have access to relevant information to enable them carry out their duties. It is also clear that there are no roles specifically reserved for management and for the commissioners, thereby causing tensions in the operations of the IEBC, further justifying the need for this study. In short, there is no effective corporate governance structure at the IEBC.

1.9 Limitations

This thesis limits its research to whether the IEBC has a corporate governance structure which demarcates the roles and responsibilities between the commissioners (the governing body) and the secretariat (management); and whether the corporate governance structure at the IEBC ensures that commissioners have access to relevant, timely, accurate and adequate information regarding the operations of the IEBC.

1.10 Hypothesis

This research proceeds on the assumption that demarcating the roles and responsibilities between commissioners and the secretariat; as well as ensuring commissioners have access to relevant, timely, accurate and adequate information regarding the operations of the IEBC will reduce tensions between the secretariat and commissioners thereby enabling them to perform their respective roles and responsibilities.

1.11 Assumptions

It is assumed that accessing the relevant decision makers at the IEBC, the State Law Office and Parliament will be problematic. Further, even if access is granted, it is assumed that the information received will be biased. As a result, this research will primarily be desk based.

1.12 Chapter breakdown

This thesis will have five (5) chapters broken down as follows:

Chapter 1 – Introduction

This chapter begins by laying out the parameters of the problem being researched. The objectives of the research are also discussed, as are the theoretical foundations that will underpin the research. The hypothesis that the paper will test is described in brief. Thereafter,

[176] The Committee on the Financial Aspects of Corporate Governance (n 100).

an outline of the sequence of chapters as well as a brief summary is set out. Finally, the chapter explains how the research informing this paper is to be conducted.

Chapter 2 – Historical Background of Electoral Management in Kenya

This chapter will deal with the historical background of electoral management in Kenya with specific emphasis on the management of electoral management bodies (EMBs). This chapter will also investigate whether there were any corporate governance structures in the electoral management bodies that have been established to conduct elections in Kenya from the colonial period to the present day. This endeavour will assist in demarcating, or at the very least, identifying when electoral management in Kenya began having problems.

Chapter 3 – The Failure of Corporate Governance at the IEBC

This chapter will trace the genesis of the corporate governance movement in Kenya and the developments which led to corporate governance being recognized and having a legal framework in Kenya. Corporate governance in state corporations as well as private sector efforts to provide for the enforcement of corporate governance in Kenya will also be discussed.

This chapter will also discuss the failings at the IEBC with respect to two aspects of corporate governance: the lack of demarcation of roles and responsibilities between the board and the secretariat; and the failure of the IEBC to ensure that commissioners have access to relevant, timely, accurate and adequate information on the operations of the IEBC.

Chapter 4 – Corporate Governance in Electoral Management Bodies: Lessons from Ghana, South Africa, and the United Kingdom

The corporate governance structures in the EMBs of these three countries will be discussed. The enabling legislation and the decision-making structures will be considered as well as how decision-making differs in the three bodies. Ultimate responsibility with regards to corporate governance will be also be interrogated. The focus will be on the lessons that the IEBC can learn from these EMBs.

Chapter 5 – Findings, Recommendations and Proposals for Reforms

This chapter will sum up the discussion in the preceding chapters. A conclusion will be made as to whether the hypothesis has been proven, as well as the lessons that the IEBC should adopt from the practice in the other electoral management bodies on strengthening its corporate governance structure.

CHAPTER 2 – HISTORICAL BACKGROUND OF ELECTORAL MANAGEMENT IN KENYA

2.1 Introduction

This chapter will deal with the historical background of electoral management in Kenya with specific emphasis on the management of electoral management bodies (EMBs). This chapter will also investigate whether there were any corporate governance structures in the electoral management bodies that have been established to conduct elections in Kenya from the colonial period to the present day. This endeavor will assist in demarcating, or at the very least, identifying when electoral management in Kenya began having problems.

2.2 Electoral management in the colonial period

There was no shortage of political activity in Kenya before independence. From Eliud Mathu's nomination as the first African member of the legislative council in 1944[177] to the formation of KAU, (Kenya African Union) in the same year, and later in 1960 when KANU (Kenya African National Union) and KADU (Kenya African Democratic Union) were formed, there was vigorous political activity aimed at gaining independence for Kenya.[178]

Despite this vigorous political activity, there is very little literature or analysis relating to the administration and management of elections in the colonial period.[179] The focus during this period was on 'the restriction of franchise and limits on political rights including controls of political parties.'[180] This is not to say that the colonial state did not have any influence in elections. The colonial state used state machinery to protect its own interests and ensure that the influence of those who were vocal in dissenting with the colonial state was minimised.[181] This was done by using the provincial administration to register voters, nominate candidates and police campaigns.[182] The pre-independence management of elections was therefore

[177] Daily Nation, 'Key Dates in Kenya's History' (2013) <https://mobile.nation.co.ke/news/Key-dates-in-Kenya-history/1950946-2108572-format-xhtml-q9rdqo/index.html> accessed 13th September 2019.

[178] Wunyabari Maloba, 'Nationalism and Decolonization 1947-1963' in William Ochieng (ed) *A Modern History of Kenya – 1895-1980* (Evans Brothers Limited 1989) 185.

[179] Felix Odhiambo Owuor, 'Reforming Elections Management and Administration in Kenya: The case for the Independent Electoral and Boundaries Commission (IEBC)' (LLM Thesis, University of Nairobi 2016) <http://erepository.uonbi.ac.ke/handle/11295/97538> accessed 25th June 2020, 65.

[180] ibid.

[181] Daniel Branch, 'Loyalists, Mau, and Elections in Kenya: The First Triumph of the System, 1957-1958' (2006) 53 (2) Africa Today <https://www.jstor.org/stable/4187771?seq=1#page_scan_tab_contents> accessed 13th September 2019, 4.

[182] ibid.

managed and administered by the state through the supervisor of elections[183] and was not in the control of an independent body.

Apart from the foregoing, there is scarce literature on how elections were carried out in the colonial period and it is therefore not possible to comment on how governance issues were addressed as there was no electoral management body. However, since the colonial state influenced the outcome of elections,[184] we can conclude that the organizational structures at the supervisor of elections were designed to ensure a pre-determined outcome.

2.3 Electoral management under the 1963 independence Constitution

The independence Constitution of Kenya was published in the Kenya Gazette and came into effect on 10th December 1963. Section 48 of the independence Constitution provided for the establishment of an Independent Electoral Commission of Kenya. This commission consisted of the speakers of the two houses of the National Assembly, and a nominee of the Prime Minister and each regional president.

Pursuant to Section 48 (8) of this Constitution, the commission was not subject to the direction or control of any person or authority in the exercise of its functions, technically preserving its independence. Section 48 (9) provided that the commission could, by regulation or otherwise, regulate its own procedure. The commission could also confer its powers on any officer or authority for the purpose of discharging its functions. Section 48 (10) of the Constitution also allowed the commission to act, notwithstanding any vacancy in its membership, provided that any decision of the commission would require the concurrence of a majority of all its members.

From the literature reviewed, it appears that there was no substantive legislation that was enacted pursuant to Section 48 of the independence Constitution to make provision for the appointment and effective operation of the electoral commission. Save for Section 48 (9) and 48 (10), there is also scarce literature on the governance structure of the independence electoral commission. It is therefore not possible to assess how, in actual fact, decisions were made and whether there were any tensions in the decision-making process and exercise of power at the commission. However, as the governments of both presidents Kenyatta and Moi deployed the powers of the state to secure their own interests,[185] with such overbearing exercise of state

[183] Christopher Mulei, 'Historical Perspectives of Elections in Kenya' in Institute for Education in Democracy, *The Electoral Environment in Kenya: A Research Project Report* (IED 1998) 24.
[184] Daniel Branch (n 181).
[185] Daniel Branch (n 181).

power, it is clear that governance issues were not given much prominence in the operations of the independence commission.

2.4 Electoral management under the 1969 Constitution

On 18th April 1969, a revised Constitution was published which brought together all of the amendments[186] made to the Constitution since independence.[187] Prior to the enactment of the eleventh amendment,[188] the Constitution of Kenya was contained in twelve different documents.[189] The eleventh amendment was intended to bring all these documents together and to reproduce the Constitution in a revised form.

In as much as an entirely new Constitution was not promulgated in 1969, for ease of reference, we will consider electoral management from the provisions of the Constitution published in 1969.

Section 41 (1) of this Constitution provided for the establishment of an electoral commission which would consist of a chairman and not less than four members appointed by the president. Appointments were made for five-year periods and dismissal before then could take place only through a procedure similar to that of dismissal of judges to ensure that the commission did its job fairly and honestly.[190] This security of tenure was intended to ensure independence in decision making which, unfortunately, did not ensue.

Section 41 (9) provided that the commission would not be subject to the direction of any other person or authority. Section 41 (10) provided that the commission would regulate its own procedure and, with the consent of the President, could confer powers or impose duties on any public authority for the purpose of the discharge of its functions.

Kenyan elections, even under one party rule, have always been hotly contested and there are inevitably accusations of rigging and unfairness in the electoral process.[191] Before 1992, elections were conducted under the one party regime, while after 1992, elections were

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[186] The amendments to the Constitution of Kenya from 1963 to 2019 can be retrieved from <http://kenyalaw.org/kl/index.php?id=9631> accessed 16th September 2019.

[187] Githu Muigai, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997) A Study of the Politics of the Constitution' (PhD Thesis, University of Nairobi 2001) <http://erepository.uonbi.ac.ke/handle/11295/15784?show=full> accessed 25th June 2020, 158.

[188] Constitution of Kenya (Amendment) Act No 5 of 1969.

[189] ibid.

[190] Y. P. Ghai & J. P. W. B McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford University Press 1970) 324.

[191] Peter Wanyande, 'Electoral Politics and Election Outcomes in Kenya' (2006) 31 (3) Africa Development <https://www.ajol.info/index.php/ad/article/download/135771/125268> accessed 16th September 2019, 64.

conducted under a multiparty regime.[192] It was indeed remarkable that Kenya held so many elections, leading pro-establishment politicians to argue that the regularity of elections was proof that Kenya was a democratic country, regardless of whether the elections were free or fair.[193]

Despite the intention of constitutionalizing the electoral commission and vesting it with the mandate of organizing the elections, the government continued to play an important role.[194] By 1969, most of the functions of the electoral commission 'were taken over by the supervisor of elections that was an office under the Attorney General.'[195] This government interference in elections was, arguably, made easier by the lack of corporate governance at the institution as the government used the electoral process for its own political interests, such as rewarding cronies and punishing disloyalty.[196]

The National Assembly and Presidential Elections Act (NAPE),[197] was passed in 1969 and its commencement date was 21st August 1969. The third schedule of this Act provided for the proceedings of the electoral commission where the commission was empowered to regulate its own proceedings. NAPE did not specifically detail the roles of the commissioners and the roles of the secretariat.

It was not until 1997 that the Electoral Commission of Kenya (ECK) was reconstituted with 21 commissioners,[198] 10 of them nominated by opposition political parties represented in Parliament under the Inter Party Parliamentary Group (IPPG) agreement of 1997.[199] Apart from this amendment, and from the provisions of Section 42A of the Constitution that provided for the responsibilities of the electoral commission with regards to conducting the elections, there were no statutory provisions detailing how the commission was to exercise its powers in the conduct of its core mandate.

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192 Constitution of Kenya (Amendment) Act No. 12 of 1991 repealed Section 2A of the Constitution, returning Kenya to a multi-party regime after the 1992 elections.

193 Peter Wanyande (n 191) 66.

194 Y. P. Ghai & J. P. W. B McAuslan (n 190) 325.

195 Peter Wanyande (n 191) 66.

196 Westen K. Shilaho, 'I do not know who won the elections: How not to conduct elections and Kenya's democratic reversals' (2014) 33 (3) Politeia <https://upjournals.co.za/index.php/Politeia/article/view/3274/1732> accessed 16th September 2019, 2.

197 Chapter 7 of the Laws of Kenya.

198 Constitution of Kenya (Amendment) Act No 9 of 1997.

199 Committee of Eminent Persons, 'Report of the Committee of Eminent Persons on the Constitution Review Process' (2006) <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Committee-of-Eminent-Persons-on-the-Constitution-Review-Process.pdf> accessed 20th September 2019, 16.

Vide Constitutional Amendment Act No. 10 of 2008, the Electoral Commission of Kenya was replaced by the Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundaries Review Commission (IIBRC) charged with electoral management and boundary delimitation respectively. The disbandment of the ECK came about from the aftermath of the post-election violence in 2007-2008 that necessitated the need for electoral reforms.[200]

The IIEC is credited with conducting the 2010 referendum,[201] which led to the passage and enactment of the 2010 Constitution. Notwithstanding this positive result, neither the corporate governance structures of the IIEC nor the IIBRC have been documented and there is scarce information that would enable interrogation of how decisions were made. Furthermore, NAPE did not specifically detail the roles of the commissioners and the roles of the secretariat. It can therefore be safely concluded that electoral management under the 1969 Constitution was not consistent with the pillars of corporate governance being discussed in this study.

2.5 Electoral management under the 2010 Constitution

Section 17A of the National Assembly and Presidential Elections Act (NAPE), provided that the then Electoral Commission of Kenya, as established under Section 41 of the repealed 1969 constitution, was to have overall conduct of elections under that Act. The third schedule of NAPE provided for the proceedings of the ECK with regards to how the ECK would go about conducting its business. NAPE was repealed by the Elections Act, No 24 of 2011.

The third schedule of NAPE was remarkably similar to the second schedule of the IEBC Act which has been discussed elsewhere in this study.[202] From a reading of the two schedules, it is clear that the drafters of the IEBC Act did not give much thought to the corporate governance structure of the IEBC. It appears that the conduct and regulation of the operation and affairs of the IEBC would follow the same "business as usual" route which had characterised previous electoral management bodies in Kenya.

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200 Independent Review Commission (n 10).

201 Standard Online, 'IIEC publishes final referendum results' (2010) <https://www.standardmedia.co.ke/article/2000016601/iiec-publishes-final-referendum-results> accessed 14th September 2019.

202 See chapter 1 of this study.

2.6 Conclusion

From the discussion on the corporate governance structures, or lack thereof, of the preceding electoral management bodies, it is clear that corporate governance of EMBs in Kenya has not been considered a crucial topic by the legislature and the relevant stakeholders.

This entire study focuses on the corporate governance structure of the IEBC as established under the 2010 constitution and under the relevant statutory provisions. It will be demonstrated in due course that there is no adequate corporate governance structure at the IEBC, which compounds the problems associated with how power is exercised at the IEBC. Resolving this problem will be crucial given the winner take all nature of Kenyan politics and the potentially disastrous effects of having another botched election in the country.[203]

[203] Independent Review Commission (n 10) 10.

CHAPTER 3 – THE FAILURE OF CORPORATE GOVERNANCE AT THE IEBC

3.1 Introduction

This chapter will trace the genesis of the corporate governance movement in Kenya and the developments which led to corporate governance being recognized and having a legal framework in Kenya. Corporate governance in state corporations as well as private sector efforts to provide for the enforcement of corporate governance in Kenya will be discussed.

This chapter will also discuss the failings at the IEBC with respect to two aspects of corporate governance: the lack of demarcation of roles and responsibilities between the board and the secretariat; and the failure of the IEBC to ensure that commissioners have access to relevant, timely, accurate and adequate information on the operations of the IEBC.

Corporate governance, being 'the system by which companies are directed and controlled'[204] has to be distinguished from the day to day operational management by full time executives.[205] Consideration will now be given to how corporate governance has evolved in Kenya over the years.

3.1.1 Corporate governance in the private sector

In Kenya, the development of corporate governance began in earnest in the late 1990's, a period during which the lack of accountability and inefficiency in the public sector was 'compounded by the lack of a corporate governance framework.'[206] The situation in the private sector was no better. For instance, the family owned and managed stockbrokers who traded on the Nairobi Stock Exchange (NSE) 'were mainly interested in making their businesses thrive and they were not overly concerned with regulation.'[207] This *laissez faire* approach continued, even with the establishment and subsequent inauguration of the Capital Markets Authority (CMA) in 1990[208] while efforts were made by the Kenyan government to improve ethics and governance so as to attract foreign direct investment.[209]

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[204] The Committee on the Financial Aspects of Corporate Governance (n 100) 14.

[205] Financial Reporting Council (n 115) 5.

[206] Jacob Gakeri, 'Enhancing Kenya's Securities Markets through Corporate Governance: Challenges and Opportunities' (2013) 3 (6) International Journal of Humanities and Social Science <http://www.ijhssnet.com/journals/Vol_3_No_6_Special_Issue_March_2013/11.pdf> accessed 15th May 2019, 104.

[207] ibid 97.

[208] ibid.

[209] Benjamin Mwanzia Mulili and Dr Peter Wong, 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) 2 (1) International Journal of Business Administration <http://www.sciedu.ca/journal/index.php/ijba/article/view/37/42> accessed 15th May 2019, 9.

Failure to entrench corporate governance in Kenya led to private sector efforts to develop a code for best practice for corporate governance in Kenya. Through several workshops in 1998, efforts by the Private Sector Corporate Governance Trust eventually resulted in the first draft of the code of best practice for corporate governance being produced and distributed.[210] More seminars and workshops to develop this code were held in 1999,[211] which efforts eventually led to a code being developed and circulated as a guide for corporate governance in Kenya.[212] In 2002, the Capital Market Authority (CMA) promulgated the guidelines on principles of corporate governance for public listed companies.[213]

> The 2002 guidelines were divided into two parts: principles of good corporate governance; and recommended best practices in corporate governance. The principles of good corporate governance revolve around guidelines governing directors, the chairman, the chief executive, shareholders, audit and accountability and general practices; while the recommended best practices revolve around best practices relating to the board of directors, chairman and chief executive, shareholders, conducting general meetings, and accountability and the role of audit committees.[214]

The 2002 guidelines were replaced by the 2015 code which 'applies to all companies that issue both debt and equity securities to the public, regardless of whether or not they are listed.'[215] Through the 2015 Code, the CMA advocates 'the adoption of standards of governance that go beyond the minimum standards set in legislation, including in the Companies Act, 2015.'[216] The 2015 Code is based on an 'apply or explain' principle which recognizes that no single set of rules can be applicable to all types of companies and allows flexibility in the decision making process.[217] The 2015 code will therefore offer crucial lessons in strengthening corporate

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210 Private Sector Initiative for Corporate Governance (n 119) 2.
211 Rita Ruparelia and Amos Njuguna (n 140) 155.
212 Rita Ruparelia and Amos Njuguna (n 140) 155.
213 Gazette Notice No 3362 of 14th May 2002 - Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya.
214 ibid.
215 Gazette Notice Number 1420 of 15th December 2015 - Code of Corporate Governance Practices for the Issuers of Securities to the Public 2015.
216 Michira Mweti, 'Kenya's Corporate Governance Practices Code, 2015' (2016) <http://www.bowmanslaw.com/insights/finance/kenyas-corporate-governance-practices-code-2015/> accessed 15th May 2019.
217 Capital Markets Authority, 'New Corporate Governance Code For Listed Companies And Guidelines On Prevention Of Money Laundering And Terrorism Financing In Capital Markets Gazetted' (2016) <https://www.cma.or.ke/index.php?option=com_content&view=article&id=178:new-corporate-governance-code-for-listed-companies-and-guidelines-on-prevention-of-money-laundering-and-terrorism-financing-in-capital-markets-gazetted&catid=12&Itemid=207> accessed 15th May 2019.

governance at the IEBC, with the obvious amendments to take into account the political climate the IEBC operates under, as well as the fact that the IEBC is not a commercial enterprise.

In recent days, 'the way companies are governed has become more important than the way they are managed'[218] and in an effort to increase investments into the country and to scale up the ease of doing business rankings, Kenya embarked on its transition to modern company law with the enactment of the 2015 Companies Act, an enormous piece of legislation running into 1,026 sections captured in more than 1600 pages. Admittedly, the Companies Act is a statute that is relevant primarily in the private sphere of commerce and industry.

Of interest to the IEBC is that in the new statute, the duties of directors that were previously codified in common law have now been explicitly provided for in statute. This is important for the IEBC as currently, there are no clear roles and functions for commissioners. Division 3 of the Kenyan Companies Act, 2015 provides for the duties that directors owe to their companies. These duties are, *inter alia*, the duty of a director to exercise independent judgment; to promote the success of the company, to exercise reasonable care, skill and diligence, and the duty to avoid conflicts of interest.

Regarding banks, the Central Bank of Kenya issued prudential guidelines[219] in January 2013, which specifically provide for corporate governance. The guidelines contain fourteen corporate governance principles, which are to be adhered to by all institutions licensed under the Banking Act. For instance, principle 3 provides that the **board has overall responsibility for the bank as well as providing oversight of senior management**. Concerning senior management, principle 7 requires the board to ensure that they ably direct senior management in their day to day functions, highlighting the critical role directors provide in a bank. The Banking Act also provides penalties should any person fail to comply with the directions of the CBK.

Corporate governance is taken very seriously by the Central Bank of Kenya as banking failures affect a large portion of the population with depositors funds at risk. A recent corporate failure in the banking sector has been Imperial Bank Limited that was placed under receivership by the Central Bank of Kenya on 13th October 2015.[220] This receivership is unique as allegedly,

[218] Bob Tricker (n 1) 40.

[219] Central Bank of Kenya, 'Prudential Guidelines for Institutions Licensed under the Banking Act' (2013) <https://www.centralbank.go.ke/wp-content/uploads/2016/08/PRUDENTIAL-GUIDELINES.pdf> accessed 21st July 2019, 34.

[220] Central Bank of Kenya, 'Press Release – Imperial Bank Limited' (2015) <https://www.centralbank.go.ke//images/docs/media/Press%20Releases/Press_Release_-_Imperial_Bank.pdf> accessed 11th July 2019.

the former managing director of Imperial bank had, for many years, authorised irregular disbursements of vast amounts of money which had been concealed from the board.[221] Upon finding out this scheme, the board notified the Central Bank of Kenya, which almost immediately, appointed the Kenya Deposit Insurance Corporation as the receiver of the bank.[222]

The receiver of the bank filed suit[223] against its shareholders and former directors, claiming, *inter alia*, that the directors and shareholders had breached numerous principles as detailed in the CBK prudential guidelines, which led to the loss of more than Kshs 38 billion of depositors funds. The directors and shareholders proceeded to file a counterclaim where, *inter alia*, they blame senior management of the bank for being responsible for the systemic fraud perpetrated in the bank.[224] In essence, in this case, the directors of Imperial Bank are blaming management for the losses suffered which, in itself, is quite surprising as it is the board that has overall responsibility for the bank.

At the time of writing, the judgment in this case had not been delivered. However, this case will be a landmark decision on corporate governance on whether directors can be held personally liable, and to what extent, in the event that they do not comply with corporate governance guidelines. In addition, the case will also be important to ascertain whether directors ought to do more to obtain information about the operations of the company from management. Criminal liability for directors is rather stringent though as Section 282 of the Penal Code provides for imprisonment for seven years for directors who steal the property of the company. Section 328 of the Penal Code provides that a director who is found guilty of fraudulent appropriation or accounting is liable for imprisonment for seven years. Lastly, section 329 of the Penal Code provides that a director who makes false statements with intent to defraud any member of the company is guilty of a felony and is liable for imprisonment for 7 years. The Penal Code therefore has very harsh consequences for a director who abuses his position.

These provisions are important to remind directors of the sacrosanct nature of the position they hold and the consequences which would follow for breaching the trust bestowed on them.

221 Capital Markets Authority –v- Alnashir Popat & 8 others [2019] eKLR.
222 ibid.
223 HCCC 392 of 2016 – Imperial Bank Limited (In receivership) and 2 Others –v- Alnashir Popat and Others.
224 Imperial Bank Limited (In Receivership) & 2 others -v- Alnashir Popat & 17 others [2017] eKLR, 8.

These provisions buttress corporate governance as they temper the exercise of power by directors to avoid criminal consequences.

In conclusion, corporate governance in the above sectors of the private sector is very well defined and there are penalties where directors fail to comply. These are some of the lessons to be learnt by the IEBC.

3.1.2 Corporate governance in state corporations

Directors of parastatals face an added hindrance to the effective performance of their duties as, being political appointees, 'directors were required to accede to political interests that may not have been in the interest of the parastatal.'[225] Perhaps as a realisation of this ineffectiveness, the State Corporations Advisory Committee, (SCAC) developed Mwongozo[226] which, *inter alia*, addresses matters of effectiveness of boards, transparency, disclosure and accountability.[227]

Given the impact which state corporations have in Kenya and the budgetary allocations which they control, in some years, almost a quarter of the entire national budget,[228] it was therefore incumbent on the government to ensure that good corporate governance principles are also applied in such parastatals. The development of the various corporate governance codes discussed above have therefore been validated by the government that has seen their vital importance in the management of state corporations.

However, Mwongozo does not envisage a situation where the directors of the parastatal do not fully implement the tenets of the code. This is in stark contrast to Section 769 (1) of the Companies Act, 2015, which makes it an offence for directors to fail to establish an audit committee in the company. This is significant as the audit committee is required to set out the corporate governance principles applicable in the company, and ensure their observance as set out in Section 770 of the Companies Act. This omission in Mwongozo should be rectified to strengthen corporate governance in parastatals.

The State Corporations Act is also relevant when discussing corporate governance in state corporations. Section 6 of this Act provides that the board of a state corporation shall consist

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[225] Kiarie Mwaura, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya' (n 68) 15.
[226] State Corporations Advisory Committee (n 39).
[227] ibid.
[228] Institute of Economic Affairs, 'Budget Analysis 2018' (2018) <https://www.ieakenya.or.ke/downloads.php?page=1529658599.pdf> accessed 20th July 2019, 6.

of a chairman appointed by the president, a chief executive officer, among other members. Section 8 provides for meetings and procedures of the board while section 9 provides for the establishment of committees consisting of members to deal with such matters as the board may specify.

It is also important to consider the State Corporations (Performance Contracting) Regulations, 2004[229] which explicitly provides at regulation 4 (2) (b) that the board of directors is responsible for recruitment of staff, including the chief executive of the state corporation. Regulation 4 (2) (f) also mandates the board to enter into and implement performance contracts with the chief executive of the state corporation. The regulations do not explicitly state that the board can terminate the employment of the chief executive. However, the High Court[230] confirmed that the board is the best placed body to recruit members of staff including the chief executive officer, and even the minister responsible must defer to the decision of the board in matters appointment.

It is therefore clear that the board of a parastatal has immense power and can terminate the employment of a chief executive whose performance is wanting. This is a vital tool in corporate governance to enable the board carry out its singular role of being responsible for the decisions of the organisation and for its performance.[231]

3.1.3 The 2010 Constitution of Kenya

Article 10 of the Constitution of Kenya provides that the national values and principles of governance bind all state organs, state officers and public officers. These national values and principles of governance, as per Article 10 (2) (c), include good governance, integrity, transparency and accountability. In the conduct of its operations, the IEBC is therefore mandated to ensure that good governance, integrity, transparency and accountably are applied in all of its functions.

The Constitution, by itself, does not detail how the values and principles of good governance are to be applied. Therefore, the provisions of other statutes become relevant to ensure the realisation of the constitutional principles. In this case, with respect to corporate governance and being a corporate entity, the provisions of the 2015 Companies Act are relevant and should be applied to ensure that the IEBC complies with the foregoing constitutional provisions.

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[229] Legal Notice No 93 of 2004.

[230] Republic –v- Attorney General and 2 others *exparte* the Consumers Federation of Kenya (2012) eKLR.

[231] Bob Tricker (n 1) 4.

3.2 The failure of corporate governance at the IEBC

In this section, the author summarises the failures of the corporate governance structure at the IEBC taking into account the literature reviewed so far, the legal framework discussed in this chapter, as well as identifying whether the IEBC complies with the core pillars of corporate governance. The core principles or pillars of corporate governance have been discussed in chapter 1.8.1 of this study and we need not go into great length on the specifics. It is abundantly clear that the IEBC fails miserably and does not meet any one of the core pillars of corporate governance.[232]

In addition, being a constitutional commission, the IEBC is held to a higher standard than other mere corporate entities. In this regard, chapter 6 of the Constitution on leadership and integrity is vital to decision making and the governance structure of the IEBC and the next section will illustrate the importance of compliance with the articles detailed in chapter 6 of the Constitution. Integrity is of the utmost importance at the IEBC and failure to adhere to these values has immense consequences as will be discussed in due course.

3.2.1 No demarcation of roles and responsibilities between commissioners and the secretariat

Chapter 1.1 of this study considered at length how there is no demarcation of the roles and responsibilities between the commissioners and the secretariat. By way of summary, from the evidence of insiders at the IEBC, the provisions of the IEBC Act, and as seen from the strategic plan published by the IEBC,[233] there are no clear demarcations on which roles are reserved for commissioners and which roles are the exclusive domain of the secretariat.

The attempt made in the second schedule to the IEBC Act to prescribe how the affairs of the IEBC should be run is woefully deficient on details and it lacks the key aspects of decision making as detailed by the International Institute for Democracy and Electoral Assistance.[234] This results in tensions between these two organs of the IEBC, thereby hindering effective decision making at the IEBC.[235]

It was also demonstrated in chapter 1.8 of this study that the chairperson and the commissioners occupy full time positions at the IEBC, thereby making it difficult to separate the oversight

[232] Private Sector Initiative for Corporate Governance (n 119) 3-4.
[233] Independent Electoral and Boundaries Commission (n 23).
[234] International Institute for Democracy and Electoral Assistance (n 7) 123.
[235] See chapter 1.1 of this study, especially the statements by Dr Akombe, Mr Chiloba and Carol Musyoka.

functions of the commissioners, from the daily, full time executive roles that commissioners perform.[236] This dual role further compounds the governance problem at the IEBC.

3.2.1.1 Lack of oversight over management

The lack of demarcation of roles in the IEBC and its predecessors in title also ensures that there is no oversight over the secretariat. To illustrate this, we begin with corporate governance failures at the Electoral Commission of Kenya (ECK) that was disbanded after the 2007 elections. As an Africog study shows, 'between 1991 and 2007, the ECK received Kshs 15.8 billion to run elections.'[237] The report merits extensive quotation:

> Of this amount, 1.9 billion was paid out to commissioners in irregular payments and allowances and imprests not accounted for. Yet huge as those amounts are, they are nothing compared to the wastefulness of the Interim Independent Electoral Commission (IIEC) and the Independent Electoral and Boundaries Commission (IEBC) since 2008….In this first procurement scam, senior officials of the IEBC were paid handsome kickbacks by Smith and Ouzman, a UK-based security printer from whom they had contracted to buy electoral materials. …**But 'chickengate' was nothing compared to the wanton procurement corruption perpetrated by the new electoral commission, the IEBC, in 2013. Every item bought for that election was bought corruptly**.[238]

When the parties who participated in the 2013 tender challenged the procurement at the Public Procurement Administrative Review Board, (PPARB), the board held that it would have cancelled the contract were the election not so close.[239] In the board's view, the IEBC was using public interest as a defence to justify its wanton breaches of procurement law.[240] Strong oversight would have ensured that such a critical function of the IEBC was not carried out in brazen contravention of procurement laws.

The National Assembly has also pointed out the failure of corporate governance at the IEBC. In its report while scrutinising the financial statements of the IEBC, the Public Accounts Committee of the National Assembly found that 'there were instances of outright conflict in

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236 Carol Musyoka (n 32).
237 Africog (n 22).
238 Africog (n 22).
239 Africog (n 22). See also Public Procurement Administrative Review Board decision in Review No. 59/2012 of 19th November 2012, No. 61/2012 of the 20th of November 2012 and No. 62/2012 of the 21st of November 2012; Avante International Technology Inc and Others –v- IEBC (2012) <http://ppra.go.ke/arb-decisions/#> accessed 21st September 2019, 63.
240 ibid.

the functions of the CEO and that of the chairman of IEBC and that the conflicts arose mainly on procurement of election materials.'[241] This is not surprising given the amounts involved in such procurement contracts and from what the AfriCOG report showed. In 2019, the National Assembly recommended that the legal framework for the IEBC should be strengthened to

> take into account the recommendations of the Kriegler Commission so as to resolve tension between the offices of the chairman and the CEO by having their functions clearly spelt out and accountability appropriately assigned.[242]

With such findings by competent authorities of the state and with such firm recommendations by the National Assembly of the Republic of Kenya, it is indeed surprising that these recommendations have never been implemented.

3.2.1.2 Diffusion of responsibility at the IEBC

In the presidential election petition in 2017, the IEBC was castigated by the Supreme Court for having a systemic institutional problem.[243] In Chapter 1 of this study, it became clear that if there was a proper governing body at the IEBC, and if the commissioners adequately supervised management as opposed to being part of the executive structure of the IEBC, the institutional problems may have been identified and rectified.

In addition, within the current structure of the IEBC, it is difficult to pinpoint which official is responsible for a particular task, confirming what the Supreme Court found in the Raila Odinga case, that they were unable to find specific fingerprints of individuals who played a role in commission of illegalities during the nullified 2017 elections.[244] The phrase diffusion of responsibility[245] which has been discussed at length in part 1.8.2 of this study aptly describes the systemic organizational problem subsisting at the IEBC as no official is willing to take responsibility for the failures at the commission.

3.2.2 Inability of commissioners to access relevant, timely, accurate and adequate information

Management is supposed to provide information on the company's operations to board members for directors to make informed decisions.[246] It is important to remember what Dr

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241 The National Assembly (n 14).
242 ibid.
243 Raila Amolo Odinga & another (n 15).
244 ibid 85.
245 Erica Beecher (n 150).
246 Alex Baum, David F. Larcker, Brian Tayan, and Jacob Welch (n 26).

Akombe wrote about the frustrations of commissioners where she argued that there was a deliberate attempt to ensure commissioners simply endorsed secretariat decisions by denying commissioners relevant information, and also being rebuffed by the CEO and directors when they sought information on the workings of the organization.[247]

This demonstrates the complete failure by the IEBC to ensure that commissioners are adequately empowered to perform their duties as they cannot make decisions in the absence of the required relevant information. Arguably, as was demonstrated in the Africog report, this may be deliberate so that there is no scrutiny in matters such as procurement where there is evidence of massive corruption at the IEBC.[248]

3.3 Failure to comply with the pillars of corporate governance

Of necessity, the board is required to be responsible and it must behave in a diligent manner.[249] In typical corporates, ensuring good corporate governance and monitoring the behaviour of directors is done by; *inter alia*, 'independent directors, shareholders, the capital market, the media and corporate governance codes.'[250] For purposes of the IEBC, there are no shareholders and the capital markets will be of no relevance. More importantly, there are no independent directors or commissioners who would be in a better position to monitor the activities of the board and secretariat. The lack of independent directors will have an impact on critical functions such has checking the autonomy given to the board.[251]

It is clearly evident from the literature being reviewed, 'the organisational characteristics of an electoral commission have a considerable bearing on the electoral process and on the results of that process.'[252] Issues such whether the commissioners are on good terms among themselves are all crucial issues that have a bearing on the electoral process.[253] The personality issues at play at the IEBC have been described in the background to this study.[254] Such issues can be

[247] The Elephant (n 19) 14-15.
[248] Africog (n 22).
[249] Lilian Miles and Zhong Zhang, 'Improving Corporate Governance in State-owned corporations in China: Which way forward?' (2006) 6 (1) Journal of Corporate Law Studies <https://www.tandfonline.com/doi/abs/10.1080/14735970.2006.11419951> accessed 17th April 2019, 222.
[250] ibid.
[251] Kiarie Mwaura, 'Constitutional Restructuring of Corporate Governance in State Owned Enterprises: Dynamism or Distraction?' (n 67) 6. See also David Vogel, 'The Corporation as Government: Challenges & Dilemmas' (1975) 8 (1) Polity <http://www.jstor.org/stable/3234345> accessed 18th April 2019, 17.
[252] Jørgen Elklit and Andrew Reynolds, 'The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda' (2000) Kellog Institute Working Paper 281 <https://kellogg.nd.edu/publications/workingpapers/WPS/281.pdf> accessed 24th December 2018, 6.
[253] ibid.
[254] See chapter 1.1 of this study.

tamed or their effects may be minimised with a strong corporate governance structure, which provides checks and balances to ensure that the organisation is properly run.

Unfortunately, in Kenya, while juxtaposed against issues such as rebuilding society[255] and constitutional reform,[256] corporate governance has not been considered as a big issue. It may be due to this reason that little has been written on the corporate governance structure of the IEBC, or indeed of other constitutional commissions in Kenya. The importance of resolving the corporate governance structure at the IEBC is therefore, a fundamental issue that needs to be addressed at the earliest.

The IEBC conducts its functions in the political sphere, where the main actors, politicians, have their own interests and objectives. However, out of necessity, these same politicians and other political stakeholders must be engaged to ensure that the IEBC has legitimacy and is seen as a professional electoral administration body.[257] The political history of Kenya and the extremely competitive nature and winner take all system in Kenyan elective politics demands that the electoral management body has put in place infrastructure that will produce credible results that are accurate and verifiable, and that can withstand the pressures from the political class who would want to advance their own objectives within the electoral management body.

All stakeholders must be engaged to ensure the development of a credible corporate governance structure at the IEBC. Even though in the past, the focus has been on reforming electoral systems to enhance representation, as this study aims to demonstrate, reforms to the body which organises and administers elections is also of equal importance.[258]

How power is exercised at the IEBC is of crucial importance in determining how elections will be organised and administered. Corporate governance reform at the IEBC, which is essentially reforming the machinery of organising and administering elections, is therefore of equal importance as reforming the other aspects of the Kenyan state. Through corporate governance reform, the board, or commissioners of the IEBC will be empowered to ensure that the institution is running in the right direction, and that the IEBC will organise and administer credible elections.

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[255] Sally Wheeler (n 48).
[256] David Machio (n 51).
[257] International Institute for Democracy and Electoral Assistance (n 7) 4.
[258] International Institute for Democracy and Electoral Assistance (n 7) 1.

From the statements by Dr Akombe,[259] Mr Chiloba[260] and Carol Musyoka,[261] it is clear that IEBC lacks a governing body and that there is no clarity in the roles between the secretariat (management) and the commissioners (the board). From the provisions of the IEBC Act and from the publications of the IEBC itself,[262] there are no clear demarcations on which roles are reserved for the commissioners and which roles are for the exclusive domain of the secretariat. This unique working arrangement makes it difficult for the IEBC to achieve its objectives in organising and running a credible election.

It is difficult for the commissioners of the IEBC to supervise the secretariat, when the commissioners themselves occupy full time positions, thereby blurring the lines between their executive functions and the oversight role they are supposed to play. It makes it difficult for the commissioners to formulate strategy, evaluate risk and put in place suitable measures to address, and mitigate such risks when they are involved in full time roles at the same institution.

If there was a proper governing body at the IEBC, if the commissioners adequately supervised management as opposed to being part of the executive structure of the IEBC, the institutional problems may have been identified and rectified. It is precisely for this reason that the board is ultimately responsible for managing risk and formulating strategy.[263]

It is extremely unfortunate that commissioners of the IEBC do not have timely access to relevant information that is in the possession of management[264] to enable the commissioners make informed decisions.[265] The lack of relevant and adequate information being relayed to the commissioners of the IEBC is one symptom of the IEBC having a systemic institutional problem.[266]

Electoral management bodies (EMBs) operate in a unique sphere. In certain countries, including Kenya, the EMB is explicitly provided for in the Constitution, the intention being to shield it from partisan political influence and interference when carrying out its functions.[267]

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[259] The Elephant (n 19) 13 to 14.
[260] Patrick Langat (n 2).
[261] Carol Musyoka (n 32).
[262] Independent Electoral and Boundaries Commission (n 23).
[263] Bob Tricker (n 1) 21.
[264] Alex Baum, David F. Larcker, Brian Tayan, and Jacob Welch (n 26).
[265] The Elephant (n 19) 13 to 14.
[266] The Elephant (n 19) 13 to 14.
[267] Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21 Review of Constitutional Studies <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2792626> accessed 12th April 2020, 87 to 88.

However noble the intention of constitutionalising the IEBC, interference has not been completely eliminated. Even though the IEBC is a constitutional commission, interference is evident as can be seen from the frustrations of the commissioners where they are hindered in the performance of their duties.[268] It is clear that for the IEBC, the typical principles of corporate governance would have to take into account the unique circumstances under which the IEBC operates. The Kenyan experience has demonstrated that the elevation of the IEBC to a constitutional commission did not resolve the governance challenges it faces.

Members of an electoral management body are similar to the board of a corporation and their role is to guide the direction of the EMB.[269] The role of commissioners is therefore to guide the direction of the IEBC. This guidance comes from the decisions that are made, having access to relevant and adequate information from the secretariat,[270] as well as the decision-making process that is followed at the IEBC.

There is no cogent research on the corporate governance structure at the IEBC. In his LLM thesis, Felix Odhiambo Owuor wrote about the parameters encompassing the organisational structure of the IEBC, one of which was the demarcation or the roles and responsibilities between the commission and the secretariat.[271] However, Mr Owuor does not delve into the corporate governance structure at the IEBC or indeed the demarcation of roles and responsibilities, a core issue that has caused tension at the IEBC.[272] This unfortunately confirms that corporate governance reform at the IEBC has not been focused on resolving fundamental issues which cause tensions between the commissioners and the secretariat and therefore fails to address the real issues affecting the IEBC.

This study concentrates on the corporate governance at the IEBC, an institution whose main stakeholders are the political class. The core business of the IEBC is, *inter alia*, to conduct elections and announce results. Politics is therefore at the heart of the IEBC, which in turn, affects its corporate governance structure. Politics in Kenya is unfortunately undertaken for the selfish primary goal of primitive accumulation of resources, mainly from public coffers.[273] Therefore, corporate governance at the IEBC has to be scrutinised with this mind-set, knowing

268 The Elephant (n 19) 14 to 15.
269 International Institute for Democracy and Electoral Assistance (n 7) 107.
270 Alex Baum, David F. Larcker, Brian Tayan, and Jacob Welch (n 26).
271 Felix Odhiambo Owuor (n 179).
272 See chapter 1.1 of this study.
273 Kiarie Mwaura, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya' (n 68) 7.

that the typical principles of corporate governance will have to be adjusted accordingly.

The legislature is composed of politicians who may have ensured that the IEBC lacks a credible corporate governance structure to enable them gain influence over the workings of the organisation. The same situation prevails in parastatals where directors, being political appointees, have not always acted in the best interest of the organisation due to political expediencies.[274]

In the case of the IEBC, the commissioners have executive roles and are unable to properly and effectively supervise the secretariat due to a myriad of factors such as lack of information from the secretariat or even being rebuffed by the CEO.[275] Most of the existing literature on corporate governance at the IEBC is both uninformative and naive[276] and fails to adequately describe the corporate governance structure at the IEBC, or indeed, make any attempt at demarcating the roles between the commissioners and secretariat. From the literature reviewed, there is no effective corporate governance system in place at the IEBC, and neither is there any cogent research on the subject.

3.4 Conclusion

It is clear that the journey to the publication of the corporate governance codes and guidelines discussed in this chapter was a long and tedious one. Gallant efforts have been made by the institutions mentioned to provide and advocate for the application of good corporate governance principles and best practices in Kenya. With regards to enforceability, clause 1.1.3 of the 2015 CMA code requires issuers to implement the code within one year of publication. In quoted companies, Section 770 of the Companies Act requires the establishment of an audit committee which is required, *inter alia*, to set out the corporate governance principles that are appropriate for the nature and scope of the company's business. It is only these two sections that provide a mandatory requirement for issuers and quoted companies to comply with corporate governance guidelines in Kenya. Private companies, if they are not issuers, are not mandated to comply with any form of corporate governance while state corporations only have to comply with Mwongozo.

Unfortunately, these gallant efforts seem not to have been appreciated and even adopted by the IEBC as its corporate governance structure is almost non-existent. As it is not a private

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[274] ibid 15.

[275] See chapter 1.1 of this study.

[276] Ismail Eturk, Julie Froud, Sukhdev Johal and Karel Williams (n 3) 680.

commercial enterprise, the IEBC is not legally mandated to comply with any corporate governance requirements. Section 8 of the IEBC Act requires the IEBC to comply with the provisions of the second schedule in the conduct of its affairs. However, as seen in chapter 1 of this study, the schedule is woefully deficient on how the IEBC is to regulate its own affairs,[277] let alone providing for details of how corporate governance is to be exercised at the institution.

In as much as the IEBC Act does not detail how governance, integrity, transparency and accountability are to be achieved, being a constitutional commission, the IEBC must comply with the provisions of Article 10 of the Constitution and Chapter 6 on leadership and integrity. However, the IEBC Act is silent on how governance issues are to be addressed. Strengthening corporate governance at the IEBC will require amendments to the IEBC Act to incorporate provisions similar to Section 770 of the Companies Act as well as having a code of corporate governance. We have seen how failures in complying with constitutional values of leadership and integrity led to massive corruption with regards to the procurement of election materials.[278] In the next chapter, we will look at how EMBs in select countries handle the issue of corporate governance.

[277] See chapter 1 of this study.
[278] Africog (n 22).

CHAPTER 4 - CORPORATE GOVERNANCE LESSONS FROM ELECTORAL MANAGEMENT BODIES IN GHANA, SOUTH AFRICA, AND THE UNITED KINGDOM

4.1 Introduction

In terms of organising elections on the African continent, few electoral management bodies can compete with the electoral commissions of Ghana and South Africa. The electoral commission of Ghana is widely regarded for the manner in which it carries out elections[279] while the independent electoral commission of South Africa has been rated as one of the best in Africa.[280] Concerning the UK electoral commission, from the research undertaken, it is the only electoral management body that has ensured that corporate governance is firmly entrenched in its organisational structure. As has been demonstrated in this study, corporate governance is crucial in the decision making process of any organisation. With regards to electoral management bodies, decision-making is all the more important given the destructive effects of disputes over the electoral process, especially on the African continent.[281]

It is with the foregoing reasons that this study will interrogate the corporate governance structures of the electoral management bodies in these three countries. The enabling legislation as well as how decision-making differs in the three bodies will be considered. Ultimate responsibility with regards to corporate governance will be also be discussed.

4.2 The Electoral Commission of Ghana

The Ghanaian Companies Act[282] is largely modelled on the English Companies Act of 1948,[283] and it specifies the requirements of corporate governance fundamentals in Ghana such as greater roles for the company's directors and an effective participation of the shareholders in company's affairs.[284] The Securities and Exchange Commission (SEC) of Ghana published

[279] Alexander K. D. Frempong, 'Innovations in Electoral Politics in Ghana's Fourth Republic: An Analysis' (2008) <http://biblioteca.clacso.edu.ar/clacso/sur-sur/20120321095139/12.fre.pdf> accessed 18th September 2019, 10.

[280] Corruption Watch, 'Electoral Integrity in Africa – why does it matter?' <https://www.corruptionwatch.org.za/electoral-integrity-africa-matter/> accessed 19th February 2020.

[281] George B. N. Ayittey (n 56).

[282] Act 179 of 1963.

[283] Olusegun Gabriel Adegbite, 'Corporate governance developments in Ghana: the past, the present and the future' (2012) 1 (2) Public and Municipal Finance <https://businessperspectives.org/images/pdf/applications/publishing/templates/article/assets/4290/pmf_2012_02_Adegbite.pdf> accessed 13th November 2019, 3.

[284] ibid 4.

corporate governance guidelines for use by listed companies.[285] However, enforcement of these guidelines has been a major challenge[286] as the guidelines are purely voluntary and compliance is minimal.[287] In 2018, the Bank of Ghana issued a corporate governance directive that applies to banks and other financial holding companies.[288] Under this directive, the board is specifically responsible for, *inter alia*, corporate governance, as well as providing oversight of senior management.[289]

With this brief background, we now consider corporate governance specifically at the Electoral Commission of Ghana. From a department in the ministry of local government in the 1950's and 1960's, to an electoral commission in the 1970's and 1980's, to an interim electoral commission in the 1990's until it was replaced in 1993 by a permanent electoral commission, there have been various bodies responsible for organising elections in Ghana.[290]

Article 43 (1) of the Constitution of Ghana establishes the Electoral Commission of Ghana ("ECG"). The ECG 'organizes, conducts and supervises all the elections and referenda and it has complete independence from the government.'[291] The ECG is composed of seven members, namely, a chairman, two deputy chairmen and four other members,[292] and it was established to, *inter alia*, deliver free and fair elections in Ghana, and to regulate the activities of political parties.[293]

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[285] World Bank, 'Report on Observance of Standards and Codes (ROSC)' (2010) <https://openknowledge.worldbank.org/bitstream/handle/10986/20448/908180ROSC0Box00Ghana0201000PUBLIC0.pdf?sequence=1&isAllowed=y> accessed 13th November 2019, 6.

[286] Otuo Agyemang Serebour, Emmanuel Aboagye, and Aaron Yao Ofoe Ahali, 'Prospects and Challenges of Corporate Governance in Ghana' (2013) 3 (5) International Journal of Scientific and Research Publications <http://www.ijsrp.org/research-paper-0513/ijsrp-p1717.pdf> accessed 13th November 2019, 7.

[287] World Bank (n 285).

[288] Bank of Ghana, 'Corporate Governance Directive 2018' (2018) <https://www.bog.gov.gh/wp-content/uploads/2019/09/CGD-Corporate-Governance-Directive-2018-Final-For-PublicationV1.1.pdf> accessed 19th February 2020.

[289] ibid 10.

[290] Shaheen Mozaffar, 'Patterns of Electoral Governance in Africa's Emerging Democracies' (2002) 23 (1) International Political Science Review <https://www.jstor.org/stable/1601412> accessed 24th November 2019, 10.

[291] Mamoudou Gazibo, 'The Forging of Institutional Autonomy: A Comparative Study of Electoral Management Commissions in Africa' (2006) 39 (3) Canadian Journal of Political Science <https://www.jstor.org/stable/25165995> accessed 24th November 2019, 10.

[292] Electoral Commission of Ghana, 'Structure of the EC' (2018) <http://www.ec.gov.gh/about/structure-of-the-ec.html> accessed 27th December 2018.

[293] Electoral Commission of Ghana, 'Ghana Strategic Plan 2016-2020' (2016) <https://new-ndpc-static1.s3.amazonaws.com/CACHES/PUBLICATIONS/2016/05/03/electoral-commission-ghana-strategic-plan-2016.pdf> accessed 30th June 2019, 11.

Article 51 of the Ghanaian Constitution empowers the electoral commission of Ghana to make regulations for the effective performance of its functions.[294] Apart from the Ghanaian Constitution, the Electoral Commission Act of 1993,[295] also provides for the establishment of the ECG. Of importance is the fact that **the chairman is the chief executive of the ECG** and he is to preside over every meeting.**[296]** As per Section 6 (6) of the Act, the commission is to regulate the procedure for the conduct of its meetings. All the members of the ECG are involved whenever important electoral and managerial decisions are to be taken.[297] However, the day-to-day management decisions are taken and executed by three executive members, namely, the chairman and the two deputy chairmen,[298] who are assisted in the administration of the ECG by a number of other directors and departmental heads.[299]

The chairman and the two deputies oversee the day-to-day administration of the ECG as required by law and they also have a number of administrative functions.[300] It is evident that there is no board at the ECG as the commissioners perform administrative functions without the benefit of having a leadership body above them.[301] Despite the lack of a board, the ECG is widely regarded in Ghana for the manner in which it carries out elections.[302] After the 1992 elections, the ECG reformed itself in order to 'gain legitimacy and public confidence in its activities.'[303] These reforms achieved their intended purpose 'as there is high acceptance of

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[294] E. Gyimah-Boadi, 'Modelling Success: Governance and Institution-Building in Africa: The Case of Ghana's Electoral Commission' (2007) <https://www.codesria.org/IMG/pdf/CDD_CDP__Electoral_Commission_Modelling_Success_-_Research_Report_Boadi_Gymah.pdf> accessed 30th June 2019, 9.

[295] Act 451 of the Laws of Ghana.

[296] United Nations Development Programme (n 133).

[297] E. Gyimah-Boadi (n 294) 14.

[298] E. Gyimah-Boadi (n 294) 14 -15.

[299] Frederich Ebert Stiftung, 'Ghana's Parliamentary and Presidential Elections 2004' (2005) <https://library.fes.de/pdf-files/bueros/ghana/03610.pdf> accessed 30th June 2019, 11.

[300] Emanuel Asante Kissi, 'Electoral Commission and Election Management in Ghana (1993-2008)' (Master of Philosophy Thesis, University of Ghana 2012) <http://ugspace.ug.edu.gh/bitstream/handle/123456789/5565/Emmanuel%20Asante%20Kissi_Electoral%20Commission%20and%20Election%20Management%20in%20Ghana%20%281993-2008%29_2012.pdf?sequence=1&isAllowed=y> accessed 30th June 2019, 72.

[301] Electoral Commission of Ghana, 'Ghana Strategic Plan 2016-2020' (n 293) 25.

[302] Alexander K. D. Frempong (n 279).

[303] Thomas P. Botchway and Abdul Hamid Kwarteng, 'Electoral Reforms and Democratic Consolidation in Ghana: An Analysis of the Role of the Electoral Commission in the Fourth Republic (1992-2016)' (2018) 5 (3) Asian Research Journal of Arts & Social Sciences <http://journalarjass.com/index.php/ARJASS/article/download/11365/20602> accessed 18th September 2019, 6.

election results in Ghana.'[304] The ECG understood that for the results to be credible and accepted, 'the most crucial role in the entire process belonged solely to the ECG.'[305]

In Ghana, there was a deliberate effort to learn from the mistakes of previous elections to ensure that those issues were addressed and did not affect future elections.[306] It is clear from the literature reviewed that the ECG is performing its functions to a high standard and it has achieved something rare in African elections: a high acceptance of election results.[307] This is indeed remarkable given that the ECG does not have a board to supervise the activities of management and neither does failure to comply with corporate governance guidelines attract any repercussions.[308]

We can see that the ECG does not comply with the first pillar of corporate governance as it does not have a body responsible for governance separate and independent of management. Despite this, the ECG is performing its duties to a very high standard. In addition, from the literature reviewed, the commissioners of the ECG do not appear to have any challenges in accessing relevant information regarding the operations of the ECG.

With respect to the issues under discussion in this study, the ECG does not face the same corporate governance challenges facing the Kenyan IEBC and it will therefore serve as a useful model from which the IEBC can derive useful lessons.

4.3 The Electoral Commission of South Africa

Initially published in 1994, the King Report is the 'definitive document on corporate governance in South Africa.'[309] The King report has been revised and the current version is the King IV report that was published in 2016.[310] The King IV report is explicit that:

[304] ibid.

[305] Alexander K. D. Frempong (n 279) 11.

[306] Ransford Edward Van Gyampo, 'The State of Electoral Reforms in Ghana' (2017) 52 (3) African Spectrum <https://journals.sub.uni-hamburg.de/giga/afsp/article/view/1081.html> accessed 18th September 2019, 3.

[307] Thomas P. Botchway and Abdul Hamid Kwarteng (n 303).

[308] Otuo Agyemang Serebour, Emmanuel Aboagye, and Aaron Yao Ofoe Ahali (n 286).

[309] G. J. Rossouw, A. van der Watt and D. P. Malan, 'Corporate Governance in South Africa' (2002) 37 (3) Journal of Business Ethics <https://www.jstor.org/stable/25074755?seq=1> accessed 13th November 2019, 9.

[310] Institute of Directors in Southern Africa NPC, 'King IV Report on Corporate Governance in South Africa 2016' (2016) <https://c.ymcdn.com/sites/iodsa.site-ym.com/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf> accessed 13th November 2019.

> The role of the governing body is to, *inter alia*, steer the organisation and set its strategic direction, on the basis of which management will develop the strategy, which is to be approved by the governing body.[311]

After its initial publication, the King report was 'redrafted to make it more easily accessible and relevant to all organisations regardless of size and irrespective of whether they are in the public and private sphere.'[312] Therefore, the King report simply talks of 'organisations and governing bodies, as opposed to companies and boards of directors.'[313]

In South Africa, the administration of elections has often been ignored by political parties and the media as being unimportant.[314] During the apartheid years, the Department of Home Affairs (DHA), a government ministry, had the responsibility for administering elections in South Africa.[315] After the end of apartheid in 1994, the Independent Electoral Commission Act[316] was passed establishing the Independent Electoral Commission (IEC) of South Africa.

The vision and the aim of the IEC is to strengthen constitutional democracy[317] and its commissioners are expected to be independent and impartial at all times.[318] It is with this in mind that an incident at the IEC in 2014 becomes relevant. In 2014, one of the members of staff became a whistle blower to reveal unethical conduct involving the then chief executive, which eventually led to the chief executive's resignation.[319] The conduct of the whistle blower symbolises an organisation where staff have the confidence of revealing suspected unethical conduct and they have the confidence of knowing that the said conduct will be investigated

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311 ibid.

312 Andrew West, 'Theorising South Africa's Corporate Governance' (2006) 68 (4) Journal of Business Ethics <https://www.jstor.org/stable/25123927> accessed 13th November 2019, 2.

313 ibid.

314 Kealeboga J Maphunye, 'Evaluating Election Management in South Africa's 2009 Elections' (2010) 9 (2) Journal of African Elections <https://journals.co.za/content/eisa_jae/9/2/EJC32498> accessed 10th November 2019, 60.

315 Vijay Padmanabhan, 'Democracy's Baby Blocks: South Africa's Electoral Commissions' (2002) 77 (4) New York University Law Review <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-77-4-Padmanabhan.pdf> accessed 11th November 2019, 7.

316 No 150 of 1993.

317 Constanze Bauer, 'The 1994 and 1999 Electoral Process/Systems: Promoting Democracy in South Africa' (2001) 6 (1) Africa Journal of Political Science <https://www.jstor.org/stable/23495262> accessed 19th September 2019, 10.

318 Co-operative for Research & Education, 'Representations to the Constitutional Court by the Co-operative for Research and Education on issues related to the establishment of the Electoral Commission' (1996) <http://www.justice.gov.za/legislation/constitution/history/CERTIF/OTH49.PDF> accessed 10th November 2019, 2.

319 Mcebisi Ndletyana, 'The IEC and the 2014 Elections: A Mark of Institutional Maturity?' (2015) 14 (1) Journal of African Elections <https://www.eisa.org.za/pdf/JAE14.1Ndletyana2.pdf> accessed 11th November 2019, 15.

impartially and without retribution.[320] This aspect of the governance structure of the electoral commission will be examined shortly.

Section 181 (1) (f) of the South African Constitution establishes the Electoral Commission of South Africa. Section 12 (1) of the Electoral Commission Act,[321] requires the commission to appoint a suitably qualified and experienced person as chief electoral officer. Under Section 12 (2), the chief electoral officer is the head of the administration of the commission. For the purposes of this study, the South African commission is similar to the Kenyan IEBC in terms of corporate structure as the chief executive officer is also the head of the administration at the commission.[322]

In its vision statement, the South African electoral commission has stated that it aims to strengthen institutional governance by, *inter alia*, delineating the powers, roles and functions between the commissioners and the administration.[323] This is indeed relevant to this study as the Kenyan IEBC is plagued by conflicts between the commissioners and the secretariat as there is no delineation of roles at the IEBC.[324]

In its annual report for 2018, the South African electoral commission provides that 'commissioners and the CEO of the electoral commission are responsible for corporate governance'[325] while 'the executive authority of the electoral commission is the chairperson of the commission.'[326] The CEO is appointed by the commission[327] which has also established a number of committees to advise it on the execution of its duties. These committees include the governance and ethics committee, the finance, risk and compliance committee among others.[328]

When compared to the Kenyan IEBC, the South African electoral commission is different as it specifically acknowledges that there should be delineation between the roles of the commissioners and the administration. From the literature reviewed, it does not appear that the

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320 ibid 16.

321 Act No 51 of 1996. This Act repealed the Independent Electoral Commission Act, Act 150 of 1993.

322 Independent Electoral and Boundaries Commission (n 23) 9.

323 South African Electoral Commission, 'Vision 2018' (2018) <https://www.elections.org.za/content/About-Us/Vision-2018-(PDF)/> accessed 30th June 2019, 13.

324 The National Assembly (n 14).

325 South African Electoral Commission, 'Annual Report' (2018) <https://www.elections.org.za/content/Documents/Annual-reports,-reports-and-strategic-documents/Annual-reports---IEC/2018-IEC-Annual-Report/> accessed 30th June 2019, 48.

326 Treasury Regulation 1.1 of the PFMA [Public Finance Management Act], Act No 1 of 1999.

327 South African Electoral Commission, 'Vision 2018' (n 323) 13.

328 South African Electoral Commission, 'Vision 2018' (n 323) 17.

South African commissioners have any challenges accessing information regarding the operations of the electoral commission. The South African electoral commission does not therefore suffer from the corporate governance challenges facing the IEBC and the IEBC may draw useful lessons from the governance structure of the South African commission.

4.4 The Electoral Commission of the United Kingdom

Historically, elections in the United Kingdom were carried out by the Home Office.[329] The ineffectiveness and lack of institutional memory at the Home Office[330] led to calls for the creation of an electoral commission in the United Kingdom.[331] The Committee on Standards in Public Life, established in October 1994, recommended for the establishment of an independent electoral commission[332] to advise Parliament and to have oversight of electoral administration.[333]

The electoral commission was eventually set up as a result of the passage of the Political Parties, Elections and Representations Act 2000[334] that established the commission as an independent body corporate.[335] The electoral commission provides support and guidance to locally appointed returning officers and election registration officers in each constituency as the election administration is decentralized and the commission does not have a direct role.[336]

The UK electoral commission has a corporate governance framework, which, *inter alia* 'demarcates the roles, responsibilities and code of conduct for commissioners, and the

329 Isobel White, 'The Electoral Commission' (2008) <https://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03127.pdf> accessed 11th November 2019, 2.

330 Peter Riddell and Catherine Haddon, 'Transitions: preparing for changes of government' (2009) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Transitions%20-%20preparing%20for%20changes%20to%20government.pdf> accessed 11th November 2019, 46.

331 Fifth Report of the Committee on Standards in Public Life, 'The Funding of Political Parties in the United Kingdom' (1998) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336870/5thInquiry_FullReport.pdf> accessed 11th November 2019, 152.

332 Committee on Standards of Public Life, 'Review of the Electoral Commission' (2007) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336902/11thReport_Summary.pdf> accessed 11th November 2019, 3.

333 Iain Mclean, 'The Jenkins Commission and the Implications of Electoral Reform for the UK Constitution' (1999) 34 (2) Government and Opposition <https://www.jstor.org/stable/44482820?seq=1#page_scan_tab_contents> accessed 11th November 2019, 15.

334 Isobel White (n 329).

335 Chapter 41, UK Public General Acts.

336 OSCE/ODIHIR Election Expert Team Final Report, 'United Kingdom Of Great Britain And Northern Ireland: General Election 7th May 2015' (2015) <https://www.osce.org/odihr/elections/uk/174081?download=true> accessed 11th November 2019, 4.

commission's business and delegated powers.'[337] The commissioners constitute the board and they monitor the performance of the commission.[338] The chair of the board has particular responsibilities for, *inter alia*, strategic leadership and corporate governance.[339] By approving the corporate governance framework, the board delegated to the chief executive all responsibility for the day-to-day management of the commission and this chief executive is also 'authorised to delegate matters to other commission staff, and those delegations are set out in an executive scheme of delegation that sets out the authority for various levels of staff and decision-making.'[340]

The corporate governance framework has reserved certain powers to the board, including corporate governance, strategy, corporate plans and budgets, and risk management.[341] Standing orders of the commission provide a procedural framework within which the commission discharges its business, and they also deal with the business of the commission, procedure at meetings of the board and any committees, delegation of powers, declaration of interests and standards of conduct.[342]

It is clear that the UK electoral commission does not face the same corporate governance challenges facing the IEBC. There is clarity in the demarcation of roles between the board and management and from the literature reviewed, it does not appear that there is any hindrance to sharing information between the commissioners and management.

4.5 Conclusion

In having a chairman who is the chief executive of the commission, the structure of the Ghanaian ECG is fundamentally different from the Kenyan electoral commission. However, this structure appears to have worked for Ghana as the ECG is widely respected on the African continent.[343] With regards to the South African electoral commission, it has put in place measures to delineate the powers, roles and functions between the commissioners and the administration. These measures have resulted in making the South African commission one of

[337] UK Electoral Commission, 'Electoral Commission Corporate Governance Framework' (2017) <https://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/227885/Corporate-Governance-Framework-March-2017-FOR-PUBLICATION.pdf> accessed 30th June 2019, 3.

[338] ibid 185.

[339] ibid 9.

[340] ibid 13.

[341] ibid 16.

[342] ibid 24.

[343] J Shola Omotola, 'The Electoral Commission of Ghana and the Administration of the 2012 Elections' (2013) 12 (2) Journal of African Elections <https://www.eisa.org.za/pdf/JAE12.2Omotola2.pdf> accessed 30th June 2019, 9.

the most trusted national institutions in South Africa.[344] Of additional importance is the fact that both the commissioners and the CEO of the South African commission are responsible for corporate governance.[345]

Lastly, the UK electoral commission has an elaborate corporate governance framework that details the roles and responsibilities of the board of the commission as well as the roles of the chief executive. There is also an executive scheme of delegation that sets out the authority for various levels of staff and decision-making. From the electoral management bodies studied so far, the UK commission is the only one with an elaborate corporate governance framework and an elaborate scheme of delegation.

In the Ghanaian ECG, there is no body separate from the management that is responsible for corporate governance as the chairman is also the chief executive of the ECG.[346] In South Africa, both the commissioners and the CEO of the electoral commission are responsible for corporate governance,[347] while in the UK, corporate governance is specifically reserved for board of the commission.[348]

In terms of strict compliance with the first pillar of corporate governance,[349] the Ghanaian ECG does not comply at all, the UK Commission complies fully, while in South Africa, their commission has a blend where both the CEO and the commissioners are responsible for corporate governance.

It is abundantly clear that having a body responsible for governance that is separate and independent of management results in effective demarcation of roles and responsibilities between management and the board. In addition, having this demarcation requires the commissioners or the board to have access to information on the operations of the IEC. Given that the EMBs being discussed are highly respected and deliver credible results, it can be safely concluded that commissioners have access to information on the functions of the EMB. In the next chapter, this study will aggregate the lessons the IEBC can learn from the research done.

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344 Collete Schulz-Herzenberg, 'South Africa' (2016) in *Election Management Bodies in Southern Africa: Comparative study of the Electoral Commissions' Contribution to Electoral Processes* (Open Society Initiative for Southern Africa (OSISA) and African Minds 2016) <http://www.africanminds.co.za/wp-content/uploads/2017/04/OSISA-EMB-CASE-STUDIES-29MAR1200-WEB.pdf> accessed 20th September 2019, 259.
345 South African Electoral Commission, 'Vision 2018' (n 323).
346 United Nations Development Programme (n 133).
347 South African Electoral Commission, 'Vision 2018' (n 323).
348 UK Electoral Commission (n 337) 16.
349 Private Sector Initiative for Corporate Governance (n 119) 3-4.

CHAPTER 5 – FINDINGS, RECOMMENDATIONS AND PROPOSALS FOR REFORM

5.1 Introduction

The very essence of this study is that 'good elections are impossible without effective electoral governance'[350] which is 'the set of related activities that involves rule making, rule application, and rule adjudication.'[351] This study has focused on that set of rules that govern the corporate governance framework of election management bodies, in this case, the demarcation of roles between the commissioners and the secretariat, as well as ensuring information is available to commissioners to enable them discharge their mandate.

The ineffectiveness of the ECK which conducted the shambolic 2007 general elections that almost catapulted the country over the precipice into a civil war is a constant reminder of the need to ensure that the IEBC is properly structured and empowered to deliver credible elections whose results are accepted by the majority of the electorate.

It is highly unlikely that a credible election can be held if the electoral management body has a systemic institutional problem as the Supreme Court of Kenya found in the Raila Odinga case discussed in Chapter 1 of in this study. The nature of elections, being complex logistical exercises, requires that the IEBC resolves its institutional failures to ensure a credible election.

In this chapter, the author concludes the discussion by summarising the findings from the corporate governance structures of the other EMBs and the lessons that the IEBC may learn. I also formulate what would be an appropriate corporate governance policy for the IEBC, and I make proposals for legislative reforms to entrench the recommendations into binding provisions of the law.

5.2 Findings from the research and whether the hypothesis has been proven

The hypothesis of this study was predicated on the assumption that a sound corporate governance structure at the IEBC will reduce tensions between the secretariat and commissioners thereby enabling them to perform their respective roles and responsibilities. This study set out to determine the following:

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350 Shaheen Mozaffar and Andreas Schedler, 'The Comparative Study of Electoral Governance: Introduction' (2002) 23 (1) International Political Science Review <https://www.jstor.org/stable/1601408> accessed 19th September 2019, 3.
351 ibid 6.

1. To examine the historical background of electoral management in Kenya.
2. To examine whether the IEBC Act demarcates the roles and responsibilities between the commissioners (the governing body) and the secretariat (management).
3. To examine whether the corporate governance structure at the IEBC ensures that commissioners have access to relevant, timely, accurate and adequate information regarding the operations of the IEBC.
4. To ascertain whether the current corporate governance structure of the IEBC results in tensions between commissioners and secretariat of the IEBC.
5. To investigate the corporate governance structures of the electoral management bodies in Ghana, South Africa and the United Kingdom, and the lessons that the IEBC can learn.

It has been demonstrated that the IEBC Act does not demarcate the roles between the commissioners and the secretariat of the organization; and also, that commissioners do not have access to accurate, relevant and timely information on the operations of the IEBC.[352] Arising from this failure, there exists tensions between commissioners and the secretariat, which results in an organization that has a systemic problem as held by the Supreme Court.[353] It is therefore the conclusion of the author that the hypothesis of this study has been proven.

With regards to the comparative study undertaken, it was found that the Ghanaian ECG is fundamentally different from the Kenyan electoral commission as the chair is also the chief executive of the commission. It is beyond the scope of this study to investigate how the Ghanaian ECG achieved such remarkable acceptance of its results despite lacking a board to provide oversight. However, from the Kenyan experience, where the Public Accounts Committee of the National Assembly found that the conflicts between the CEO and the chairman of the IEBC arose mainly on procurement of election materials,[354] the Ghanaian example will not be suitable for Kenya as, despite there being a chair and a CEO, conflicts on procurement matters still persisted.

If the chair would be the CEO of the IEBC, it is safe to assume that corruption in procurement matters would increase exponentially due to the lack of oversight over the massive amounts

352 Independent Review Commission (n 10) 49.

353 Raila Amolo Odinga & another (n 15) where the Supreme Court found that there was a systemic institutional problem at the IEBC.

354 The National Assembly (n 14).

spent on procurement.[355] The Kenyan IEBC requires these systems to discourage self-interested behaviour[356] as currently, there are no checks and balances and there is ample evidence from the Africog report that individual selfish interests have overrun the IEBC.

In South Africa, their electoral commission has put in place measures to delineate the powers, roles and functions between the commissioners and the administration, while the UK electoral commission has an elaborate corporate governance framework that details the roles and responsibilities of the board of the commission as well as the roles of the chief executive. In the UK commission, there is also an executive scheme of delegation that sets out the authority for various levels of staff and decision-making.

In the following section, this study summarises the lessons that have been learnt by investigating the EMBs from other jurisdictions, as well as considering whether the corporate governance structures of the various entities studied can be translated into the Kenyan IEBC.

5.3 Reforms key to strengthening corporate governance at the IEBC

It should be remembered that commissioners of the IEBC were often rebuffed by directors in the secretariat and even the CEO when they attempted to have substantive discussion on the work of the commission.[357] The commissioners are denied information on the functioning of the commission demonstrating the information gap that exists at the IEBC, and this also hinders them in the performance of their oversight role.[358] Even though the commissioners of the IEBC occupy full time positions, this observation still applies to them as they are denied crucial information by the secretariat.

5.3.1 Lessons on transparency, disclosure and accessing information

As much as directors should not be overly involved in management affairs, they should also be in a position to question the information being given to them by management to make appropriate decisions. To enable this, it is necessary for directors to have access to management information. From the discussion in part 1.8.3 of this study, the author recommends that the following should be adopted into the corporate governance policy of the IEBC.

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[355] Africog (n 22).
[356] David F. Larcker and Brian Tayan, 'Trust: The Unwritten Contract in Corporate Governance' (n 103) 1.
[357] The Elephant (n 19) 13 to 14.
[358] David F. Larcker and Brian Tayan, 'Netflix Approach to Governance: Genuine Transparency with the Board' (n 147) 1.

1. Commissioners should periodically attend (in an observing capacity only) senior management meetings. Commissioners who attend these meetings are expected to observe but not influence or participate in the discussion and the commissioners can follow up with the CEO after the meetings with questions, if any.
2. Communication to the commissioners should be structured as online memos in narrative form that not only include links to supporting analysis, but also allow open access to all data and information on the company's internal shared systems, including the ability to ask clarifying questions of the subject authors.
3. Commissioners should receive the memo at least seven (7) days prior to board meetings and the commissioners are expected to review the material before the board meeting. From the online portal or digital memo, commissioners should have the ability to pose questions or ask for clarification from the senior management, to which senior management are expected to respond to at least two (2) days prior to the meeting.

The above guidelines should be explicitly stated in the IEBC corporate governance guidelines, and compliance should be made mandatory.

5.3.2 Lessons from the EMBs in South Africa and the United Kingdom

With regards to the South Africa Electoral Commission, corporate governance is applied through the Public Finance Management Act[359] and its various regulations. Parliament, the executive authority, the commissioners and the CEO of the electoral commission are all responsible for the commission's corporate governance[360] while the executive authority of the South African electoral commission is vested in its chairperson.

With regards to the UK, the UK electoral commission has a corporate governance framework,[361] which, *inter alia*, explicitly states that commissioners constitute the board of the commission; demarcates the roles, responsibilities and code of conduct for commissioners, and the commission's business and delegated powers. The corporate governance framework has

[359] Act No 1 of 1999.
[360] South African Electoral Commission, 'Vision 2018' (n 323).
[361] UK Electoral Commission (n 337) 3.

reserved certain powers to the board. These include, *inter alia*, corporate governance, strategy, corporate plans and budgets, and risk management.[362]

From the UK and South African EMBs studied, it is clear that corporate governance is very clearly provided for and responsibility is assigned to the board to avoid any ambiguity. This is not the case in Kenya. The IEBC Act does not identify the offices that are responsible for corporate governance. It is recommended therefore that the IEBC Act be amended to specifically identify the offices that would be ultimately responsible to ensure that corporate governance is adhered to by the IEBC. It is proposed that this responsibility be vested on the board of the IEBC as ultimately, it is the board that is 'responsible for the organisation's decisions and its performance.'[363]

It was demonstrated that the decision making process in the IEBC is provided for in the poorly drafted second schedule to the Act, some provisions of which had been declared unconstitutional by the High Court.[364] To cure this, it is proposed that the IEBC should also enact a code of corporate governance, or a corporate governance framework similar to the framework enacted by the UK Electoral Commission.[365] This framework should replace the second schedule to the IEBC Act so as to provide a sound framework guiding how decisions are made in the IEBC as well as how power is to be exercised at the institution. In addition, an executive schedule of delegation should be in place to avoid the problem of diffusion of responsibility that is evident at the IEBC.

5.3.3 Effective body responsible for governance separate and independent of management

The commissioners should not occupy fulltime positions to avoid the incessant conflicts between the secretariat and the commissioners that have been witnessed at the IEBC. This would ensure compliance with the first pillar of corporate governance as well as ensuring commissioners provide adequate oversight over management by providing crucial check on the activities of the secretariat.

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[362] UK Electoral Commission (n 337) 16.

[363] Bob Tricker (n 1) 4.

[364] Katiba Institute & 3 others –v- Attorney General & 2 others (n 35).

[365] UK Electoral Commission (n 337) 3.

5.3.4 Lessons in corporate governance from the Kenyan Companies Act 2015, the CMA and the CBK

Division 3 of the Kenyan Companies Act, 2015 provides for the duties that directors owe to their companies. Section 703 of this Act also makes provision for liability of directors for all false or misleading statements in the company financial statements and reports. The directors are also liable to compensate the company for any loss suffered as a result of the misleading statements.

With regards to corporate governance in quoted companies, Section 769 (1) of the Companies Act requires the directors to ensure that the company has an audit committee appropriate for the business conducted by the company while Section 770 of the Companies Act mandates the audit committee to, *inter alia*, set out the corporate governance principles that are appropriate for the nature and scope of the company's business. The audit committee of the quoted company is also responsible for, *inter alia*, organising the company to promote the effective and prudent management of the company and the directors' oversight of that management.

Clause 2.2.2 of the 2015 CMA corporate governance guidelines requires the board to establish committees to cover broad functions of the company such as audit, board nominations, risk management, remuneration, finance, investment and governance.[366] Of all these committees, it is only the audit committee that has been tasked with the conduct of ensuring that corporate governance is adhered to, thereby, giving the audit committee a critical role in the overall performance of the organisation.

Section 33 (4) of the Banking Act,[367] empowers the Central Bank of Kenya to issue directions with respect to, *inter alia*, guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system. Pursuant to this Section, the Central Bank of Kenya issued prudential guidelines[368] in January 2013 that specifically provide for corporate governance. The board has overall responsibility for the bank, including approving and overseeing the implementation of the bank's strategic objectives, risk strategy, corporate governance and corporate values. The board is also responsible for providing oversight of senior management. Section 33 (5) of the Banking Act provides that a person who fails to comply with any directions issued by the CBK under Section 33 of the Banking Act commits

[366] Gazette Notice No 3362 of 14th May 2002 (n 213).
[367] Cap 488, Laws of Kenya.
[368] Central Bank of Kenya (n 219) 34.

an offence and is liable to the penalty prescribed under Section 49 of the Banking Act, either imprisonment or a monetary fine.

Corporate governance at the IEBC should also be adhered to with the vigilance of the CBK, and failure of the commissioners to ensure that corporate governance is adhered to should attract the same consequences as those stipulated in the Companies Act and the Banking Act. The IEBC Act should be amended to include penalty clauses in the event the board fails to establish an audit committee tasked with ensuring that corporate governance is adhered to.

5.4 Conclusion

By whichever name that is used, commissioners are the governing body of the IEBC. Returning to the hypothesis posed at the beginning of this dissertation, it is now possible to state that a sound corporate governance structure of the IEBC will enhance the credibility of elections in Kenya, and in turn, enable Kenyans to express their will during the electoral process. This finding arises from what the Supreme Court found in the Raila Odinga case, that they were unable to identify the individuals who played a role in commission of illegalities during the nullified 2017 elections, demonstrating the diffusion of responsibility prevalent at the IEBC.[369] In its desire to become a consolidated democracy, it is incumbent on Kenya to 'design electoral machinery that produces free and fair elections,'[370] and having a sound corporate governance framework at the IEBC will be a massive step on this journey as it will reduce the possibilities of having another nullified elections in the country.

The aim of this study was to assist in this journey by ensuring that the governance issue at the IEBC is conclusively addressed. With a proper corporate governance framework, diffusion of responsibility[371] will be avoided, and if possible, eliminated, thereby ensuring that all parties take responsibilities for their actions.

From what has been demonstrated and considering the justification for this study,[372] the recommendations by various bodies including parliament[373] and the BBI taskforce[374] that the current commissioners simply be replaced or that the chair should be the CEO of the IEBC are merely cosmetic recommendations and do not resolve the governance challenges the IEBC

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369 ibid 85.
370 Vijay Padmanabhan (n 315) 2.
371 Erica Beecher (n 150).
372 See part 1.3 of this thesis.
373 The National Assembly e-News (n 50).
374 Presidential Taskforce on Building Bridges to Unity Advisory (n 53).

faces and will, unfortunately, still result in the same set of problems which have been set out in this study.[375]

However, despite the overbearing character of Kenyan politics which will have an impact on the eventual organisational structure of the IEBC,[376] the IEBC can still reform itself and be referred to as one of the best electoral commissions on the continent, in the same breath as the Ghanaian electoral commission which is highly regarded on the African continent.[377] This will only happen if the focus of attention shifts from the personalities in charge at the organisation, to the rules and organisational structures at the IEBC.[378]

It is hoped that the recommendations proposed in this chapter will be adopted by the relevant policy makers and ultimately, the legislature to amend the enabling legislation and provide for a proper corporate governance structure at the IEBC. All stakeholders should be invited to participate and contribute to this process. With regards to timeframes, amendments to the corporate governance structure of the IEBC will, inevitably, take a political tone, and any realistic chance that there will be any change will depend on the prevailing political goodwill.

Whether the recommendations herein will be adopted and implemented in the short, medium or long term, will depend entirely on the prevailing political goodwill. It is the belief of the author that, as has been demonstrated through the rapid establishment of the BBI taskforce,[379] and the push towards a referendum to implement the BBI report,[380] the recommendations herein can be adopted and implemented in the short term only if the political will is present.

[375] Patrick Langat (n 2).

[376] Peter A. Gourevitch, 'The Politics of Corporate Governance Regulation' (2003) 112 Yale Law Journal <https://www.yalelawjournal.org/pdf/202_jbiiaemr.pdf> accessed 28th November 2019, 14.

[377] Shadrack Bentil and Edmund Poku Adu, 'Communication Deficit and Monetization of Political Contests at the Electoral Commission of Ghana' (2019) 9 (1) Jurnal Ilmu Pemerintahan <https://www.academia.edu/39354781/Communication_Deficit_and_Monetization_of_Political_Contests_at_the_Electoral_Commission_of_Ghana> accessed 28th November 2019, 13.

[378] Daniel P. Tokaji (n 51).

[379] Presidential Taskforce on Building Bridges to Unity Advisory (n 53).

[380] John Kamau, 'Uhuru hints at referendum to implement BBI report' (2020) <https://www.the-star.co.ke/news/2019-12-04-uhuru-hints-at-referendum-to-implement-bbi-report/> accessed 22nd June 2020.

BIBLIOGRAPHY

Authored Books

1. Akech M, *Administrative Law* (Strathmore University Press 2016)

2. Cadbury A, *Corporate Governance and Chairmanship: A Personal View* (Oxford University Press 2002)

3. Ghai Y. P, & J. P. W. B McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford University Press 1970)

4. Ojwang J B, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (African Centre for Technology Studies (ACTS) Press 1990)

5. Smith A, *The Wealth of Nations* (1776) <https://eet.pixel-online.org/files/etranslation/original/The%20Wealth%20of%20Nations.pdf> accessed 28th April 2019

6. Tricker B, *Corporate Governance: Principles, Policies, and Practices* (International Third Edition, Oxford University Press 2015)

Edited Books

7. Maloba W, 'Nationalism and Decolonization 1947-1963' in William Ochieng (ed) *A Modern History of Kenya – 1895-1980* (Evans Brothers Limited 1989)

8. Ramsay M I, 'The Corporate Governance Debate and the Role of Directors Duties' (1997) in Ian M Ramsay (ed) *Corporate Governance and the Duties of Company Directors* (The Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne, 1997)

9. Schulz-Herzenberg C, 'South Africa' (2016) in *Election Management Bodies in Southern Africa: Comparative study of the Electoral Commissions' Contribution to Electoral Processes* (Open Society Initiative for Southern Africa (OSISA) and African Minds 2016) <http://www.africanminds.co.za/wp-content/uploads/2017/04/OSISA-EMB-CASE-STUDIES-29MAR1200-WEB.pdf> accessed 20th September 2019

Theses

10. Ayodele Ogunseyin M, 'Determinants of Board Processes: Trust in the Boardroom' (PhD Thesis, University of Wolverhampton 2017) <https://core.ac.uk/download/pdf/96708096.pdf> accessed 24th December 2019
11. Kissi E A, 'Electoral Commission and Election Management in Ghana (1993-2008)' (Master of Philosophy Thesis, University of Ghana 2012) <http://ugspace.ug.edu.gh/bitstream/handle/123456789/5565/Emmanuel%20Asante%20Kissi_Electoral%20Commission%20and%20Election%20Management%20in%20Ghana%20%281993-2008%29_2012.pdf?sequence=1&isAllowed=y> accessed 25th June 2020
12. Muigai G, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997) A Study of the Politics of the Constitution' (PhD Thesis, University of Nairobi 2001) <http://erepository.uonbi.ac.ke/handle/11295/15784?show=full> accessed 25th June 2020
13. Owuor F O, 'Reforming Elections Management and Administration in Kenya: The case for the Independent Electoral and Boundaries Commission (IEBC)' (LLM Thesis, University of Nairobi 2016) <http://erepository.uonbi.ac.ke/handle/11295/97538> accessed 25th June 2020

Hard Copy Journal

14. Mwaura K, 'Constitutional Restructuring of Corporate Governance in State Owned Enterprises: Dynamism or Distraction?' (2011) 1 Mount Kenya University Law Journal

Online Journals

15. Adegbite O, 'Corporate governance developments in Ghana: the past, the present and the future' (2012) 1 (2) Public and Municipal Finance <https://businessperspectives.org/images/pdf/applications/publishing/templates/article/assets/4290/pmf_2012_02_Adegbite.pdf> accessed 13th November 2019
16. Aebi V, Sabato G, & Schmid M, 'Risk Management, Corporate Governance, and Bank Performance in the Financial Crisis' (2012) 36 Journal of Banking & Finance <https://web.actuaries.ie/sites/default/files/ermresources/80_risk_management_financial_crisis.pdf.pdf> accessed 24th April, 2019

17. Agyemang O S, Emmanuel Aboagye, and Aaron Yao Ofoe Ahali, 'Prospects and Challenges of Corporate Governance in Ghana' (2013) 3 (5) International Journal of Scientific and Research Publications <http://www.ijsrp.org/research-paper-0513/ijsrp-p1717.pdf> accessed 13th November 2019

18. Aguilera R V, 'Corporate Governance and Director Accountability: an Institutional Comparative Perspective' (2005) 16 (1) British Journal of Management <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.510.6044&rep=rep1&type=pdf> accessed 13th April 2020

19. Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution enhance Government Accountability' (2011) 18 (1) Indiana Journal of Global Legal Studies <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1447&context=ijgls> accessed 30th June 2020

20. Alam Z S, Mark A. Chen, Conrad S. Ciccotello, Harley E. Ryan and Jr., 'Does the Location of Directors Matter? Information Acquisition and Board Decisions' (2014) 49 (1) The Journal of Financial and Quantitative Analysis <https://www.jstor.org/stable/43303872?seq=1> accessed 13th April 2020

21. Bauer C, 'The 1994 and 1999 Electoral Process/Systems: Promoting Democracy in South Africa' (2001) 6 (1) Africa Journal of Political Science <https://www.jstor.org/stable/23495262> accessed 19th September 2019

22. Beecher E, 'Corporate Governance in the Wake of Enron: An Examination of the Audit Committee Solution to Corporate Fraud' (2003) 55 (2) Administrative Law Review <https://www.jstor.org/stable/40712143?seq=1#page_scan_tab_contents> accessed 6th May 2019

23. Bentil S, and Edmund Poku Adu, 'Communication Deficit and Monetization of Political Contests at the Electoral Commission of Ghana' (2019) 9 (1) Jurnal Ilmu Pemerintahan <https://www.academia.edu/39354781/Communication_Deficit_and_Monetization_of_Political_Contests_at_the_Electoral_Commission_of_Ghana> accessed 28th November 2019

24. Botchway P, and Abdul Hamid Kwarteng, 'Electoral Reforms and Democratic Consolidation in Ghana: An Analysis of the Role of the Electoral Commission in the

Fourth Republic (1992-2016)' (2018) 5 (3) Asian Research Journal of Arts & Social Sciences <http://journalarjass.com/index.php/ARJASS/article/download/11365/20602> accessed 18th September 2019

25. Boyd C, 'Ethics and Corporate Governance: The issues raised by the Cadbury Report in the United Kingdom' (1996) 15 (2) Journal of Business Ethics <https://www.jstor.org/stable/25072743> accessed 24th November 2019

26. Branch D, 'Loyalists, Mau, and Elections in Kenya: The First Triumph of the System, 1957-1958' (2006) 53 (2) Africa Today <https://www.jstor.org/stable/4187771?seq=1#page_scan_tab_contents> accessed 13th September 2019

27. Cheffins B, 'Corporate Governance in the United Kingdom: Lessons for Canada' (1997) 28 (1) Canadian Business Law Journal <https://heinonline.org/HOL/P?h=hein.journals/canadbus28&i=87> accessed 27th November 2019

28. Dallas L, 'The Multiple Roles of Corporate Boards of Directors' (2003) 40 (3) San Diego Law Review <https://heinonline.org/HOL/P?h=hein.journals/sanlr40&i=791> accessed 15th December 2019

29. Douglas O W, 'Directors who do not direct' (1934) 47 (8) Harvard Law Review <https://www.jstor.org/stable/1331256> accessed 13th April 2020

30. Eturk I, Julie Froud, Sukhdev Johal and Karel Williams, 'Corporate Governance and disappointment' (2004) Review of International Political Economy <https://www.academia.edu/802871/Corporate_governance_and_disappointment?auto=download> accessed 28th April 2019

31. Farvaque E, Catherine Refait-Alexandre, Dhafer Saïdane, 'Corporate disclosure: A review of its (direct and indirect) benefits and costs' (2011) 128 International Economics <https://www.sciencedirect.com/science/article/abs/pii/S2110701713600013> accessed 25th April 2020

32. Fung B, ‘The Demand and Need for Transparency and Disclosure in Corporate Governance’ (2014) 2 (2) Universal Journal of Management <http://www.hrpub.org/journals/article_info.php?aid=1243> accessed 24th April 2020

33. Gakeri J, ‘Enhancing Kenya’s Securities Markets through Corporate Governance: Challenges and Opportunities’ (2013) 3 (6) International Journal of Humanities and Social Science <http://www.ijhssnet.com/journals/Vol_3_No_6_Special_Issue_March_2013/11.pdf> accessed 15th May 2019

34. Gardner J A, ‘The Sociological Jurisprudence of Roscoe Pound (Part I)’ (1961) 7 (1) Villanova Law Review <http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1> accessed 28th April 2019

35. Gazibo M, ‘The Forging of Institutional Autonomy: A Comparative Study of Electoral Management Commissions in Africa’ (2006) 39 (3) Canadian Journal of Political Science <https://www.jstor.org/stable/25165995> accessed 24th November 2019

36. Ghosh D A, ‘Emerging Corporate Board Practices’ (2005) 40 (6) Economic and Political Weekly <https://www.jstor.org/stable/4416165> accessed 15th December 2019

37. Ghosh D N, ‘Corporate Governance and Boardroom Politics’ (2000) 35 (46) Economic and Political Weekly <https://www.jstor.org/stable/4409950> accessed 25th April 2020

38. Gourevitch P, ‘The Politics of Corporate Governance Regulation’ (2003) 112 Yale Law Journal <https://www.yalelawjournal.org/pdf/202_jbiiaemr.pdf> accessed 28th November 2019

39. Hadjikyprianou G, ‘The Principle of “Comply or Explain” Underpinning the UK Corporate Governance Regulation: Is There a Need for a Change?’ (2015) 7 (81) Corporate Governance Law Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690687> accessed 17th April 2019

40. Hamdani A. and Reinier Kraakman, ‘Rewarding outside directors’ (2007) 105 (8) Michigan Law Review <https://www.jstor.org/stable/40041563> accessed 13th April 2020

41. Hart O, 'Corporate Governance: Some Theory and Implications' (1995) 105 (430) The Economic Journal <https://www.jstor.org/stable/2235027> accessed 22nd June 2020

42. Kanyinga K, and James D. Long, 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution' (2012) 55 (1) African Studies Review <https://www.jstor.org/stable/41804127?seq=1> accessed 24th April 2020

43. Lee I B, 'Is there a cure for corporate "Psychopathy"?' (2005) 42 (1-6) American Business Law Journal <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1714.2005.00014.x> accessed 18th April 2019

44. Maphunye K J, 'Evaluating Election Management in South Africa's 2009 Elections' (2010) 9 (2) Journal of African Elections <https://journals.co.za/content/eisa_jae/9/2/EJC32498> accessed 10th November 2019

45. Mclean I, 'The Jenkins Commission and the Implications of Electoral Reform for the UK Constitution' (1999) 34 (2) Government and Opposition <https://www.jstor.org/stable/44482820?seq=1#page_scan_tab_contents> accessed 11th November 2019

46. Miles L, and Zhong Zhang, 'Improving Corporate Governance in State-owned corporations in China: Which way forward?' (2006) 6 (1) Journal of Corporate Law Studies <https://www.tandfonline.com/doi/abs/10.1080/14735970.2006.11419951> accessed 17th April 2019

47. Mizruchi M S, 'Who Controls Whom? An Examination of the Relation between Management and Boards of Directors in Large American Corporations' (1983) 8 (3) The Academy of Management Review <https://www.jstor.org/stable/257831> accessed 13th April 2020

48. Mozaffar S, 'Patterns of Electoral Governance in Africa's Emerging Democracies' (2002) 23 (1) International Political Science Review <https://www.jstor.org/stable/1601412> accessed 24th November 2019

49. Mozaffar S, and Andreas Schedler, 'The Comparative Study of Electoral Governance: Introduction' (2002) 23 (1) International Political Science Review <https://www.jstor.org/stable/1601408> accessed 19th September 2019

50. Mulili M B, and Dr Peter Wong, 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) 2 (1) International Journal of Business

Administration <http://www.sciedu.ca/journal/index.php/ijba/article/view/37/42> accessed 15th May 2019

51. Musikali L, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) International Company and Commercial Law Review <https://www.academia.edu/1524463/The_law_affecting_corporate_governance_in_Kenya_a_need_for_review> accessed 15th May 2019

52. Mwaura K, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya' (2007) Fordham International Law Journal <https://ir.lawnet.fordham.edu/ilj/vol31/iss1/1/> accessed 17th April 2019

53. Ndletyana M, 'The IEC and the 2014 Elections: A Mark of Institutional Maturity?' (2015) 14 (1) Journal of African Elections <https://www.eisa.org.za/pdf/JAE14.1Ndletyana2.pdf> accessed 11th November 2019

54. Ochieng W K, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) 4 Kabarak Journal of Law and Ethics <https://www.kabarak.ac.ke/downloads/journal%20of%20law%20and%20ethics%20vol%204/The%20Independence,%20Accountability%20and%20Effectiveness.pdf> accessed 30th June 2020

55. Omotola S J, 'The Electoral Commission of Ghana and the Administration of the 2012 Elections' (2013) 12 (2) Journal of African Elections <https://www.eisa.org.za/pdf/JAE12.2Omotola2.pdf> accessed 30th June 2019

56. Padmanabhan V, 'Democracy's Baby Blocks: South Africa's Electoral Commissions' (2002) 77 (4) New York University Law Review <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-77-4-Padmanabhan.pdf> accessed 11th November 2019

57. Pal M, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21 Review of Constitutional Studies <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2792626> accessed 12th April 2020

58. Pargendler M, ‘The Corporate Governance Obsession’ (2016) 42 (2) Journal of Corporation Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491088> accessed 23rd June 2020

59. Phillips A R., ‘Stakeholder Theory and A Principle of Fairness’ (1997) 7 (1) Business Ethics Quarterly <https://www.jstor.org/stable/3857232> accessed 22nd June 2020

60. Phillips R, Edward Freeman R. and Wicks C. A., ‘What Stakeholder Theory Is Not’ (2003) 13 (4) Business Ethics Quarterly <https://www.jstor.org/stable/3857968> accessed 22nd June 2020

61. Porhel R, ‘The Economic Consequences of the Political Crisis’ (2008) 38 The East African Review <https://journals.openedition.org/eastafrica/727> accessed 24th April 2020

62. Ransford E V G, ‘The State of Electoral Reforms in Ghana’ (2017) 52 (3) African Spectrum <https://journals.sub.uni-hamburg.de/giga/afsp/article/view/1081.html> accessed 18th September 2019

63. Rossouw G J, A. Van Der Watt, and D. P. Malan, ‘Corporate Governance in South Africa’ (2002) 37 (3) Journal of Business Ethics <https://www.jstor.org/stable/25074755?seq=1> accessed 13th November 2019

64. Ruparelia R, and Amos Njuguna, ‘The Evolution of Corporate Governance and Consequent Domestication in Kenya’ (2016) 7 (5) International Journal of Business and Social Science <https://ijbssnet.com/journals/Vol_7_No_5_May_2016/14.pdf> accessed 27th April 2019

65. Shilaho WK, ‘I do not know who won the elections: How not to conduct elections and Kenya’s democratic reversals’ (2014) 33 (3) Politeia <https://upjournals.co.za/index.php/Politeia/article/view/3274/1732> accessed 16th September 2019

66. Tamanaha B Z, ‘The Third Pillar of Jurisprudence: Social Legal Theory’ (2015) 56 (6) William & Mary Law Review <http://scholarship.law.wm.edu/wmlr/vol56/iss6/6> accessed 28th April 2019

67. Tokaji D, ‘The Future of Election Reform: From Rules to Institutions’ (2009) Yale Law & Policy Review

<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1586&context=ylpr> accessed 28th November 2019

68. Vasudev P. M, ‘The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward’ (2012) 41 (2) Hofstra Law Review <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2698&context=hlr> accessed 22nd June 2020

69. Vogel D, ‘The Corporation as Government: Challenges & Dilemmas’ (1975) 8 (1) Polity <http://www.jstor.org/stable/3234345> accessed 18th April 2019

70. Wanyande P, ‘Electoral Politics and Election Outcomes in Kenya’ (2006) 31 (3) Africa Development <https://www.ajol.info/index.php/ad/article/download/135771/125268> accessed 16th September 2019

71. West A, ‘Theorising South Africa’s Corporate Governance’ (2006) 68 (4) Journal of Business Ethics <https://www.jstor.org/stable/25123927> accessed 13th November 2019

72. Wheeler S, ‘Fraser and the politics of Corporate Governance’ (2002) Journal of Law and Society <https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-6478.00124> accessed 18th April 2019

73. Zalecki P H, ‘The Corporate Governance Roles of the Inside and the Outside Directors’ (1993) 24 (4) University of Toledo Law Review <https://heinonline.org/HOL/P?h=hein.journals/utol24&i=845> accessed 15th December 2019

Working Papers

74. Baum A, David F. Larcker, Brian Tayan, and Jacob Welch, ‘Building a better board book’ (2017) Stanford University Working Paper No 68 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047910> accessed 28th April 2019

75. Cheffins B R, ‘The History of Corporate Governance’ (2012) ECGI Working Paper Series in Law 184/2012 <https://ssrn.com/abstract=1975404> accessed 22nd June 2020

76. Elklit J, and Andrew Reynolds, ‘The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda’ (2000) Kellog Institute Working Paper 281

<https://kellogg.nd.edu/publications/workingpapers/WPS/281.pdf> accessed 24th December 2018

77. Kivuva J M, 'Restructuring the Kenyan State' (2011) SID Constitution Working Paper No 1 <https://www.sidint.net/sites/www.sidint.net/files/docs/WP1.pdf> accessed 30th June 2020

78. Ormazábal G, 'The Role of Stakeholders in Corporate Governance: A View from Accounting Research' (2018) CEPR Discussion Paper No. DP12775 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138837> accessed 25th April 2020

79. Sihanya B, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' (2012) Friedrich Ebert Stiftung (FES) Kenya Occasional Paper, No. 5 <http://library.fes.de/pdf-files/bueros/kenia/09857.pdf> accessed 30th June 2020

80. Sihanya B, 'Constitutional Commissions and Independent Offices in Kenya and Africa: Experiences, Challenges and Opportunities' (2019) <http://www.innovativelawyering.com/attachments/18075.pdf> accessed 30th June 2020

81. Sihanya B, 'The Presidency and Public Authority in Kenya's new Constitutional Order' (2011) Constitution Working Paper No 2, Society for International Development <http://sidint.net/docs/WP2.pdf> accessed 30th June 2020

Reports and other Publications

82. Africog, 'State Capture: Inside Kenya's Inability to Fight Corruption' (2019) <https://www.theelephant.info/documents/africog-state-capture-inside-kenyas-inability-to-fight-corruption/> accessed 21st September 2019

83. Ardigó A I, and Nieves Zúñiga, 'Corporate transparency: Overview of issues and literature review' (2019) <https://www.jstor.org/stable/resrep20480#metadata_info_tab_contents> accessed 25th April 2020

84. Bank of Ghana, 'Corporate Governance Directive 2018' (2018) <https://www.bog.gov.gh/wp-content/uploads/2019/09/CGD-Corporate-Governance-Directive-2018-Final-For-PublicationV1.1.pdf> accessed 19th February 2020

85. Capital Markets Authority, ‘New Corporate Governance Code For Listed Companies And Guidelines On Prevention Of Money Laundering And Terrorism Financing In Capital Markets Gazetted’ (2016) <https://www.cma.or.ke/index.php?option=com_content&view=article&id=178:new-corporate-governance-code-for-listed-companies-and-guidelines-on-prevention-of-money-laundering-and-terrorism-financing-in-capital-markets-gazetted&catid=12&Itemid=207> accessed 15th May 2019

86. Central Bank of Kenya, ‘Prudential Guidelines for Institutions Licensed under the Banking Act’ (2013) <https://www.centralbank.go.ke/wp-content/uploads/2016/08/PRUDENTIAL-GUIDELINES.pdf> accessed 21st July 2019

87. Committee of Eminent Persons, ‘Report of the Committee of Eminent Persons on the Constitution Review Process’ (2006) <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Committee-of-Eminent-Persons-on-the-Constitution-Review-Process.pdf> accessed 20th September 2019

88. Committee on Standards of Public Life, ‘Review of the Electoral Commission’ (2007) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336902/11thReport_Summary.pdf> accessed 11th November 2019

89. Davies P, ‘The Board of Directors: Composition, Structure, Duties and Powers’ (2000) <https://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf> accessed 13th April 2020

90. Electoral Commission of Ghana, ‘Ghana Strategic Plan 2016-2020’ (2016) <https://new-ndpc-static1.s3.amazonaws.com/CACHES/PUBLICATIONS/2016/05/03/electoral-commission-ghana-strategic-plan-2016.pdf> accessed 30th June 2019

91. Elena G C, ‘Theoretical Framework for Corporate Governance’ in Ovidius University Annals, Economic Sciences Series, Vol. 12 (1) (Ovidius University Press 2012) <http://stec.univovidius.ro/html/anale/ENG/cuprins%20rezumate/volum2012p1.pdf> accessed 23rd February 2019

92. Fifth Report of the Committee on Standards in Public Life, ‘The Funding of Political Parties in the United Kingdom’ (1998)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336870/5thInquiry_FullReport.pdf> accessed 11th November 2019

93. Financial Reporting Council, 'The UK Corporate Governance Code' (2018) <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> accessed 28th April 2019

94. Frederich Ebert Stiftung, 'Ghana's Parliamentary and Presidential Elections 2004' (2005) <https://library.fes.de/pdf-files/bueros/ghana/03610.pdf> accessed 30th June 2019

95. Frempong A, 'Innovations in Electoral Politics in Ghana's Fourth Republic: An Analysis' (2008) <http://biblioteca.clacso.edu.ar/clacso/sur-sur/20120321095139/12.fre.pdf > accessed 18th September 2019

96. Gyimah-Boadi E, 'Modelling Success: Governance and Institution-Building in Africa: The Case of Ghana's Electoral Commission' (2007) <https://www.codesria.org/IMG/pdf/CDD_CDP__Electoral_Commission_Modelling_Success_-_Research_Report_Boadi_Gymah.pdf> accessed 30th June 2019

97. Independent Electoral and Boundaries Commission, 'Strategic Plan 2015 to 2020' (2015) <https://www.iebc.or.ke/uploads/resources/strategicplan20152020.pdf> accessed 27th December 2018

98. Independent Review Commission, 'The Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007' (2008) <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf> accessed 7 October 2017

99. Institute of Directors in Southern Africa NPC, 'King IV Report on Corporate Governance in South Africa 2016' (2016) <https://c.ymcdn.com/sites/iodsa.site-ym.com/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf> accessed 13th November 2019

100. Institute of Economic Affairs, ‘Budget Analysis 2018’ (2018) <https://www.ieakenya.or.ke/downloads.php?page=1529658599.pdf> accessed 20th July 2019

101. International Institute for Democracy and Electoral Assistance, ‘Electoral Management Design’ (2014) <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf> accessed 23 February 2019

102. Larcker D F, and Brian Tayan, ‘Chairman and CEO: The Controversy Over Board Leadership Structure’ (2016) <https://www.gsb.stanford.edu/faculty-research/publications/chairman-ceo-controversy-over-board-leadership-structure> accessed 12th December 2019

103. Larcker D F, and Brian Tayan, ‘Netflix Approach to Governance: Genuine Transparency with the Board’ (2018) <https://www.gsb.stanford.edu/faculty-research/publications/netflix-approach-governance-genuine-transparency-board> accessed 18th May 2019

104. Larcker D F, and Brian Tayan, ‘Trust: The Unwritten Contract in Corporate Governance’ (2013) <https://www.gsb.stanford.edu/faculty-research/publications/trust-unwritten-contract-corporate-governance> accessed 12th December 2019

105. McColgan P, ‘Agency Theory and Corporate Governance: a Review of the Literature from a UK Perspective’ (2001) <https://docplayer.net/7395979-Agency-theory-and-corporate-governance-a-review-of-the-literature-from-a-uk-perspective.html> accessed 13th April 2020

106. Mulei C, ‘Historical Perspectives of Elections in Kenya’ in Institute for Education in Democracy, *The Electoral Environment in Kenya: A Research Project Report* (IED 1998)

107. OECD, ‘Using the OECD principles of Corporate Governance: A Boardroom Guide’ (2008) <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/40823806.pdf> accessed 24th December 2019

108. OECD, ‘G20/OECD Principles of Corporate Governance’ (OECD Publishing 2015) <https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1593062745&id=id&accname=guest&checksum=D4471BF7E64894741982D347D685AA9F> accessed 24th December 2019

109. OSCE/ODIHIR Election Expert Team Final Report, ‘United Kingdom Of Great Britain And Northern Ireland: General Election 7th May 2015’ (2015) <https://www.osce.org/odihr/elections/uk/174081?download=true> accessed 11th November 2019

110. Presidential Taskforce on Building Bridges to Unity Advisory, ‘A Report by the Presidential Taskforce on Building Bridges to Unity Advisory’ (2019) <https://www.bbi.go.ke/> accessed 27th November 2019

111. Riddell P, and Catherine Haddon, ‘Transitions: preparing for changes of government’ (2009) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Transitions%20-%20preparing%20for%20changes%20to%20government.pdf> accessed 11th November 2019

112. South African Electoral Commission, ‘Annual Report’ (2018) <https://www.elections.org.za/content/Documents/Annual-reports,-reports-and-strategic-documents/Annual-reports---IEC/2018-IEC-Annual-Report/> accessed 30th June 2019

113. State Corporations Advisory Committee, ‘Mwongozo – The Code of Governance for State Corporations’ (2015) <http://www.scac.go.ke/2015-02-16-09-34-58/mwongozo> accessed 26th January 2019

114. The Committee on the Financial Aspects of Corporate Governance, ‘The Report of the Committee on the Financial Aspects of Corporate Governance’ (1992) <http://www.ecgi.org/codes/documents/cadbury.pdf> accessed 26th April 2019

115. The Elephant, ‘End of Assignment Report of Former IEBC Commissioner Roselyn Akombe’ (2017) <https://www.theelephant.info/documents/end-of-assignment-report-of-former-iebc-commissioner-roselyn-akombe/> accessed 29th November 2018

116. The National Assembly, 'Report on the examination of the report of the Auditor-General on the financial statements for The Independent Electoral And Boundaries Commission For The Year Ended 30th June 2017' (2019) <http://www.parliament.go.ke/sites/default/files/2019-04/IEBC%20Report%202016-2017%20-%20As%20Amended%20and%20Adopted.pdf> accessed 20th September 2019

117. UK Electoral Commission, 'Electoral Commission Corporate Governance Framework' (2017) <https://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/227885/Corporate-Governance-Framework-March-2017-FOR-PUBLICATION.pdf> accessed 30th June 2019

118. United Nations Development Programme, 'Electoral Management Bodies as Institutions of Governance' (2000) <http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/electoral_systemsandprocesses/electoral-management-bodies-as-institutions-of-governance.html> accessed 24th December 2018

119. United Nations Development Programme, 'Elections in Sub-Saharan Africa: General Trends, Challenges, and Opportunities' (2016) <https://www.undp.org/content/dam/rba/docs/Reports/undp-rba-maendeleo-elections-subsahara-africa-2016.pdf> accessed 30th June 2019

120. White I, 'The Electoral Commission' (2008) <https://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03127.pdf> accessed 11th November 2019

121. World Bank, 'Report on Observance of Standards and Codes (ROSC)' (2010) <https://openknowledge.worldbank.org/bitstream/handle/10986/20448/908180ROSC0Box00Ghana0201000PUBLIC0.pdf?sequence=1&isAllowed=y> accessed 13th November 2019

<u>Websites and Online Sources</u>

122. Africa Policy Institute, 'Kenya decides: The Electoral Commission and stability in the 2017 Presidential election' (2016) <https://www.africapi.org/kenya-decides-the-electoral-commission-and-stability-in-the-2017-presidential-election/> accessed 21 February 2019

123. Ayittey G, ‘Why Africa is Poor’ (2002) <http://ieas.unideb.hu/admin/file_6845.pdf> accessed 18th September 2019

124. Centre for Corporate Governance, ‘Our History’ (2019) <https://ccg.or.ke/our-history> accessed 17th April 2019

125. Central Bank of Kenya, ‘Press Release – Imperial Bank Limited’ (2015) <https://www.centralbank.go.ke//images/docs/media/Press%20Releases/Press_Release_-_Imperial_Bank.pdf> accessed 11th July 2019

126. Co-operative for Research & Education, ‘Representations to the Constitutional Court by the Co-operative for Research and Education on issues related to the establishment of the Electoral Commission’ (1996) <http://www.justice.gov.za/legislation/constitution/history/CERTIF/OTH49.PDF> accessed 10th November 2019

127. Corruption Watch, ‘Electoral Integrity in Africa – why does it matter?’ <https://www.corruptionwatch.org.za/electoral-integrity-africa-matter/> accessed 19th February 2020

128. Electoral Commission of Ghana, ‘Structure of the EC’ (2018) <http://www.ec.gov.gh/about/structure-of-the-ec.html> accessed 27th December 2018

129. Lord Acton, ‘Letter to Archbishop Mandell Creighton’ (1887) <https://history.hanover.edu/courses/excerpts/165acton.html> accessed 23rd June 2020

130. Mukabwa J, ‘A brief history of corporate governance in Kenya’ (2016) <https://www.linkedin.com/pulse/corporate-governance-kenya-part-i-james-mukabwa> accessed 15th May 2019

131. Musyoka C, ‘Corporate Governance in Constitutional Commissions’ (2017) <http://carolmusyoka.com/corporate-governance-in-constitutional-commissions/> accessed 24th December 2018

132. Mwachiro K, ‘Kenya’s economy slows ahead of election’ (2017) <https://www.bbc.com/news/av/business-40684206/kenya-s-economy-slows-ahead-of-election> accessed 9th January 2020

133. Mweti M, ‘Kenya’s Corporate Governance Practices Code, 2015’ (2016) <http://www.bowmanslaw.com/insights/finance/kenyas-corporate-governance-practices-code-2015/> accessed 15th May 2019

134. South African Electoral Commission, 'Vision 2018' (2018) <https://www.elections.org.za/content/About-Us/Vision-2018-(PDF)/> accessed 30th June 2019

135. The National Assembly e-News, 'JLAC considers new law to guide recruitment of IEBC commissioners' (2019) <http://www.parliament.go.ke/sites/default/files/2019-07/REVISED%20NA%20E%20NEWS%20ISSUE%20001-5.pdf> accessed 24th November 2019

Newspapers

136. Aglionby J, 'Kenyan election rerun puts further damper on economy' (2017) <https://www.ft.com/content/ebebe0bc-a213-11e7-9e4f-7f5e6a7c98a2> accessed 23d November 2019

137. Daily Nation, 'Key Dates in Kenya's History' (2013) <https://mobile.nation.co.ke/news/Key-dates-in-Kenya-history/1950946-2108572-format-xhtml-q9rdqo/index.html> accessed 13th September 2019

138. Kamau J, 'Kenya's long journey to electronic voting system' (2017) <https://www.nation.co.ke/news/politics/Kenya-s-long-journey-to-electronic-voting-system/1064-4051950-mwqfgq/index.html> accessed 12th April 2020

139. Kamau J, 'Uhuru hints at referendum to implement BBI report' (2020) <https://www.the-star.co.ke/news/2019-12-04-uhuru-hints-at-referendum-to-implement-bbi-report/> accessed 22nd June 2020

140. Langat P, 'Governance is at the heart of IEBC's woes, says Ezra Chiloba' (2018) <https://www.nation.co.ke/news/Governance-at-heart-of-IEBC-woes--says-Ezra-Chiloba/1056-4653256-l97lvh/index.html> accessed 29 November 2018

141. Langat P, 'Why all is not well at the IEBC' (2018) <https://www.nation.co.ke/news/politics/Why-all-is-not-well-at-IEBC/1064-4702600-os44bu/index.html> accessed 23rd February 2019

142. Machio D, 'BBI presents chance to foster unity' (2019) <https://www.standardmedia.co.ke/article/2001348659/bbi-presents-chance-to-foster-unity> accessed 23rd November 2019

143. Menya W, ‘Final audit exposes tender rot at IEBC that could have led to loss of billons’ (2018) <https://www.nation.co.ke/news/Final-audit-exposes-tender-rot-at-IEBC/1056-4729300-13msrokz/index.html> accessed 23rd February 2019

144. Ngirachu J, ‘Roselyn Akombe resigns from poll agency’ (2017) <https://www.nation.co.ke/news/IEBC-commissioner-Roselyn-Akombe-resigns/1056-4144480-7lyoqhz/index.html> accessed 29th November 2018

145. Standard Online, ‘IIEC publishes final referendum results’ (2010) <https://www.standardmedia.co.ke/article/2000016601/iiec-publishes-final-referendum-results> accessed 14th September 2019

146. Vidija P, ‘Are Kenya's electoral agencies cursed? A look at events since the ECK’ (2018) <https://www.the-star.co.ke/news/2018/04/16/are-kenyas-electoral-agencies-cursed-a-look-at-events-since-the-eck_c1744439> accessed 24th December 2018

147. Vidija P, ‘IEBC seeks to employ 359,000 officials for August polls’ (2017) <https://www.the-star.co.ke/news/2017-06-09-iebc-seeks-to-employ-359000-officials-for-august-polls/> accessed 12 April 2019