

REPORT

SEPTEMBER 2023



**EXAMINING
THE INDEPENDENCE &
FUNCTIONALITY OF INDEPENDENT
FISCAL INSTITUTIONS IN KENYA**



EXECUTIVE SUMMARY

The demand for independent regulatory and oversight institutions offices in Kenya's pre-2010 constitutional dispensation increased in response to the rise of widespread authoritarian leadership, corruption, and the mismanagement of public resources. These independent institutions and offices are expected to enhance democracy and accountability by monitoring and overseeing governmental functions. To effectively fulfill their mandate, the institutional framework must ensure they operate independently – free from political interference, but they must be accountable. Establishing these institutions in the Kenyan constitution was meant to signal their importance and ensure they were not tinkered with for political expediency. However, questions have been raised regarding how constitutional protection has guaranteed their independence, accountability, and effectiveness in executing their mandate, which informed this study.

The study focused on five independent fiscal institutions under Chapter 15, namely the Office of the Controller of Budget (OCOB), the Commission on Revenue Allocation (CRA), the Salaries and Remuneration Commission (SRC), and the Office of the Auditor General (OAG) which are directly entrusted with ensuring financial prudence, equity in public resource use and oversight (Popularly referred to as Independent Fiscal Institutions - IFIs). It drew on the provisions of the Constitution and the relevant legal framework, which outlines the principles of the rule of law, public finance, public administration, and their operationalization. The study also looked at the effectiveness of Parliament in its role of providing oversight to these institutions. The oversight role was established by looking at the capacity and effectiveness of Parliament and the Parliamentary Budget Office.

In collecting data, the study adopted a hybrid of qualitative and quantitative participatory approaches encompassing a secondary review of key policy, regulatory, and legislative frameworks supporting the IFIs. The qualitative approach was employed to collect non-numerical data on functional and administrative independence with norms and standards in service delivery observed as part of qualitative data for some functions and mandates of the IFIs. The tools for qualitative data included in-depth Interviews and Key Informant Interviews. Desktop reviews and data extracts were carried out to collect secondary data and entailed collecting numerical statistics. In-depth interviews and discussions were held with relevant key informants from the select institutions guided by interview tools that generated information on IFIs financing, operations, and administrative services in delivering their mandate. Data analysis and findings were curated in line with the study objectives and presented in tables, trends, and percentages and, where appropriate, to support a critical evaluation.

Overall, the study findings have underscored these institutions' critical role in upholding democracy, promoting accountability, and safeguarding the rights of Kenyan citizens. While the country has made significant strides in establishing a framework for these institutions, including a robust legal foundation, it is evident that challenges persist that continue to hinder the achievement of IFIs mandates given Kenya's political culture and practice. The

study has underscored the urgency of addressing these challenges with the recommendations in this report, offering a roadmap for meaningful reforms. Strengthening the legal framework to enhance the independence and accountability of these institutions is paramount. Equally crucial is ensuring adequate funding, which will empower these bodies to fulfill their mandates effectively.

To this end, the study makes the following recommendations:

a. Recommendations on the functions and roles of the select independent institutions and their independence, accountability, and effectiveness

- Enhance the independence and autonomy of IFIs by safeguarding their decision-making processes from political interference through revising relevant legislation. Where CRA and Treasury differ, there should be a requirement that both parties are invited to Parliament to be heard before passage of the Division of Revenue Bill.
- The commissions and independent offices can utilize enhanced multi-agency and multilateral collaborations to manage public resources and peer-to-peer support better to discharge their mandates. SRC, for example, should work closely with the Public Service Commission and the County Public Service Boards to deal with the recruitment of public servants to rationalize the country's wage bill.
- A review and re-establishment of the national treasury to delink it as part of the executive with capabilities to serve all arms of government and state organs equally should be considered.

b. Recommendations on the legal framework meant to effectuate independence, accountability, and effectiveness of the select institutions

- Review relevant legislation to free the appointment process of commissioners and chairpersons to the IFIs from political interference.
- The appointment process should guarantee an impartial and non-partisan procedure to ensure commissioners do not feel indebted to those who will be affected by their decisions.
- To enhance public accountability through Parliament, there is a need for a legal obligation for Parliament to debate the reports in a restricted time frame.
- Members of these commissions and offices should be required to appear before the relevant Parliamentary committees to discuss these reports. There is no explicit obligation in law on what should happen once Parliament receives the reports.

c. Recommendations on funding and the financial independence of the select constitutional commissions and independent offices

- One main challenge to the independent fiscal institutions' independence is the issue of inadequate resources. The institutions have been experiencing perennial budget shortfalls, thus affecting the timely

execution of their mandate. As such, minimum resource allocation for the IFIs should be based on a particular law provision to enable them to carry out their mandate and to be better protected against potential attempts to defund them.

d. Recommendations on the effectiveness of the oversight role of the parliament concerning the select constitutional commissions and independent offices

- Since constitutional commissions and independent offices are subject to Parliament protection, given their role of representation and oversight, any attack on them from the Executive or any other organization must be an affront to the institution of Parliament and must act to protect the institutions.
- Parliament must robustly defend and protect them if its watchdog role is to be felt. Parliament should always guard against unwarranted attacks, especially from persons or entities under scrutiny.
- The Auditor Generals' reports should never be mere allegories. There is an urgent need to clear the backlog of the Auditor General's reports and update them to actualize the implementation of the provisions of Article 226 (5) of the Constitution by directly apportioning culpability to public officers and offices by examining books of accounts in real-time. This will also enable the sharing of revenue between the two levels of government based on current audited statements as required by law.
- There is a need to create a high-level team drawn from Parliament, OCOB, and OAG who shall work comprehensively to follow reports and recommendations and ensure actions are undertaken.
- The PBOs should be provided with unrestricted access to information in an accessible and timely manner in electronic and paper formats to discharge their responsibilities.
- PBO requires the power and autonomy to initiate reports and programs as mandated.
- While drafting specific requests to a government department, the PBO should be detailed in the data needed and its response; government entities should take less than two weeks to provide the requested data in machine-readable formats.

e. Recommendations on the internal and external factors that impact the effectiveness of the constitutional commissions and independent offices in achieving their mandates

- The Judiciary should ensure consistent and impartial adjudication of cases related to the Independent Offices and Commissions. The court outcome should be in the public's interest and strictly conform to the rule of law.

- Amend Article 223 of the Constitution that the national government may spend money that has not been appropriated due to insufficient budgeted amount or expenditure that has arisen for the purpose that no amount has been appropriated.
- As much as expenditures under this Article are approved within two months after the first withdrawal by Parliament, the national government has used this Article as a loophole to occasion supplementary budgets that jeopardize prudent fiscal planning.
- Embrace civic education and put in place office leaders who promote supportive norms and who uphold solid values and public ethics, without which political threats will abound.

CONTENTS

Executive Summary	1
List of Acronyms	5
List of Tables and Figures	6
Chapter One: Background and Context of Independent Institutions	8
1.1 Kenya Profile	9
1.2 Legal Framework Meant to Enhance Independence, Accountability, and Effectiveness of the Select Institutions	10
1.3 Objectives of the Study	17
1.4 Significance of the Study	18
1.5 Scope of the Study	18
1.6 Study Methodology	18
1.6.1 Stakeholder Mapping	19
1.6.2 Ethical Consideration, Quality Assurance and Control	19
Chapter Two: Literature Review and Comparative Study	20
2.1 Overview of Independent Fiscal Institutions	20
2.2 Comparative Study on Independent Fiscal Institutions	20
Chapter Three: Analysis and Findings from the Select Constitutional Commissions and Independent Offices	24
3.1 The Commission on Revenue Allocation (CRA)	24
3.2 Salaries and Remuneration Commission (SRC)	30
3.3 Office of the Controller of Budget (OCOB)	35
3.4 Functions and Roles, Independence, Accountability, and Effectiveness of Office of Auditor General	38
3.5 Functions and Roles, Independence, Accountability, and Effectiveness of Public Accounts Committee & Parliamentary Budget Office	41
3.5.1 Public Accounts Committee (PAC)	41
3.5.2 Parliamentary Budget Office (PBO)	42
3.6 Extent To Which the Institutions Are Funded and Their Financial Independence	42
3.7 Effectiveness of the Oversight Role of Parliament Concerning the IFIs	44
Chapter 4: Study Recommendations and Conclusion	

LIST OF ACRONYMS

A-I-A	Appropriation in Aid
BIRRs	Budget Implementation Review Reports
CCIOs	Constitutional Commissions and Independent Offices
CEO	Chief Executive Officer
CFS	Consolidated Fund Services
COG	Council of Governors
COTU	Central Organization of Trade Unions
CRA	Commission on Revenue Allocation
CSOs	Civil Society Organizations
DCI	Director of Criminal Investigations
EACC	Ethics and Anti-Corruption Commission
FC	Finance Commission
FFC	Financial and Fiscal Commission
FWSC	Fair Wages and Salaries Commission
FY	Financial Year
IBEC	Intergovernmental Budget and Economic Council
ICT	Information, Communication, and Technology
IFIMIS	Integrated Financial Management Information Systems
IFIs	Independent Fiscal Institutions
JSC	Judicial Service Commission
KHRC	Kenya Human Rights Commission
KII	Key Informant Interview
MDAs	Ministry, Departments and Agencies
MP	Member of Parliament
NNRFC	National Natural Resources and Fiscal Commission
NT	National Treasury
OAG	Office of the Auditor General
COB	Controller of Budget
DPP	Director of Public Prosecutions
OECD	Organization of Economic Cooperation and Development
OSR	Own-Source Revenue

PAC	Parliamentary Public Accounts Committee
PBO	Parliamentary Budget Office
PESTEL	Political, Economic, Social, Technological, Environmental and Legal
PFMA	Public Finance Management Act
PIC	Parliamentary Investments Committees
PPP	Public Private Partnership
PSC	Public Service Commission
SMEs	Small Medium Enterprises
SRC	Salaries and Remuneration Commission
SWOT	Strengths, Weakness, Opportunities, and Threats
UASU	University Academic Staff Union

LIST OF TABLES AND FIGURES

Table 3.1: CRA Functions, KRAs, Strategies, and the Outcomes	24
Table 3.2: Public Expenditure and Ordinary Revenue for the Period 2013/14 to 2021/22	28
Table 3.3: Mandates, KRAs, Strategic Objectives, and Expected Outcome for SRC	30
Table 3.4: Wage Bill Trend in Relation to Other Variables – 2008/09 to 2019/20	34
Table 3.5: OCOB's Mandates and Roles, KRAs, Strategic Objectives, and Expected Outcomes	35
Table 3.6: OAG Mandates, KRAs, Strategic Objectives, and Expected Outcomes	38
Table 3.7: Recurrent and Development Allocation to Select Institutions: 2013/2014 to 2022/2023	42
Figure 3.1: CRA Proposed vs Parliament Approved Allocation of Revenue to Counties	27
Figure 3.2: Actual and Projected OSR for the FY2013/14 to 2021/22-KSh Billion	29
Figure 3.3: Funds Planned vs Allocation to Select Institutions 2013/2014 to 2022/2023	43

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CHAPTER ONE

BACKGROUND AND CONTEXT OF INDEPENDENT INSTITUTIONS

Constitutional Commissions and Independent Offices (CCIOs) are public bodies, politically neutral and independent from the three arms of government¹. They are meant to enforce the rule of law, encourage transparency and accountability, prevent corruption, and ultimately reinforce both the quality and the resilience of democracy. To achieve this, CCIOs are expected to insulate certain state activities within their mandate from partisan politics or provide a dedicated mechanism for publicly scrutinizing and reporting on state responsibilities. However, significant questions have been raised regarding their effectiveness, accountability, and independence in practice, especially in new democracies.

During the era of decolonization after World War II, independent institutions were embedded in new constitutions across Africa, Asia, and the Caribbean to preserve the institutional neutrality of politics, the civil service, and electoral administration. Consequently, the demand for independent regulatory and oversight institutions has increased in response to multi-partisan democracy, progressive demands to purge corruption from politics, and governments' increasing size and complexity. In the context of weak legislatures, opposition political parties, and civil society, CCIOs are perceived as a more effective way to address corruption, build a culture of human rights, and promote inclusivity.

At independence in 1963, Kenya enacted a Constitution whose makers hoped to create a united nation capable of social and economic progress, where men and women are confident in the sanctity of individual rights and liberties. The Independence Constitution underwent many amendments that ended up strengthening the institution of the

¹ *These mainly include judiciary, executive and parliament.*

Presidency at the expense of other institutions of governance—the legislature and Judiciary. These amendments led to a structure of government that was unaccountable and a situation where the President exercised unlimited powers contrary to the tenets of constitutionalism, resulting in the quest for a new Constitution².

To this end, the Kenya Constitution (2010)³ established CCIOs to democratize⁴ the state with the belief that it would solve complex governance problems that were being faced in the country⁵, strengthen state institutions, ensure the integrity and accountability of governments, and lead to the renewal of society and the affirmation of its values. Further, the 2010 Constitution was perceived by many as the basis for transforming law, politics, and economics. It had at its core the promise of ensuring checks and balances on the discharge of governmental powers. The Constitution was also meant to end the enormous and unfettered powers that had been the hallmark of the Presidency and the Executive branch in general in the post-independence dispensation.

1.1 Kenya Profile

The 2010 Constitution and Public Financial Management Acts, 2012 and Regulations, 2015 provided for establishing commissions and independent offices, their objects, appointment and removal of members, their powers, functions and responsibilities, funding, and oversight. Chapter 15 of the Constitution provides for independent commissions and institutions tasked with other objectives to protect the people's sovereignty, secure the observance of democratic values and principles by all State organs, and promote constitutionalism. There are 10 commissions and two independent offices in Kenya outlined in the 2010 Constitution,⁶ out of which four, namely, the Office of the Controller of Budget (OCOB), the Commission on Revenue Allocation (CRA), the Salaries and Remuneration Commission (SRC), and the Office of the Auditor General (OAG) are directly entrusted with ensuring financial prudence, equity in public resource use and oversight, which this study will focus on. The institutions are called Independent Fiscal Institutions (IFIs) and are supposed to be accountable to the citizens through Parliament.

The principles of public finance management espoused under Article 201 of the Constitution dictate openness and accountability that includes public participation in financial matters, prudent and responsible use of public funds with transparent fiscal reporting and the promotion of an equitable society, and that the burden of taxation and

² B. Sibanya (2010). *Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism: The Law Society of Kenya Journal* 24.

³ http://www.parliament.go.ke/sites/default/files/2023-03/The_Constitution_of_Kenya_2010.pdf

⁴ <https://journals.keabarak.ac.ke/index.php/kjle/article/view/178/176>

⁵ Since independence in 1963, there have been 38 amendments to the Constitution. The effect of all those amendments substantially altered the Constitution. *Constitution of Kenya (Amendment) Act No. 14 of 1986 removed the security of tenure of the offices of the Attorney-General and the Controller and Auditor-General. Subsequently, the Constitution of Kenya (Amendment) Act No. 4 of 1988 removed security of tenure for the Commissioners of the Public Service Commission, the High Court Judges and the Court of Appeal Judges*

⁶ *Chapter 15 of the Constitution*

borrowing be shared relatively and between present and future generations. In addition, Article 226(5) of the Constitution is emphatic that if the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, they are liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not. The Constitution, therefore, established commissions and independent offices to enforce public funds' prudent use and management. While the constitutional commissions and independent offices are not subject to direction or control by any person or authority, Parliament must ensure this independence is upheld, that the institutions are accountable and effective, and that adequate funds are allocated to enable them to perform their constitutional mandates.

The Constitution envisaged that the IFIs would provide impartial and non-partisan oversight of public financial management and performance and, in some cases, advise relevant offices on fiscal policy and performance towards ensuring the realization of budgetary discipline and public trust. Even though budget decision-making and implementation is ultimately the responsibility of the democratically elected government, independent fiscal institutions provide mechanisms to address bias towards spending and deficits to enhance fiscal discipline, promote greater budgetary transparency, and raise the quality of public debate on public finance management.

Conversely, this has not been the case over 10 years after the enactment of the Constitution and the establishment of independent commissions and institutions. Several issues about the use, distribution, and accounting of public funds have continued to be a growing concern in the country. Among them are inequality and unequal resource distribution, inequity in remuneration in the public sector, fiscal indiscipline in handling public resources, inadequate budgetary allocation to the development programs, and growth in recurrent funding⁷, resulting in low investment in capital projects, which weakens the countries' economy. Further, a large part of this recurrent expenditure growth is financed using borrowed resources, begging the question, how is this happening under the watch of IFIs?

In addition, there has been a generally poor budget discipline of Ministries, Departments, and Agencies (MDAs), including county governments, characterized by the alteration within a fiscal year of approved national and county budget documents through supplementary budgets, thus undermining the delivery of planned programs.

⁷ *There has been a decline in the overall expenditure of the development budget with the recurrent budget recording a worrying growth.*

1.2 Legal Framework Meant to Enhance Independence, Accountability, and Effectiveness of the Select Institutions

The demand for independent regulatory and oversight institutions offices in Kenya's pre-2010 constitutional dispensation increased in response to the rise of widespread authoritarian leadership, corruption, and mismanagement of public resources. These independent institutions and offices are expected to enhance democracy and accountability by monitoring and overseeing governmental functions. To effectively fulfill their mandate, the institutional framework must ensure they operate independently and free from political interference, but they must also be accountable. Establishing these institutions in the Kenyan Constitution was meant to signal their importance and ensure they were not tinkered with for political expediency. However, there are questions on how constitutional protection has guaranteed their independence, accountability, and effectiveness in executing their mandate. This section provides a summary of the legal provisions and an analysis of the existing ones and other statutory laws. This section will further evaluate the extent to which they entrench the independence and accountability of the IFIs in Kenya and critically review the existing legal gaps.

A. CRA

Variables to consider in the design of legal provisions on CCIO	Legal provisions
<p>Independence</p> <p>Functional:</p> <ul style="list-style-type: none"> • Should enjoy administrative independence, subject to the constitution and the law. • Carry out functions without receiving orders and instructions from other state organs. <p>Operational:</p> <ul style="list-style-type: none"> • Ability to make decisions free from governmental interference. • Having the organizational infrastructure required to function efficiently and effectively. • Non-politicization of appointments, the composition, and procedures of the commissions. • Security of tenure, with explicit legal provisions on removal. 	<ol style="list-style-type: none"> 1) Article 248 (2) (f) of the Constitution identifies CRA as a commission. 2) Article 250 of the Constitution provides for the composition, appointment, and terms of office. Office members are first ‘identified and recommended for appointment in a manner prescribed by national legislation,’ then ‘approved by the National Assembly’ and finally ‘appointed by the President.’ 3) Articles 251(1)-(7) of the Constitution lays ground and Removal from office of a member of the commission. 4) Article 252 (1) (a) of the Constitution says the Office of the CRA has the power to conduct investigations on its initiative or following a complaint made by a member of the public on budget implementation matters. 5) Article 252(1) (b) of the Constitution grants CRA powers for reconciliation, mediation, and negotiation. 6) Article 3 of the CRA Act 2021 stipulates the Powers of the Commission as a corporate body. In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to – (a) acquire, hold, charge, and dispose of movable and immovable property and (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

	<p>Perception of independence:</p> <ul style="list-style-type: none"> Public confidence in the workings of the independent office Perceived in the public sphere to be shielded from efforts to weaken their position or to call their authority into question. <p>Collaboration and consultation with other state organs:</p> <ul style="list-style-type: none"> CRA should seek collaborative relationships with other state organs to support good governance 	<p>7) Article 5 6, 7 of the CRA Act, 2011 stipulates terms, qualifications, and vacancies of the chairperson and commission members. They are required to be appointed by the provisions of Article 215 of the Constitution and serve per the provisions of Article 216. They serve on a part-time basis, are non-executive, and have led a distinguished career as professionals experienced in financial and economic matters, with at least 15 years in the case of the chairperson and 10 years in the case of any other member.</p> <p>8) Article 16 of the CRA Act, 2011. Under Article 252(1) (c) of the Constitution, the commission shall employ its own staff through a competitive and transparent process.</p>
<p>Accountability</p>	<ul style="list-style-type: none"> Checks and balances to avoid abuse of power. Public accountability. Accountability to the executive, legislature, and judicial branches of government to detect and prevent abuse, arbitrary behavior, or illegal and unconstitutional conduct. Accountability in the use of money allocated to the office. Accountability by counterpart independent institutions. 	<p>1) Article 165 of the Constitution confers on the High Court the power to intervene where it is alleged that the Constitution has either been violated or threatened with violation.</p> <p>2) Article 254(3) of the Constitution requires every commission or independent office to publish and publicize its reports.</p> <p>3) Article 22 (1) of the CRA Act, 2011. The commission shall keep all proper books and records of account of the commission's income, expenditure, assets, and liabilities. (2) Within three months at the end of each financial year, the commission shall submit to the Auditor-General the accounts of the commission in respect of that year together with a statement of the income and expenditure of the commission during that year and statement of the assets and liabilities of the commission on the last day of that financial year.</p> <p>4) Article 23 of the CRA Act, 2011. The report of the commission under Article 254 of the commission shall, in respect of the financial year to which it relates, contain: (a)</p>

		the financial statements of the commission; (b) a description of the activities of the commission; (c) such other statistical information as the commission considers appropriate relating to the commission’s functions; and (d) any other information relating to its functions that the commission considers necessary.
Effectiveness	<ul style="list-style-type: none"> To ensure effectiveness, the commission’s findings, decisions, recommendations, and conclusions should be binding and must be complied with. Otherwise, they are rendered irrelevant, and their budgetary allocation would be a waste of public resources 	1) Article 216 of the Constitution mandates CRA to primarily make recommendations for equitable revenue sharing between national and county governments and among county governments. While making these recommendations, the commission is also expected to make recommendations on financing and financial management by county governments to encourage fiscal responsibility and to define and enhance revenue sources for both levels of government. The commission must prepare a policy identifying marginalized areas, which it reviews regularly.

B. SRC

Variables to consider in the design of legal provisions on CCIO		Legal provisions
Independence	<p>Functional:</p> <ul style="list-style-type: none"> Should enjoy administrative independence, subject to the Constitution and the law. Carry out functions without receiving orders and instructions from other state organs. <p>Operational:</p> <ul style="list-style-type: none"> Ability to make decisions free from governmental interference. 	<ol style="list-style-type: none"> Article 230 establishes the SRC and outlines its membership, appointment, powers and functions, and fundamental principles to be adhered to by the commission in undertaking its mandate. Article 248 (2) (f) of the Constitution identifies SRC as a commission. Operationalized by SRC Act, 2011. Article 250 of the Constitution provides for the composition, appointment, and terms of office.

	<ul style="list-style-type: none"> • Having the organizational infrastructure required to function efficiently and effectively. • Non-politicization of appointments, the composition, and procedures of the commissions. • Security of tenure, with explicit legal provisions on removal. <p>Perception of Independence:</p> <ul style="list-style-type: none"> • Public confidence in the workings of the independent office • Perceived in the public sphere to be shielded from efforts to weaken their position or to call their authority into question. <p>Collaboration and Consultation with other State Organs:</p> <ul style="list-style-type: none"> • SRC should seek collaborative relationships with other state organs to support good governance. 	<p>Office members are first ‘identified and recommended for appointment in a manner prescribed by national legislation,’ then ‘approved by the National Assembly’ and finally ‘appointed by the President.’</p> <ol style="list-style-type: none"> 5. Articles 251(1)-(7) of the Constitution lays the ground for the removal from office of a commission member. 6. Article 252 (1) (a) of the Constitution says the Office of the SRC has the power to conduct investigations on its initiative or following a complaint made by a member of the public on budget implementation matters. 7. Article 252(1) (b) of the Constitution grants SRC powers for reconciliation, mediation, and negotiation. 8. The SRC Act 2011 (Revised in 2017) provides the functions, powers, and structures of the SRC. 9. To promote closer collaborations with critical institutions and ensure compliance with SRC’s advisories, the commission reviewed the MOU for potential engagement with the Office of Auditor General and the EACC on mutual benefit and interest matters.
Accountability	<ul style="list-style-type: none"> • Checks and balances to avoid abuse of power and public accountability to the executive, legislature, and judicial branches of government to detect and prevent misuse, arbitrary behavior, or illegal and unconstitutional conduct. • Accountability in the use of money allocated to the office. 	<ol style="list-style-type: none"> 1. Article 165 of the Constitution confers on the High Court the power to intervene where it is alleged that the Constitution has either been violated or threatened with violation. 2. Article 254(3) of the Constitution requires every commission or independent office to publish and publicize its reports.

	<ul style="list-style-type: none"> Accountability by counterpart independent institutions. 	
Effectiveness	<ul style="list-style-type: none"> To ensure effectiveness, the commission's findings, decisions, recommendations, and conclusions should be binding and complied with; otherwise, they are rendered irrelevant, and their budgetary allocation would be a waste of public resources. 	<p>Article 230 of the Constitution and SRC Act, 2011, section 11 stipulates the mandate and functions of SRC, including:</p> <p>a) <i>Set and regularly review the remuneration and benefits of all state officers.</i></p> <p>b) <i>Advise the national and county governments on the remuneration and benefits of all other public officers.</i></p>

C. OCOB

Variables to consider in the design of legal provisions on CCIO		Legal provisions
Independence	<p>Functional:</p> <ul style="list-style-type: none"> Should enjoy administrative independence, subject to the Constitution and the law. Carry out functions without receiving orders and instructions from other state organs. <p>Operational:</p> <ul style="list-style-type: none"> Ability to make decisions free from governmental interference. Having the organizational infrastructure required to function efficiently. Non-politicization of appointments, the composition, and procedures of the commissions. 	<ol style="list-style-type: none"> Article 248 (3) of the Constitution identifies OCOB as an independent office. Article 250 of the Constitution provides for the composition, appointment, and terms of office. Office members are first 'identified and recommended for appointment in a manner prescribed by national legislation,' then 'approved by the National Assembly', and finally 'appointed by the President.' Articles 251(1)-(7) of the Constitution lays the ground for the removal of office of a holder of an independent office. Article 252 (1) (a) of the Constitution says the Office of the COB has the power to conduct investigations on its initiative or following a complaint made by a member of the public on budget implementation matters.

	<ul style="list-style-type: none"> ● Security of tenure, with explicit legal provisions on removal. <p>Perception of Independence:</p> <ul style="list-style-type: none"> ● Public confidence in the workings of the independent office. ● Perceived in the public sphere to be shielded from efforts to weaken their position or to call their authority into question. <p>Collaboration and Consultation with other State Organs:</p> <ul style="list-style-type: none"> ● Independent institutions should seek collaborative relationships with other state organs to support good governance. 	<p>5. Article 252(1) (b) of the Constitution grants COB powers for reconciliation, mediation, and negotiation. COB provides an alternative budget implementation dispute resolution mechanism.</p> <p>6. Controller of Budget (COB) ACT, 2016,</p> <p>i. Section 15: Protection of COB or any other staff working or agent, working under instructions of COB from personal liability for any action, claim, or demand done in good faith to execute the powers, functions, or duties of the Controller of Budget under the Constitution, this Act, or any other law.</p> <p>ii. Section 16: Duty to cooperate with COB: A public officer, state organ, or state office shall cooperate with the Controller of Budget to enable the Controller of Budget to carry out their functions by the Constitution and any other law. Iii. A public officer who refuses or fails to cooperate with the COB as required by law commits an offense and is liable, on conviction, to a term of imprisonment not exceeding two years, a fine not exceeding one million shillings, or to both.</p>
<p>Accountability</p>	<ul style="list-style-type: none"> ● Checks and balances to avoid abuse of power ✓ Public accountability ✓ Accountability to the executive ● Legislature and judicial branches of government to detect and prevent abuse, arbitrary behavior, or; ● Illegal and unconstitutional conduct 	<p>7. Constitution 228 (6) and COB Act, 2016, section 9, requires the Controller of Budget to monitor the use of public funds and submit to each House of Parliament a report on the implementation of the budgets of the National and County Governments every four months. It provides an avenue for the COB to publicize information on budget implementation at the County Government level in line with Section 39 (8) of the Public Finance Management Act, 2012.</p> <p>8. Article 35 of the Constitution provides the right for every citizen to access public information held by the state.</p>

	<ul style="list-style-type: none"> ✓ Accountability in the use of money allocated to the office ✓ Accountability by counterpart independent institutions 	<p>9. Article 39 (8) of the Public Finance Management Act, 2012 requires the COB to provide information to the public on budget implementation at the National and County levels of Government.</p> <p>10. Article 165 of the Constitution confers on the High Court powers to intervene where it is alleged that the Constitution has either been violated or threatened with violation.</p> <p>11. Article 254(3) of the Constitution requires every commission or independent office to publish and publicize its reports.</p>
<p>Effectiveness</p>	<ul style="list-style-type: none"> ● To ensure the effectiveness of OCOB, its findings, decisions, recommendations, and conclusions should be binding and must be complied with; otherwise, they are rendered irrelevant, and their budgetary allocation would be a waste of public resources 	<p>12. Articles 204 (9), 206(4), and 207(3) of the Constitution address overseeing the implementation of the budgets of the National and County Governments, adding that OCOB has to approve the withdrawal of funds from the equalization fund, consolidated fund, county revenue fund, respectively.</p> <p>13. Articles 225 (7) of the Constitution: Financial control to state organs and public management. If parliament seeks to approve or renew a decision to stop the transfer of funds to state or public entities, the OCOB is required to present a report to parliament on the matter.</p>

D. OAG

Variables to consider in the design of legal provisions on CCIO	Legal provisions
<p>Independence</p> <p>Functional:</p> <ul style="list-style-type: none"> ● Should enjoy administrative independence, subject to the Constitution and the law. ● Carry out functions without receiving orders and instructions from other state organs. <p>Operational:</p> <ul style="list-style-type: none"> ● Ability to make decisions free from governmental interference. Analyze the legal framework to effectuate the select institutions' independence, accountability, and effectiveness and identify gaps. ● Having the organizational infrastructure required to function efficiently and effectively. ● Non-politicization of appointments, the composition, and procedures of the commissions. ● Security of tenure, with explicit legal provisions on removal. <p>Perception of Independence:</p> <ul style="list-style-type: none"> ● Public confidence in the workings of the independent office. ● Perceived in the public sphere to be shielded from efforts to weaken their position or to call their authority into question. <p>Collaboration and Consultation with other State Organs:</p>	<ol style="list-style-type: none"> 1. Article 229 establishes the Office of the Auditor General (OAG) and outlines fundamental principles for undertaking its mandate. 2. Article 248 (3) of the Constitution identifies OAG as an independent office. 3. Article 229 of the Constitution provides for the appointment and terms of office. AG is first 'identified and recommended for appointment by the president,' then 'approved by the National Assembly,' and finally 'appointed by the President.' 4. Article 249 further outlines the Auditor-General's objects and authority, including the Office's independence from any other person or rule. The Constitution requires the Office to be impartial, exercise its powers, and perform its functions without fear, favor, or prejudice. 5. Articles 251(1)-(7) of the Constitution lays ground and the process of removal from office of a holder of an independent office. 6. According to Article 252 (1) (a) of the Constitution, the OAG has the power to conduct investigations on its initiative or following a complaint made by a member of the public on budget implementation matters. 7. Article 252(1) of the Constitution grants OAG powers for reconciliation, mediation, and negotiation; powers to hire own staff, perform functions, and exercise power prescribed in legislation and conferred by the Constitution.

	<ul style="list-style-type: none"> • Independent institutions should seek collaborative relationships with other state organs to support good governance. 	<p>8. The operationalization of the mandate of the Auditor-General as stipulated in the Constitution is outlined in Section 7(1) (a-g) of the Public Audit Act, 2015.</p>
<p>Accountability</p>	<p>Checks and balances to avoid abuse of power:</p> <ul style="list-style-type: none"> • Public accountability • Accountability to the executive, legislature, and judicial branches of government to detect and prevent abuse, arbitrary behavior, or illegal and unconstitutional conduct <ul style="list-style-type: none"> ✓ Accountability on the use of money allocated to the office ✓ Accountability by counterpart independent institutions 	<p>L. Article 254(3) of the Constitution requires every commission or independent office to publish and publicize its reports. This requires the Auditor-General to submit an annual report to Parliament and the President and report on any matter that the President, the National Assembly, and the Senate may require from the Auditor-General.</p> <p><i>The Auditor-General reports to the National Assembly annually on the activities of the Office and its performance through the main accountability instruments, namely the budget, audited financial statements, and the annual corporate report.</i></p> <p><i>The OAG makes submissions to the Budget and Appropriation Committee of the National Assembly on resource requirements. Audit reports are made public and are tabled in Parliament and relevant County Assemblies.</i></p> <p><i>In addition to these audit-specific reports, OAG publishes two general summary reports each year. It analyses outcomes of the audits at the National Government level in the Blue Book and County Governments in the Green Book.</i></p> <p><i>The reports are available on the OAG website, the Government Printer, public libraries, institutions of higher learning, and every audited entity.</i></p>

		<p><i>However, reports can only be available to the public after being submitted to Parliament or the relevant County Assemblies.</i></p> <p>2. The Auditor-General is audited by an independent auditor appointed by the National Assembly as outlined in Article 226(4) of the Constitution.</p>
Effectiveness	<ul style="list-style-type: none"> To ensure the effectiveness of OAG, its findings, decisions, recommendations, and conclusions should be binding and must be complied with, otherwise; they are rendered irrelevant, and their budgetary allocation would be a waste of public resources 	<p>3. Article 229 (8) of the Constitution requires that within three months of receiving an audit report, Parliament or the County Assembly shall debate and consider the report, make recommendations, and take appropriate action.</p> <p>4. The Auditor-General follows up to confirm whether the entities have implemented the recommendations.</p>

E. PBO

Variables to consider in the design of legal provisions on CCIO		Legal provisions
Independence	<p>Functional:</p> <ul style="list-style-type: none"> Should enjoy administrative independence, namely, being subject to the Constitution and the law. Carry out functions without receiving orders and instructions from other state organs. Ability to make decisions free from governmental interference. Having the organizational infrastructure required to function effectively. 	<p>1. The Parliamentary Budget Office (PBO) was created in May 2007 to enhance the capacity of the National Assembly to scrutinize the budget and oversee budget implementation. The Office was later established by the Fiscal Management Act, 2009, which was later repealed under Section 208 of the Public Finance Management Act, 2012, with the PBO being retained under Section 9 of the PFM Act, 2012.</p> <p>2. PFM Act, 2012 Section 10. One of the stipulated tasks is to establish and foster relationships with the National Treasury,</p>

	<ul style="list-style-type: none"> • Non-politicization of appointments, the composition, and procedures of the commissions • Security of tenure, with explicit legal provisions on removal <p>Perception of Independence:</p> <ul style="list-style-type: none"> • Public confidence in the workings of the independent office. • Perceived in the public sphere to be shielded from efforts to weaken their position or to call their authority into question. <p>Collaboration and Consultation with other State Organs:</p> <ul style="list-style-type: none"> • Independent institutions should seek collaborative relationships with other state organs to support good governance 	<p>county treasuries, and other national and international organizations, with an interest in budgetary and socio-economic matters as it considers appropriate for the efficient and effective performance of its function.</p>
Accountability	<ul style="list-style-type: none"> • Checks and balances to avoid abuse of power. • Public accountability. • Accountability to the executive, legislative, and judicial branches of government to detect and prevent abuse, arbitrary behavior, or illegal and unconstitutional conduct <ul style="list-style-type: none"> ✓ Accountability in the use of money allocated to the office ✓ Accountability by counterpart independent institutions 	<ol style="list-style-type: none"> 1. Subject to Article 35 of the Constitution, ensure all reports and other documents produced by the Parliamentary Budget Office are prepared, published, and publicized not later than 14 days after production. 2. PFM Act, 2012 Section 10 requires that in carrying out its functions under the subsection, the Parliamentary Budget Office shall observe the principle of public participation in budgetary matters.
Effectiveness	<ul style="list-style-type: none"> • To ensure the effectiveness of PBO, its findings, decisions, recommendations, and conclusions should be binding and 	<ol style="list-style-type: none"> 1. Required under the Public Finance Act, 2012, to provide professional services, make recommendations, and propose alternative fiscal

	<p>complied with; otherwise, they are rendered irrelevant, and their budgetary allocation would be a waste of public resources.</p>	<p>framework to parliament committees on all budgetary matters.</p>
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The study comes at a time when the independence, functionality, and accountability of the IFIs are questionable, characterized by high levels of corruption, persistent stalemates in the revenue division between national and counties, and mismanagement of public resources. Therefore, the study sought to evaluate the IFIs based on their functionality as envisaged in the Constitution (Chapter 15) and the relevant laws, as well as analyze whether they have delivered their mandate effectively and independently.

1.3 Objectives of the Study

This study analyzed the constitutional, statutory design, and operating environment of The IFIs are meant to ensure the independence, accountability, and effectiveness in using public finances in Kenya. The following specific objectives guided the study:

- i. Examine the functions and roles of the targeted institutions, as stipulated in the Constitution, and establish the extent to which they are independent, accountable, and effective.
- ii. Analyze the legal framework to effectuate the select institutions' independence, accountability, and effectiveness and identify existing gaps.
- iii. Establish how well the offices are adequately funded and financially independent to ensure effectiveness in delivering their mandate.
- iv. Examine the effectiveness of the oversight role of parliament concerning the select institutions and commissions.
- v. Assess the existing internal and external factors that impact the effectiveness of the institutions in achieving their mandate.
- vi. Recommend strategies for improving the independence, accountability, and effectiveness of the select constitutional commissions and independent offices.

1.4 Significance of the Study

This research's findings inform future efforts to strengthen the role of IFIs in Kenya. Further, the analysis will be used by diverse audiences, including other Civil Society Organizations (CSOs), policymakers, developmental partners, universities, and the public to inform, mobilize, and advocate for the strengthening and review of various legislations aimed at enabling the target independent institutions and commissions to fulfill their intended constitutional obligations in an effective and accountable manner.

1.5 Scope of the Study

The study focused on five independent fiscal institutions under Chapter 15, namely the Office of the Controller of Budget (OCOB), the Commission on Revenue Allocation (CRA), the Salaries and Remuneration Commission (SRC), and the Office of the Auditor General (OAG) which are directly entrusted with ensuring financial prudence, equity in public resource use and oversight. It drew on the provisions of the Constitution and the relevant legal framework, which outlines the principles of the rule of law, public finance, public administration, and their operationalization. The study also looked at the effectiveness of Parliament in its role of providing oversight to these institutions. The oversight role was established by looking at the capacity and effectiveness of Parliament and the Parliamentary Budget Office.

1.6 Study Methodology

The study adopted a hybrid of qualitative and quantitative participatory approaches encompassing a secondary review of key policy, regulatory, and legislative frameworks supporting the IFIs. The qualitative approach was employed to collect non-numerical data on functional and administrative independence with norms and standards in service delivery observed as part of qualitative data for some functions and mandates of the IFIs. The tools for qualitative data included in-depth interviews and key informant interviews.

In addition, desktop reviews and data extracts were carried out to collect secondary data, which entailed collecting numerical statistics on the budget proposals, requisition, and allocations versus the actual amount released to these independent institutions over a stipulated period. Further, an in-depth review of documents published and grey literature on the effectiveness, efficiency, independence, and accountability of commissions and independent institutions was carried out. IFIs' Public Expenditure Framework was analyzed to gauge the planning, budgeting, allocations, funds release, and implementations. The study also undertook a critical review of the statutory laws and legislature that have a bearing on the operation of these institutions against the provisions of the Constitution. In addition, a study of their strategic plans was undertaken to identify the potential risks that could hinder their optimal functioning. In-depth interviews and discussions were also held with relevant key informants from the select institutions guided by interview tools that generated information on IFIs financing, operation, and administrative services in delivering their mandate.

Data analysis and findings were discussed per the study objectives and presented in tables, trends, and percentages where appropriate to support a critical evaluation. Data Triangulation was used to increase the validity of the results and reviews undertaken to ascertain the extent to which the independent institutions and offices are anchored in the Constitution and the guarantee implied as to their independence, accountability, and effectiveness. A comparative analysis was carried out from other jurisdictions for cross-learning and adoption to improve the effectiveness and efficiency of the IFIs.

1.4.1 Stakeholder Mapping

The critical stakeholders consulted during key informant interviews (KII) included the CEOs and chairpersons of IFIs, beneficiaries that were key recipients and implementing the various interventions, Parliament, and labor unions.

1.4.2 Ethical Consideration, Quality Assurance and Control

The study was conducted in strict compliance with widely accepted ethical standards. Before conducting key informant interviews and in-depth interviews, the respondents' verbal informed consent was sought and obtained. In pursuing their consent, the respondents were assured that their responses would be accorded privacy, anonymity, and confidentiality and would be used solely to achieve the study's objectives. In addition, the respondents were adequately informed about their liberty to freely opt out of the data collection process at any time. Validation meetings were held with experts and stakeholders to ensure the accuracy of the data collected. Further, the report was peer-reviewed by technical partners knowledgeable about IFIs.

CHAPTER TWO:

LITERATURE REVIEW AND COMPARATIVE STUDY

2.1 Overview of Independent Fiscal Institutions

To respond to unprecedented buildup in public sector financial imprudence and lack of oversight, an increasing number of countries have created IFIs with the sole responsibility of providing checks and balances on the executive and legislative branches of government and ensure transparency, accountability, and impartiality which in turn helps bolster the credibility of governments. According to Sajó (2004),⁸ the emergence of IFIs within the government is a means of checking the problem of accountability deficit since traditional democracy is about spoils and the abuse of power to maximize political interest, resulting in a legitimacy crisis in governments.

The creation of independent institutions is thus a reaction to the need for an alternative to the exploitation of the state machinery by the political majority, with the independent institutions expected to provide a new and effective check on the behavior of the elected branches of government. According to the 2012 OECD Recommendation of the Council on Regulatory Policy and Governance, independent regulatory agencies and commissions ought to be considered in instances where there is a crucial requirement for the regulatory body to appear autonomous from politicians, the government, and those being regulated to uphold public trust in decision-making objectivity and to

⁸ Sajó 'Concepts of Neutrality and the State' in R Dworkin et al (eds) *From Liberal Values to Democratic Transition* (2004) 107

ensure confidence in the market. Furthermore, it is vital to have these agencies when governmental and non-governmental entities operate under a unified framework, necessitating competitive neutrality⁹.

Although accountable to the legislature, IFIs are not part of it and are exclusively independent permanent entities with a broad mandate mainly over the central and local governments.¹⁰ IFIs exist and operate based on the system of government in place (parliamentary or presidential), which determines the institutions' independence, accountability, and effectiveness. The heads should be impartial, with no active political affiliation, and serve for a predetermined period spanning beyond the term of the government. In most cases, the institutions have technical staff with full access to all necessary data and information from the government to facilitate the realization of its mandate. Further, to strengthen the culture of independent institutions, the OECD¹¹ states there should be a clear definition of roles towards ensuring accountability, financial independence, autonomous leadership, and staff code of conduct.

The Public Governance Committee of the OECD (2014) further provides principles under which the IFIs should exist: public funding, local ownership, independence and non-partisanship, mandate, relationship with the legislature, access to information, transparency and accountability, communication, and external evaluation. The power of the IFIs is the visibility of its high-quality analysis, as it has no formal instruments to correct fiscal policy.

2.2. Comparative Study on Independent Fiscal Institutions

Independent Fiscal Institutions in European countries, particularly Italy, Spain, and Portugal, were established when the nations were experiencing high levels of public debt. Therefore, the IFIs developed solid reputations due to the success of establishing fiscal discipline, adequate resourcing, and a clear mandate. Important factors contributing to their success also included competent staff, credible board members including academicians, and experts in public finance with solid links with Parliament and media for visibility.

According to the Richard Posner Theory in the Economic Theory of Law,¹² the law can be used to improve economic efficiency as the legal system, much like the market, is seen as a means that regulates the allocation of resources. The theory further argues that the development of a functioning Legal Independent Institution is underpinned by economic logic and its operations guided by principles of economic efficiency. Further, Gloppen, Gargarella, and

⁹ Kopits, George (2011), "Independent Fiscal Institutions: Developing Good Practices", *OECD Journal on Budgeting*, Vol. 11/3.

¹⁰ *OECD JOURNAL ON BUDGETING – VOLUME 2011/3*

¹¹ *OECD JOURNAL ON BUDGETING – VOLUME 2011/3*

¹² Richard Posner, 'Values and Consequences: An Introduction to Economic Analysis of Law.' Available at http://www.law.uchicago.edu/files/files/53.Posner.Values_0.pdf

Skaar¹³ opine that the IFIs are accountable because if left to their own devices, they risk drowning in power and usurping the law, which would be an unpleasant outcome.

Per the Nepal Constitution, conditional grants are designed based on the Government of Nepal's policy and programs, standards, and status of infrastructural development at the local level¹⁴. The National Natural Resources and Fiscal Commission (NNRFC) was constituted under Article 250 with the mandate to determine the fiscal transfers to provinces and local-level governments (The Fiscal Equalization Grants) after Nepal transitioned to a federal government, registering success as its recommendations were legally binding. The NNRFC also recorded significant victory because the subnational governments' expenditure needs and revenue capacity determined resources.

In South Africa, the Financial and Fiscal Commission (FFC)¹⁵ has achieved its mandate due to the binding nature of its recommendations. FFC is a permanent expert commission with a constitutionally defined structure, responsible for advising and making recommendations to Parliament, provincial legislatures organized local government, and other state organs on financial and fiscal matters. Its primary role is to create and maintain an effective, equitable, and sustainable system of intergovernmental fiscal relations in South Africa. It provides proactive, expert, and independent advice on promoting a sustainable budgetary and fair intergovernmental fiscal relations system through evidence-based policy analysis to ensure the realization of constitutional values.

In the case of India, tax devolution and grants recommended by the Finance Commission (FC) form the bulk of Central transfers to states. However, transfers from the union to states are not limited to FC recommendations. The Constitution of India establishes the State Finance Commission (FC), which guides the magnitude of the transfer of resources from the center to the states. The Constitution is categorical on the mandate of FCs, which includes distributing net proceeds of union-divisible taxes between unions and states. As part of its operations, the FC consults with Central ministries, state governments, industrial and business bodies, academicians, and several other stakeholders. It considers their views on making vertical and horizontal equity distribution and transfers for states¹⁶.

Best practices drawn from Ghana's Fair Wages and Salaries Commission (FWSC) include the collaboration between the commission and the Ministry of Employment and Labor Relations, the Ministry of Finance, the Controller & Accountant-General's Department, and the Public Services Joint Standing Negotiation Committee towards the fair determination and management of salaries for all public servants. The (FWSC) ensures job grading, evaluation, performance management, and research are employed in pay administration to enhance productivity and ensure

¹³ *Siri Gloppen, Roberto Gargarella and Elin Skaar, Introduction in Siri Gloppen, Roberto Gargarella and Elin Skaar, Democratization, and the Judiciary: The Accountability Function of Courts in New Democracies (Frank Cass Publishers, 2004)*

¹⁴ *Chakraborty L., Kaur G, Rangan D., Kaur A. & Jacob F. (2021). Analyzing Fiscal Federalism in Global South: South Africa, Kenya, Ethiopia, and Nepal: NIPFP Working Paper Series*

¹⁵ <https://nationalgovernment.co.za/units/view/53/financial-and-fiscal-commission-ffc>

¹⁶ *Finance Commission of India, (2019). Resource Sharing between Centre and States and Allocation across States: Some Issues in Balancing Equity and Efficiency. INSTITUTE OF ECONOMIC GROWTH, DELHI*

high-caliber employees are attracted to and retained within the public service. Before its establishment, the government of Ghana grappled with the challenge of adequately managing salaries and other germane labor concerns of public service workers, a situation that led to rampant strikes on the labor front. The commission introduced the single Spine Salary Structure to migrate all government workers to a single pay platform for proper administration.¹⁷

The evolution of IFIs has not occurred without stumbling blocks. These institutions have had to face considerable challenges along the way. Fombad and Hatchard et al.,¹⁸ argue that developing IFIs that can guarantee accountable governance is a significant challenge. According to the Council of EU¹⁹, it is essential to realize that a watchdog is never likely to be “loved” by the institution it monitors and not at a moment when it criticizes it.

Classic examples of frustrated IFIs include the Venezuela Congressional Budget Office – mainly designed after the United States model – following three years of operation, which was terminated by President Hugo Chávez in 2000; Hungary’s Fiscal Council, which was denied access to some official information and was threatened with a significant cut in funding which was finally struck out, with the council losing all its budget and its technical staff abolished under Prime Minister Viktor Orbán at the end of 2010. Apart from the destabilizing effect on the economy reflected in Hungary’s output, the most significant damage inflicted by such reckless reactions was the sharp erosion in credibility in fiscal management. The lack of transparency and incomplete reporting of public accounts characterized by abuses through the Public Private Partnership (PPP) projects, delayed recognition of state-owned enterprise losses, and optimistic macro-fiscal projections became endemic practices. In many respects, the short-lived experience of Hungary’s Fiscal Council illustrates in fast motion the challenges an independent fiscal institution faces in an environment characterized by fiscal indulgence and low policy credibility.

IFIs designed to operate with a degree of autonomy can sometimes face the threat of being unduly influenced by powerful interest groups. This results in regulatory capture and emerges when such agencies operate without sufficient political oversight, making them vulnerable to the bodies they are meant to regulate. This vulnerability can lead to regulatory decisions that unduly favor individual interests over public benefits²⁰.

Given the above, the functionality and independence of IFIs require a legal framework that explicitly protects the institutions’ independence and impartiality. The law and institutional design must separate IFIs from the President and block any room for control by the Executive branch over the agenda and operations of the IFIs.²¹ These bodies

¹⁷ *Fair Wages Commission calls for Independent Emoluments Commission*

¹⁸ J Hatchard et al *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004)

¹⁹ *Conclusion of 14 March 2023 of the Council of the European Union* (2023, p.6)

²⁰ Quintyn, M., & Taylor, M. W. (2004, March 8). *Economic Issues No. 32 - Should Financial Sector Regulators Be Independent?* *Www.imf.org*. <https://www.imf.org/external/pubs/ft/issues/issues32>

²¹ PL Strauss ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch’ (1984) 84(3) *Columbia Law Review* 594

must also maintain distance from Parliament, which is equally likely to be the object of scrutiny. The constitutional and statutory design of the regime meant to effectuate the principle of independence of these institutions must promote the intention of securing freedom. This is premised on the fact that institutional design is supposed to diminish partisan influence since the institutional structure is not conceived correctly. Partisan interests can twist the law to serve political or private interests, thus defeating the aim of entrenching these IFIs²². The analysis concludes that introducing transparency and checks and balances is pivotal in ensuring a harmonious balance between IFIs and their independence, accountability, and effectiveness. Bentham's principle²³ notes that checks and balances are built on the premise that absolute power corrupts absolutely. This best captures the idea behind the necessity of accountability of IFIs by effectively demonstrating the basis of their decisions.

A lesson from the comparative study is that in the initial phase-in period, which may last through as many as one or two changes in government, the IFIs must prove their non-partisanship and technical competence by ensuring accountability and responsibility on the part of IFIs and respect for the rule of law and impartiality in overseeing IFIs by Parliament.

²² A Sajó 'Neutral Institutions: Implications for Government Trustworthiness in East European Democracies' in J Kornai & S Rose-Ackerman (eds) *Building a Trustworthy State in Post-Socialist Transition* (2004) 37.

²³ Staffan I Lindberg, 'Accountability: The Core Concept and Its Subtypes'

CHAPTER THREE:

ANALYSIS AND FINDINGS FROM THE SELECT CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

This chapter examines the constitutional, statutory design, and operating environment of the four select constitutional commissions and independent offices meant to enhance the independence, accountability, and effectiveness of public finances in Kenya. The Independent Fiscal Institutions reviewed include the Office of Controller of Budget, the Salaries and Remuneration Commission, the Commission on Revenue Allocation, and the Office of the Auditor General. The chapter also probed the role of Parliament in its oversight of the institutions and overseeing revenue and expenditure in the country. This section, therefore, summarizes the study's findings on the mandates and functions of these institutions and provides the status of their independence, accountability, and effectiveness.

3.1 The Commission on Revenue Allocation (CRA)

The Commission on Revenue Allocation (CRA) is an independent commission established under Article 215 of the Constitution and derives its mandate from Articles 216, 203, 204, 205, 249, and the Sixth Schedule of the Constitution. The principal function of CRA, as stipulated in Article 216 (1), is to recommend the basis for the equitable sharing of revenue raised by the national government between the national and county governments (vertical revenue sharing) and horizontally among the county governments. Other functions of the commission include making recommendations on other matters concerning the financing of and financial management by county governments and determining, publishing, and regularly reviewing a policy in which it sets out the criteria to facilitate the identification of marginalized areas for sharing the equalization fund. The spirit and intentions of

the Constitution were to sufficiently empower CRA to temper and guard against unequal and inequitable sharing of resources, given that resource allocation is a political process and requires impartiality. Table 3.1 gives an overview of the commission mandates, Key Result Areas (KRAs), expected outcomes, and the strategies adopted by the commission to attain its mandate.

Table 3.1: CRA Functions, KRAs, Strategies, and the Outcomes

	Functions/roles per the Law	Key Result Area	Strategic Objectives	Strategies	Outcome
1	Recommend the basis of equitable revenue-sharing raised by the national government between national and county governments.	Equitable sharing of revenue	Review & develop the bases for equitable revenue sharing	Develop the basis for annual equitable sharing of revenue between the national and county governments	Equitable share between national and county governments
				Examine and determine equitable criteria for sharing various decentralized funds.	Equitable sharing frameworks
				Develop the basis for equitable sharing of revenue among county governments	Equitable share among county governments
2	Make recommendations on matters concerning the financing of and financial management by county governments. (seek to encourage fiscal responsibility).	Prudent public financial management	Promote prudent financial management at county government levels	Advocate for proper management of recurrent expenditure for county governments	More resources allocated for development
				Promote consistency between county plans, budgets, and implementation	Proper utilization of resources
				Develop a framework for prudent financial management for county governments.	Accountable and transparent utilization of resources

			Promote adherence to principles of fiscal responsibility	Strengthen transparency & accountability Support a sustainable fiscal stance in government.	Sustainable fiscal conduct
3	Define and enhance revenue sources of national and county governments.	Revenue enhancement	To define and improve revenue sources at both levels of government	Identify and assess potential revenue sources from natural resources Develop revenue enhancement guidelines.	Level of adoption of guidelines
			To strengthen revenue administration systems	Champion revenue management and administration automation Enhance awareness of county governments in revenue management and oversight.	Level of adoption of recommendations and manual developed
4	To determine, publish, and regularly review a policy identifying marginalized areas in Kenya.	Transitional equalization	Set out criteria for sharing revenue from the Equalization Fund.	Identify and profile marginalized areas. Assess the outcome of the implementation of the policy.	

Source of Information: CRA

In assessing CRA's accountability, the study took cognizance of its mandate and how this aligns with the letter and spirit of the Constitution. The study also analyzed the commission's appointment structure, decision-making process, and effectiveness of the decisions made by the commission.

Key Findings

a. Political Interference in the Division of Revenue process

The Division of Revenue (DoR) remains a critical aspect of devolution as it is an enabler of equitable development and service delivery not only at the counties but also at the national level. The study established that, whereas the law obligates the Commission of Revenue Allocation (CRA) to develop and recommend a formula for vertical and horizontal division of revenue, most of the time, the commission's effort is watered down in both houses of Parliament (National Assembly and Senate) as politics takes the day in the final decision-making process on the formula demonstrated through unabated stalemates on DOR in Parliament. The study further revealed that the CRA recommendations are not considered mainly as Parliament continues to allow the National Treasury to introduce an amended Revenue Division Bill instead of debating the original revenue division, as CRA recommended, against the Constitution. In addition, the Senate, which is supposed to be the upper house meant to protect devolution, has been crippled by the law and thus remains an underdog, consequently failing to safeguard the CRA in delivering its mandate. Because of the preceding, the Senate has had to go to the Supreme Court due to the National Assembly's resolution that it had no business in legislating the Division of Revenue Bill – a function that primarily defines the roles and responsibilities of the Senate.

Navigating the politically charged process of developing recommendations to allocate revenue rationally and equitably has heavily interfered with CRA's primary mandate and compromised its independence when creating the formula. So far, the commission has generated three revenue-sharing formulas since its establishment, both marred with controversies. The first and second bases were similar and macro, while the third incorporated sectoral considerations based on critical functions assigned to county governments. The third basis for revenue sharing among county governments, which was fully anchored in the tenets of Articles 202, 203, and 216, and for the first time aligning funding to functions, commenced in the financial year 2021/22 when the equitable share allocation to counties increased by KSh53.5 billion to KSh370 billion. Despite the progressive results from the process, the third basis CRA recommendation was rejected 11 times in the Senate. In the end, the formula was approved with amendments, excluding two critical parameters, namely population and equal share, because they would not address the unique needs of the counties, unequal development, and contention on the accuracy of the existing population figures – a significant challenge to improving governance in Kenya's devolution. As such, the study revealed that the recommendations by CRA are not legally binding and can be adopted, modified, or rejected, thus a setback for CRA in the quest to deliver on its constitutional mandate. The DoR disputes often lead to delays in the allocation of funds and political polarization and sometimes hinder the effective delivery of services and development projects at county levels.

The study also noted that although the equitable share is on the rise, it has always been below the recommendations by the CRA, with the difference in most cases emanating from the deviation by the National Treasury amendments as it works unabated as an agent to the Executive arm of government, contrary to the Constitution which envisaged it as a shared entity between the national and county governments. This decision by the National Treasury to take center stage in the division of the revenue process further undermines the role of CRA and, ultimately, the tenets of devolution.

The study further observed that the legislatures largely failed in the revenue division debate and approvals as personal and executive interests primarily took center stage. The Executive and Opposition leadership have often pushed through their members in Parliament in directions of interest, disregarding their constitutional obligation to represent the public interest. Importantly, finding a fair and balanced formula that could satisfy the diverse needs of Kenya's counties has been a complex and contentious process yet has the potential to impact the success of the country's devolution system and overall governance.

b. Politicized Appointment of Commissioners

The study noted that the chairperson of CRA is a nominee by the President and approved by the National Assembly. The other commissioners are nominated by the political parties represented in the National Assembly and the Senate according to their proportion and co-opting the Principal Secretary for National Treasury. According to the Constitution, all the seven commissioners must have long technical experience in public finance and economics. They should be persons of principle and extraordinary integrity. Further, the commissioners must be able to stand up to political pressure and speak out against the excesses of power, as well as oversee the commission to ensure it discharges its mandate with integrity and based on professionalism. From the study respondents, it emerged that the politicized appointment of commissioners to the CRA is a matter of concern as it potentially compromises the independence and effectiveness of the commission and erodes public trust in its ability to perform its critical role. Additionally, it results in revenue allocation decisions driven by short-term political interests rather than long-term fiscal sustainability and equity.

c. Limited Uptake of CRA Recommendations on The Revenue Division Process

CRA plays a crucial role in determining the allocation of funds to counties and ensuring a fair distribution of resources. The Constitution stipulates that once every five years, the Senate shall, by resolution, determine the basis for allocating national revenue to county governments on an annual basis. In determining the cause of revenue sharing, the law requires the Senate to request and consider recommendations from the CRA. However, the study confirmed that the recommendations from CRA are largely revised to suit political interests. This situation emanates from the absence of adequate legal backing for the CRA in discharging its mandate. This situation was further

worsened by the support of the Supreme Court ruling in 2020, which said CRA recommendations are not binding on Parliament.

Because of the above, CRA’s role has been relegated to making recommendations on a formula for DoR, with the final decision ultimately lying with the National Assembly and the Senate, a scenario that has provided room for exploitation as both houses of parliament pursue political interests. The limited uptake of the recommended revenue-sharing formula as generated by CRA is an abuse of the Constitution and efforts by the commission in the preparation of the procedure, which is backed up by technical and financial resources. Figure 3.1 below presents the difference between the CRA proposal for vertical revenue sharing and the actual Parliament-approved division of revenue.

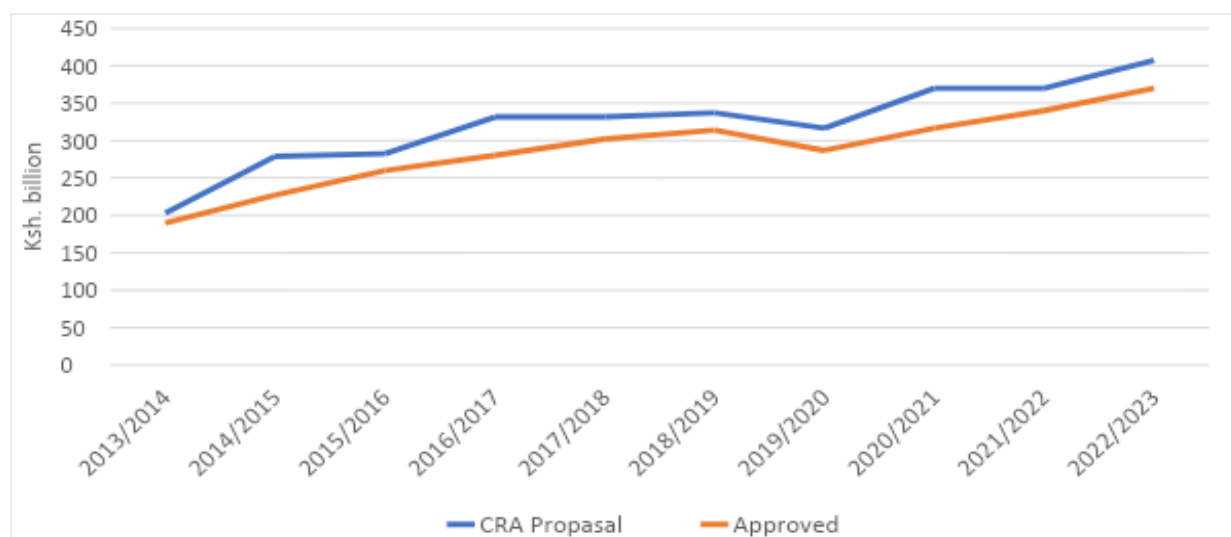


Figure 3.1: CRA Proposed vs Parliament Approved Allocation of Revenue to Counties

Further, Article 204 of the Constitution mandates the CRA to determine, publish, and regularly review a policy that sets out the criteria to identify marginalized areas to share the Equalization Fund. Further, Article 204 (2) provides that the Equalization Fund be used to provide essential services, including water, roads, health facilities, and electricity to marginalized areas to the extent necessary to bring the quality of those services in traditionally marginalized areas to the level generally enjoyed by the rest of the nation. The study noted that since the onset of devolution, CRA had prepared two policies identifying marginalized areas. One was never presented to the Senate, while the other is yet to be implemented by the National Treasury. Due to the delay, money earmarked for essential amenities in marginalized regions has piled up at the National Treasury. According to the Auditor General’s report, the total Equalization Fund from FY2011/12 to FY2019/20 had accumulated to KSh30.78 billion, with KSh12 billion having been transferred to the Equalization Fund, leaving the Consolidated Account with KSh18 billion. As the operationalization of the fund faces legislative and administrative gaps, it continues to hurt marginalized counties that are deprived of essential services and development.

d. Limited Coordination with Other Independent Fiscal Institutions

The commission, in discharging its mandate, requires support and coordination from other oversight bodies, including the Office of the Controller of Budget, the Office of the Auditor General, and the National Treasury, to ensure compliance by the national government and county governments to the requirements of the Public Finance Management Act. Findings from the study reveal that limited coordination with other Independent Fiscal Institutions (IFIs) by the CRA is a notable challenge that has significant implications for fiscal governance and policy effectiveness. The CRA plays a critical role in recommending the allocation of revenue among different levels of government, but its effectiveness is hindered by its relatively isolated functioning. This situation is occasioned by the lack of efficient information sharing and collaboration between the CRA and other IFIs, such as the Parliamentary Budget Office (PBO) and the Controller of Budget, institutions that are responsible for fiscal oversight, budget analysis, and ensuring financial accountability. The absence of a seamless information exchange mechanism between CRA and other IFIs impedes its ability to perform its mandate effectively. Further, when IFIs work in isolation, it becomes challenging to align fiscal policies and strategies, potentially leading to disjointed economic and development efforts, which can undermine the country's overall financial stability and growth prospects.

e. Limited Compliance with The Legal Framework on Shareable Revenue

The law requires that at least 15% of the national revenue collected by the national government be shared among the 47 counties. CRA, therefore, provides the methodology or formula towards securing at least 15% of the funding to the 47 counties as well as the criteria of sharing the resources amongst the counties. By adopting the three revenue-sharing formulas generated by CRA over the last ten years of devolution (financial year 2013/14 to 2022/23), counties have collectively received KSh3.6 trillion. This comprises KSh2.9 trillion as an equitable share, KSh148 billion in national government conditional grants, and KSh220 billion in loans and grants from development partners. County governments have also collected their revenue amounting to KSh306 billion. However, the study showed as a percentage of the current ordinary revenue, the above allocation is far less than the actual percentage of sharable revenue to the counties as recommended by the CRA.

In addition, the study also found that over time, a higher proportion of ordinary revenue is being taken up by debt repayment, thereby reducing the shareable revenue channeled to the counties. County equitable share of revenue as a percentage of ordinary revenue decreased from 29.5% in FY2015/16 to 21% in FY2021/22 and dropped to 17% in FY2022/23. On the other hand, interest payments for the borrowed funds, as a percentage of ordinary revenue, have increased from 20% in FY2013/14 to 30% in FY2022/23. This means any additional revenue the national government raises goes towards servicing debt. Table 3.2 presents the expenditure data.

Table 3.2 Public Expenditure and Ordinary Revenue for the Period 2013/14 to 2021/22

	Recurrent	Development	CFS	County Governments	Ordinary Revenue		% of C.A to O. R
2021/2022	1,405.74	553.37	995.95	400.96	1,839.5		21.8
Percentage	38.2% (96.6)	13.3% (80.3)	34.9	10.6% (74.8)			
2020/2021	1,152.06	561.52	878.78	398.01	1,487.5		26.8
Percentage	38% (91.5)	18% (79.5)	34%	10% (79.3)			
2019/2020	1,110.7	614.3	807.3	383.8	1,453.5		26.4
Percentage	37% (87.8)	20% (86.2)	32%	11% (76.7)			
2018/2019	1,066.4	540.9	895.0	376.0	1,440.2		26.1
Percentage	40% (94.9)	22% (79.2)	27%	11% (76.8)			
2017/2018	961.9	425.8	583.2	303.8	1,253.4		24.2
Percentage	40% (90.3)	21% (72.2)	27%	12% (87.8)			
2016/2017	858	602.3	499.0	319.1	1,108.2		28.8
Percentage	40% (92.5)	21% (69.9)	25%	14% (79.9)			
2015/2016	706.5	451.83	475.54	295.27	1,001.43		29.5
Percentage	40.2% (87.1)	18.6 % (66.3)	26.6%	14.7 % (80.4)			
2014/2015	1,054.9	318.7	432	258.6	1,070		24.2
Percentage	64.6% (84.6)	19.5% (45.8)		15.9% (79.1)			
2013/2014	897.1	241.1	310.8	169.4	964		17.6
Percentage	69% (87.3%)	18% (52%)	27%	13 (80.7)			

Note: In brackets represents absorption, % is the percentage of total expenditure, C. A is County Allocation, and O.R is Ordinary Revenue

Source of Data: OCOB

The study also established that the rise in Consolidated Fund Services (CFS) has also contributed to reducing the county governments' shareable revenue since sharable revenue is calculated after deducting the CFS. Consequently, as a percentage of the total budget, the county allocation on sharable payments has averaged 11% for the period 2013/14 to 2022/2023, contrary to the 15% stipulated in law. In addition, the process of tabling the audited revenue reports before Parliament for approval has been slow, failing to apply updated data in the sharing of revenue. For instance, the recommendation on revenue sharing for the financial year 2022/23 was based on audited accounts for FY2017/18, with the above scenarios pointing to barriers in the realization of the law.

Regarding Own Source Revenue (OSR) performance, the commission works closely with all 47 counties to develop sustainable own-source revenue mechanisms and reduce over-reliance on the national government. Article 216 (3) notes that in formulating recommendations, the commission shall seek to promote and give effect to the criteria under Article 203 (1) and, when appropriate, to define and enhance the revenue sources of the national and county governments and to encourage fiscal responsibility. The county governments' actual OSR has been declining to the target, as shown in Figure 3.2

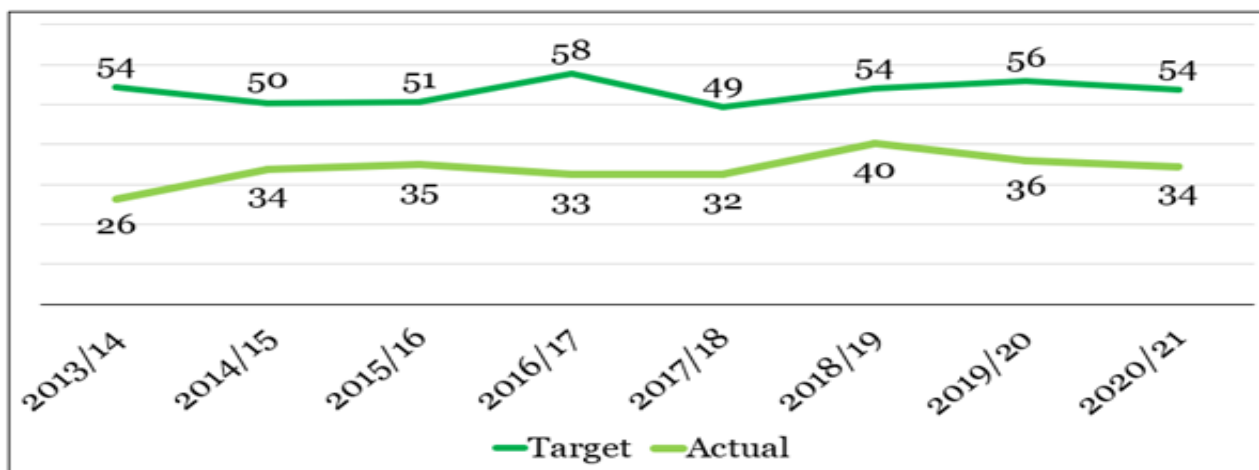


Figure 3.2: Actual and Projected OSR for the FY2013/14 to 2021/22-KSh Billion

Source: CRA, 2021

OSR collection by counties from FY2013/14 to FY2020/21 was KSh270.7 billion against a target of KSh442.6 billion. OSR rose sluggishly from KSh26.3 billion in FY2013/2014 to KSh40.3 billion in FY2018/19. There was a noticeable dip in the collection of OSR by counties in FY2016/2017, where counties collected KSh32.52 billion from KSh35.02 billion in FY2015/16. The OSR further decreased to KSh32.49 billion in FY2017/18 before rising to KSh40.3 billion in FY2018/19. In FY2019/20, the OSR target was KSh54.9 billion while the actual collection was KSh35.77 billion, representing 65.2% of the target, recording a decrease compared to KSh40.30 billion generated in FY2018/19. Further, in FY2020/21, counties collected a total of KSh34.44 billion, representing 64.2% of the annual target of KSh53.66 billion, pointing to a continued drop compared to KSh35.77 billion generated in FY2019/20.

The decline in OSR has been associated with insufficient political goodwill from the county governments, inadequate enforcement mechanisms, a slow pace in enactment of revenue legislations, and failure by the county governments to adhere to the advice of CRA. The study established that there is low revenue collection capacity at the county level, non-compliance in payment of fees, charges, and property rates, and pilferage attributed to manual revenue collection. The massive shortfalls in meeting the OSR targets pose a financial risk to county governments, as

evidenced by substantial pending bills. These counties' pending bills have left suppliers frustrated and put some out of business.

3.2 Salaries and Remuneration Commission (SRC)

The Salaries and Remuneration²⁴ Commission (SRC) was established by the Constitution to harmonize salaries and benefits of public officers, including elected officials, civil servants, and other government employees, within the context of fairness and merit towards effective public administration and fiscal responsibility in Kenya. Therefore, the commission's focus and expected outcomes are to ensure equitable compensation to public servants while ensuring the general wage bill is fiscally sustainable, implying a responsibility to institute strategic actions to ensure the public settlement is fair, competitive, and affordable and that resources are utilized optimally. Table 3.3 summarizes the commission mandates, KRAs, strategic objectives, and the expected outcome.

Table 3.3: Mandates, KRAs, Strategic Objectives, and Expected Outcome for SRC

	Mandates	Key Result Area	Strategic Objectives	Outcome
1	To set and regularly review the remuneration and benefits of all state officers.	Fiscal sustainability of public service wage bill	Review all matters relating to the salaries and remuneration of public officers.	Revised policy on public sector remuneration and benefits
				Public service rationalization strategy for a fiscally sustainable public wage bill
				Policy paper and strategy on streamlining allowances for public wage bill sustainability
		Policy paper on mainstreaming work ethic to achieve productivity and performance		
		Remuneration and benefits	To reward performance and productivity in the public service	Strategy on productivity and performance in the public service

²⁴ SRC Act 2011

		Policy and legal framework	To enhance operational efficiency	Reward performance and productivity in the public service
		Collaboration and partnerships	Conduct comparative surveys on the labor markets and trends in remuneration to determine the monetary worth of jobs in public offices.	Policy paper and strategy on pension
2	Advise the national and county governments on the remuneration and benefits of all other public officers.	Fiscal sustainability of public service wage bill	<p>Advice on Collective Bargaining Agreements (CBAs)</p> <p>Advise on the salaries and remuneration to be paid out of public funds</p> <p>Advise on harmonization, equity, and fairness of remuneration.</p> <p>Make recommendations on matters relating to the salary and remuneration of a particular state or public officer.</p> <p>Make recommendations on the review of pensions payable to holders of public offices.</p>	<p>Labor relations policy and strategy for a fiscally sustainable, stable, and predictable labor environment</p> <p>Attraction and retention of requisite skills in the public sector</p>

Source of Information: SRC

SRC's role involves setting a new dawn in the management of salaries and benefits in the public service, which since independence had remained unchecked. The literature reviewed established that remuneration and benefits for public workers were characterized by schemes of service that automatically awarded public service employees with salary raises and promotions based on years of service and not on productivity and performance.

In addition, there were weak human resources management systems and practices that led to the collapse of public sector staff appraisal systems. The introduction of performance contracting did not achieve much as it had no link with employment/engagement contracts. Public officials with an influential capacity to increase their remunerations and determine their allowances abused the system by expanding their pay and benefits uncontrollably, creating disparities between the highly and lowly-paid cadres. The consequences were devastating, characterized by discontent, low morale, and a mass exodus of professionals seeking better terms in other sectors

both within and outside the country and, ultimately, poor services to Kenyans. Given the above, SRC was handed through the Constitution the onus to bring sanity in the management of salaries and benefits in the entire public service.

In evaluating SRC's independence, the study analyzed the commission's functional, operational, and financial independence with functional autonomy, implying that SRC should enjoy administrative freedom, subject to the Constitution and its legal framework.

Key findings

a. Exhibition of animosity by Parliament towards SRC

The protection of functional independence of SRC by law has played out concerning the National Assembly's attempts to interfere with the mandate of the commission in the process of discharging its mandate of regulating the salaries of the members of parliament. A case in point was witnessed when SRC, through Gazette Notice Number 2886, provided a scale for the remuneration of MPs who, in turn, were aggrieved. The legislators pursued a two-pronged attack on the commission by passing a resolution to nullify all the notices in the Special Gazette Issue²⁵. They threatened to pursue a constitutional amendment to remove MPs, county assemblies, and judges, as well as magistrates, from the list of state officers whose remuneration is determined by the SRC, thus pointing to a clawback on the constitutional gains and a return to anarchy.

Consequently, in affirming the functional independence of the SRC, the High Court held that a constitutional amendment that goes to the root of divesting the SRC of its constitutional mandate must be approved in a referendum. Subsequently, the High Court held that the National Assembly exceeded its mandate by purporting to annul the Gazette Notices issued by the SRC²⁶, asserting the exclusive mandate of the SRC in Article 230(4) of the Constitution to set and regularly review the remuneration and benefits of all state officers. The above is an example of the lengths to which other public entities are willing to go to protect themselves from SRC due to vested interests.

b. Political Interference in the Appointment of Commissioners

Article 230 of the Constitution establishes the SRC and outlines its mandate, as well as specifying the qualifications, appointment process, and term of office for the chairperson. The SRC chairperson is identified and recommended for appointment by the President in a manner prescribed by national legislation and approved by the National Assembly, with the other commissioners being derived from bodies and professions²⁷.

²⁵ *Okija Omtata and Others v Attorney General and Others, Petition Numbers 227, 281 and 282 2013 where the nullification of the Gazette was challenged.*

²⁶ *Okija Omtatah Okoiti & 3 others v Attorney General & 5 others [2014] eKLR*

²⁷ The other members of the commission are: one person each nominated by bodies including the trade unions; employers; and the professional, one person each nominated by— the Cabinet Secretary responsible for finance and public service as well as the Attorney-General. In addition, one member of the commission shall be a person who has experience in the management of human resources.

The SRC plays a crucial role in determining the salaries and benefits of public officers, including MPs, judges, and other public servants. As such, the appointment of its chairperson is a matter of great importance as it can have far-reaching implications for public sector compensation and governance.

The study findings show that political interference in the appointment of the SRC chairperson is a persistent problem, often taking the form of pressure from political leaders and parties to appoint individuals who are politically loyal or sympathetic to the ruling party, as opposed to candidates with merit. This perspective has raised concerns about the independence and effectiveness of the SRC, which, by design, is supposed to ensure public sector compensation is fair, reasonable, and aligned with the country's economic realities.

About the commissioners, the study found that the public perceived the commissioners to be too close and desperate to be close to the government of the day, a situation that continues to compromise their ability to be or be seen to be neutral. Further, the study noted that the SRC had lately been accused of being government machinery for silencing public workers, characterized by thwarting any attempts by workers to have their welfare issues addressed. An example provided to support this scenario was the contestation between teachers and the Teachers Service Commission. According to the respondents, SRC assisted the government in delaying tactics toward the implementation of the teachers' salary increments as agreed upon in the Collective Bargaining Agreement, which covers the period between July 1, 2021, and June 30, 2025. The move was strongly objected to by SRC, which noted that it was not consulted and that the CBA was a political decision that would have a negative bearing on the wage bill, considering the current economic standing.

c. Uncoordinated Operations Between Salaries and Remuneration Commission, Public Service Commission, and County Public Service Boards

Whereas SRC has control over the remuneration and benefits structure, the study observed that SRC operated in a silo. This applied to the Public Service Commission (PSC) and the County Public Service Board (CPSB), a move that resulted in the burgeoning wage bill, as employing agents stated above have the ultimate control over the number of employees. The uncontrolled recruitment of staff has increased the number of public servants from 655,300 in 2012 to about 843,000 in 2019.

The wage bill grew steadily from KSh464.90 billion in FY2012/13 to KSh733 billion in FY2017/18. It further increased to KSh795.2 billion in FY2018/19 due to, among others, uncurbed employment in the counties since devolution. This upward trend has resulted in an increased number of public servants and the unending push for higher pay by employees, exerting pressure on the already struggling economy. The study further noted that the high wage bill continues to crowd out spending on development and negatively impacts the government's ability to render public services.

d. Disparities in Remuneration

Other pertinent concerns from the respondents included the vast disparities in remunerations, denoting that over 80% of civil servants are remunerated below par. Key questions arose: *“How can one explain how a secretarial post with a diploma as the minimum academic qualification at Kenya Revenue Authority (KRA) attracts more salary than a master’s degree holder in the civil service? Why does an engineer at National Water and Pipeline Conservation earn much more than a similar engineer in the Ministry of Water and Irrigation? Why would a receptionist in the Judiciary earn more than a District head in the civil service?”*²⁸ The list is endless, and SRC needs to address these issues if it is indeed worth the name and the resources allocated to it.”

The study also observed that whereas it is difficult to increase basic salaries due to their effect on other sectors and pensions, public service employers introduce allowances as an alternative method of employee compensation. Consequently, there has been a rise in expenditure on allowances, hence affecting the public service wage bill.

The absence of a policy framework to guide the management of allowances has given room for public institutions to pay allowances in an uncontrolled manner, leading to disparities in eligibility, justification, modes, and rates.

The findings of the study show that up to 70% of gross public servants' pay comes from allowances. Further, the high allowances paid to senior public servants make the government a lucrative and preferred employer by many candidates and has created a loophole for exacerbating corruption.

c. Absence of a Robust Productivity Framework for the Public Sector

The study noted that the country does not have a system of performance and productivity-based reward mechanisms. Whereas the labor laws recognize performance and productivity as crucial components in salaries, wages, and allowances determination, this has not been adequately enforced by critical actors, including the SRC, thus contributing to the ballooned wage bill that fails to realize equivalent results in the delivery by the public sector.

d. Lack of Clarity of SRC Mandate on Allowances and Benefits for Other Independent Commissions and Institutions

Article 254 requires that the SRC be held accountable by submitting an annual report to the President and Parliament and on demand by the National Assembly and the Senate. The law also demands that the reports be published and publicized and that the commission is subject to financial audits. Significantly, SRC is also subject to the court’s jurisdiction, with the decisions, actions, and omissions subject to review by the tribunals. However, the research established that the independence of SRC is threatened by the accountability framework in place, which leaves room for manipulation from the very organs meant to offer checks and balances, pointing to a possibility that the institution may engage in partisan interests rather than the public interest.

²⁸ These were some of quotes from the respondents during Key Informant Interviews

A representative case to the above scenario was witnessed when SRC capped the number of sittings that the Judicial Service Commission (JSC) commissioners could hold per month under its responsibility of setting and regularly reviewing the remuneration and benefits of all state officers, a case that the JSC challenged in court.

The High Court held that the SRC does not have the mandate to limit the number of remunerative meetings that a constitutional commission can have, as this would violate JSC's independence.

A significant finding of the research was the concern about the ability of SRC to issue binding recommendations or to prescribe binding remedial action to an individual, organization, public officer, state officer, or state organs in line with its mandate stipulated in the Constitution. However, the Court of Appeal affirmed that the powers of the SRC under Article 230(4)(b) of the Constitution to advise the national and county governments on the remuneration and benefits of all other officers was binding. The court argued that granting state organs discretion on whether to comply with the advice of the SRC would render the institution ineffective and irrelevant²⁹.

e. Pathway Towards Wage Bill Rationalization

Before the 2010 Constitution and before the formation of the SRC, the ratio of wage bill expenditure to ordinary revenue averaged 48%. The wage bill steadily increased to KSh790.4 billion by FY2021/22, representing 53.7% of expected revenue and 8.3% of GDP as such, requiring effective measures by SRC and other critical actors to achieve the desired expansion in public services in a fiscally sustainable manner.

Article 230(5) of the Constitution requires that public service remuneration should be fiscally sustainable, able to attract and retain requisite skills, recognize productivity and performance, and be transparent and fair. The study observed that the current wage bill is fiscally unsustainable because it is beyond the threshold recommended by the PFMA and international best practices. The PFMA Regulations (2015) recommends levels of the public sector wage bill to ordinary revenue to be at 35% and wage bill to GDP at 7.5%.

Table 3.4 demonstrates the public sector wage bill as a percentage of revenue and GDP.

Table 3.4: Wage Bill Trend in Relation to Other Variables – 2008/09 to 2019/20

²⁹ *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR.*

Sustainability Ratios	Total Wage Bill: GDP	Total Wage Bill: Ordinary Revenue	Total Wage Bill: Recurrent Expenditure	Total Wage Bill: Total Expenditure
2008/09	10.7	49.3	55.2	40.4
2009/10	11.4	47.6	54.7	38.5
2010/11	11.3	47.1	53.1	38.7
2011/12	11	48.1	51.6	38
2012/13	10.3	59.9	57	41
2013/14	10.3	56.8	66	40
2014/15	9.8	55	63	35
2015/16	9.5	54.4	62	31
2016/17	9.1	51.8	59	32
2017/18	8.6	53.5	55	31
2018/19	7.9	48.1	53	30
2019/20	8.8	52.6	50	28
2020/21	8.2	56	36.9	29.5
2021/22	7.7	52	36.6	27.5

Source of the Data: SRC

3.3 Office of the Controller of Budget (OCOB)

Before the establishment of OCOB, the Controller and the Auditor General (AG) were responsible, among other things, for approval of the withdrawal of funds from the Consolidated Fund as well as auditing accounts of public entities. The arrangement meant there was no clear separation of functions for COB and AG. The 2010 Constitution separated the tasks of controlling the budget and auditing by establishing an independent OCOB and OAG to ensure proper management of public funds.

As such, the Office of the Controller of Budget (OCOB) is one of the two independent offices established under Article 228 of the Constitution to oversee the implementation and reporting on the budgets of the national and county governments. It authorizes the withdrawal of public resources from public funds accounts under Articles 204, 206, and 207. The COB is appointed through nomination by the President and approval by the National Assembly. The law, under Article 228 (5) of the Constitution, requires that before authorizing any withdrawal from public funds, COB must be satisfied that the retreat is in line with the existing legal framework.

Among its functions, the OCOB conducts monitoring, evaluating, reporting, and making recommendations to the national and county governments on measures to improve budget implementation. This entails the preparation of

quarterly, annual, and special reports to the legislature and executive on budget implementation matters, advising Parliament on financial issues, including where a Cabinet Secretary has stopped the transfer of funds to a state organ or public entity, carrying out an investigation and arbitration or mediation and provide information to the public on budget implementation.

Based on the preceding, the OCOB is expected to ensure fiscal discipline, transparency, and accountability in the budget implementation processes at both national and county levels.

Table 3.5 summarizes the KRAs, strategic objectives, and expected outcomes.

Table 3.5: OCOB’s Mandates and Roles, KRAs, Strategic Objectives and Expected Outcomes

	Mandate	KRA	Strategic Objective	Expected Outcomes
1	Overseeing the implementation of the budgets of both the national and county governments.	Authorizing withdrawals from public funds. These are Equalization Fund (Article 204), Consolidated Fund (Article 206), and the County Revenue Fund (Article 207)	To ensure timely approval of withdrawals from the Public Funds, withdrawal is permitted by law, as per Article 228 (5) of the Constitution.	Timely approval of exchequer requisitions Ensure prudent financial management
		Conducting investigations based on its motion or a complaint made by a member of the public (Article 252 (1) (a))	Enforce compliance	Increased compliance with the law
2	Monitoring, evaluating, reporting, and making recommendations to the national and county governments on measures to improve budget implementation.	Preparation of quarterly, annual, and special reports to the Legislature and Executive on budget implementation matters of the national and county governments according to Article 228 (6).	OCOB is to submit to each House of Parliament quarterly reports on the implementation of the budgets of the national and county governments.	Quarterly statutory reports to each House of Parliament on budget implementation.
		Advice on budgeting and budget implementation.	To provide advice on financial, planning, and budgeting issues.	Annual reports to the President and Parliament
		To oversee and regularly monitor the utilization of public funds released to spending units.	To ensure the provision of quality advice on	Special reports through a request by the President, Parliament,

		budgeting and budget implementation.	or a member of the public through a petition.
	Conducting alternative dispute resolution, including conciliation, mediation, and negotiation to resolve budget implementation disputes (Article 252 (1) (b))	OCOB to strengthen its capacity for handling complaints, investigations, and conflicts.	Arbitration/Mediation reports to Parliament on matters relating to Budget Implementation.
	Strengthen the capacity of MDAs and county governments in planning and budgeting.	Compliance with planning and budgeting process among spending entities.	Performance reports for the activities of the OCOB.
	Enhance openness, accountability, and public participation in prudent fiscal management and enhance the public's access to budget implementation information.	Ensuring the public has access to information on budget implementation at the national and county levels.	Informed citizens

Source of the Information: OCOB, 2022

Key Findings

In evaluating OCOB, the study investigated the functional, operational, and financial independence of the office and established as follows:

a. Delayed Reporting Contrary to the Law

The COB reports are based on financial and non-financial performance data submitted by ministries, departments, and agencies (MDAs) in line with Section 83 of the PFMA, which requires, among others, that the MDAs submit their reports promptly. The study established that the OCOB experiences delays in the submission of the annual reports on financial and non-financial performance by some MDAs, thereby affecting the timely submission of its reports to Parliament and subsequent publicization.

At the onset of devolution, the office of the COB was involved in conflict and political intimidation with several governors and senators. The county heads cited interference of the COB on their independence whenever the office executed its mandate and halted authorization of county budgets that did not adhere to the laws and regulations of the PFMA. Such scenarios point to disregard of the OCOB, thereby undermining devolution and effective service delivery.

b. Political Interference in the Mandate of OCOB

The law mandates the COB to ensure that public entities rigorously adhere to the legal framework before approving the withdrawal of resources from various funds' accounts. Nonetheless, the study has observed that despite the COB's diligent execution of its mandate per the law, the credibility and independence of the office have come under threat due to political interference, as evidenced by a recent scandal. The COB claimed to have been under duress from the Executive to approve irregular public payments worth KSh15 billion days before the 2022 general election. This resulted in the National Treasury accessing the Annuity Fund to raise the KSh9.2 billion that was not budgeted for. Article 223 provides that if sufficient funds for an expenditure or a new need arises for a purpose for which the Appropriation Act has not provided an adequate amount, the government may spend money that has yet to be appropriated from the Contingencies Fund. However, the National Treasury accessed the Annuity Fund, breaching the law. Per Article 248 of the Constitution, constitutional commissions and independent offices, such as OCOB, are designed to protect the people's sovereignty, ensure adherence to democratic values and principles, and promote constitutionalism. As such, the actions by the COB cited above do not inspire public confidence in the institution, and its oversight role on national and county budgets is questioned.

c. Exploitation of Grey Areas Within the Legal Framework

The study observed that the OCOB's mandate continues to be implemented by ensuring legal expenditure to national and county budgets even after the supplementary budget and subsequent diversion of funds. The study revealed several instances in which COB accused the Executive of using Supplementary budgets (SB) to slip in rejected expenditures, leading to the loss of public funds. This was achieved through the invocation of Article 223 of the Constitution and the use of the Supplementary Budgets to reallocate funds to items that were rejected/shelved during the budget-making process.

Whereas budget revision through SBs is permissible under Article 223 of the Constitution and Section 44 of the PFMA to rationalize budgetary allocations to non-core activities to release resources for pressing budget needs, the timing in most cases reviewed failed to allow enough time for MDAs and counties to implement the planned budget activities and revisions in different financial years.

It also emerged that an absorption rate above 100% was recorded in some reports reviewed, and the same attributed to budget expenditure already incurred, indicating that MDAs exceed the approved budget. This over-absorption of funds is attributed to budget cuts during the SB revisions, which are affected when expenditure on the budget item has been incurred.

Further, Article 223 of the Constitution states that the National Government may spend money that has not yet been appropriated due to insufficiency of the budgeted amount or expenditure that has arisen for the purpose for which no amount had been appropriated. The study observed that Parliament and the National Government have consistently used this Article to occasion SBs that negate prudent fiscal planning and implementation. In some

instances, the Executive erroneously applied this Article to hinder the independence of Parliament, commissions, and independent offices that are responsible for financial management.

The OCOB ideally should ensure the reasons for which the monies they approve for withdrawals are applied for the same purpose by quarterly reporting on the in-year budget implementation. However, the office relies heavily on the reports of the MDAs and county governments to prepare its reports. Thus, corroboration and authenticity cannot be guaranteed as the chances of anomalies from the original reports remain high.

In addition, the study showed several financial reports submitted to the OCOB by MDAs showed expenditures that were higher than the exchequer releases, especially on the development budget. This was partly due to Appropriations-in-Aid (A-I-A), funding from donors and development partners who were not released as exchequers through the Consolidated Fund but received directly to MDAs projects and activities as approved in their budget and therefore not approved by COB. This contradicts Article 206 (1) of the Constitution, which specifies that all government revenues should be received in the Consolidated Fund.

In addition, the study observed non-disclosure of A-I-A in the IFMIS-generated reports that the National Treasury has prescribed for use by all national and county government entities in line with Article 12(1)(e) of the Constitution. This system adequately captures transfers and expenditures by the MDAs but fails to capture A-I-A generated by the MDAs. Therefore, financial reports generated from the system are sometimes incomplete and lead to MDAs reporting higher expenditures than the released exchequer issues.

3.4 Functions and Roles, Independence, Accountability, and Effectiveness of Office of the Auditor General

The office of the Auditor-General (OAG) is established under Articles 248 and 229 of the Constitution as an Independent Office. The Auditor-General is appointed through nomination of the President and approved by the National Assembly. The mandate of the OAG is to audit and report on all entities supported by public funds and to confirm whether public money has been spent lawfully and optimally for the public good (Article 299(6)). Additionally, the Constitution gives the Auditor-General the role of supporting oversight on public resource utilization and accountability and exercising impartiality in performing its functions – without fear, favor, or prejudice.

Table 3.6 summarizes OAG mandates, KRAs, strategic objectives, and the expected outcomes of this office.

Table 3.6: OAG Mandates, KRAs, Strategic Objectives and Expected Outcomes

Mandate	Key Result Areas	Objectives	Strategic Objective	Expected Outcomes
Audit and report on all accounts of public entities by 31 December	To assess and confirm whether the public entities have utilized the public resources entrusted to them lawfully and in an effective way	Enhance the quality of audit services for improved management of public resources	Provide audit services that meet professional standards	Confirmation of whether public money has been applied lawfully and in an effective way
			Enhance the value and benefits of audit reports.	
			Safeguard OAG independence	
Report on the lawfulness and effectiveness of the use and management of public resources	Protect the sovereignty of the people; secure the observance by all state organs of democratic values and principles; and promote constitutionalism.	Position the Office of the Auditor-General for greater relevance and credibility to stakeholders.	Sustain stakeholders' interest in audit services for a more significant impact.	Provision of timely and accurate information
			Sustain OAG as a credible source of independent and objective insight on public sector accountability.	
			Enhance visibility for impact.	
			Improve OAG communication	
	Conduct investigations, conciliations, mediations, and negotiations and to issue summons to witnesses for investigations	Be a model organization for effective service delivery	Institutionalize good governance focusing on transparency and accountability and cultivate management that enhances performance	Confidence by the public
			Attract, retain, and maintain a competent, productive, and motivated workforce.	
			Leverage on ICT for efficient service delivery	

Source: OAG

The discharge of the mandate of OAG is intended to promote efficiency, accountability, effectiveness, and transparency of public administration that is conducive to the achievement of national development objectives and priorities. The office is intended to promote accountable and democratic institutions by preventing financial malpractice, corruption, and delivery of information to taxpayers about the carrying out of government policies and

programs. This implies that AG should be subject to the Constitution and other relevant legal frameworks only and should not be directed or controlled by any interests or persons external to this body but only subject to legally prescribed channels of accountability.

Key findings

a. Minimal compliance/action on OAG reports

The law requires that within six months after the end of each financial year, the Auditor-General prepares audit reports concerning that financial year on the accounts of any entity that is supported by public coffers. The audit reports are submitted to Parliament or the relevant county assembly not later than six months after the closure of a financial year.

Within three months of receiving an audit report, Parliament or the county assembly, with the assistance of the Office of the Auditor-General, will debate and consider the report and take appropriate action(s). The law requires these bodies to prepare a committee report on the audit findings for action by investigative agencies³⁰. It is thus expected that government entities affected by the outcome of the above resolutions should act on these recommendations.

However, the research findings revealed failure and delays by relevant authorities to impose sanctions on public entities and individuals as recommended in the AG reports, thus undermining the power of the office. The lack of action and sanctions for national and county government entities that flout recommendations from AG reports has resulted in persistent fiscal indiscipline, including misallocations, wastage of resources, lack of value for money in the implementation of projects, and loss of public funds, thereby impacting negatively on development.

Further, the study observed that there is a lack of an effective mechanism to follow up on the implementation of audit recommendations. Most audit queries recurred in subsequent audit reports due to a lack of requisite action, resulting in the use of public resources with impunity, a concern that the AG has consistently raised.

Section 204(1)(g) of the Public Finance Management Act, 2012, provides that the National Treasury CS may apply sanctions to a National Government entity that fails to address issues raised by the Auditor-General and recommendation by the Public Accounts Committee (PAC), to the satisfaction of the Auditor-General. However, there is concern about the lack of requisite sanctions by the Treasury CS, leading to perennial failure by some accounting officers to account for the management and use of public resources adequately. This inaction by the CS has also led to fiscal indiscipline, including misallocations, wastage of resources, and lack of value for money in the

³⁰ These include the police, office of the Director of Public Prosecutions (ODPP), Director of Criminal Investigations (DCI), and the Ethics and Anti-Corruption Commission (EACC).

implementation of projects, thereby affecting development programs and threatening the quality and sustainability of service delivery.

A check on the feedback from a section of Kenyans points to one glaring outcry: *“Why are suspects of these audit queries free, some smiling at the damning revelations from the OAG and investigative agencies? The AG’s office should move beyond auditing and reporting and ensure the suspects are taken to court.”*

b. Failure By Government Entities to Adequately Prepare for Audits

The OAG must ensure the audit results and the recommendations are credible, relevant, reliable, and value-adding. The study observed that there were instances of accounting officers’ breaches of Section 62 of the Public Audit Act, 2015. They failed to adequately prepare for audit, which is exhibited in numerous inaccuracies in financial statements presented for audit, lack of requisite supporting documents, several revisions of financial statements, and, in some cases, reluctance to cooperate with the auditors.

c. Delay In Processing of AOG Reports by Parliament

The Auditor-General is required to submit within six months after the end of each financial year reports in respect to that financial year on the accounts of any entity that is supported by public coffers to Parliament and county assemblies for further interrogation, actions, and sanctions against the responsible heads of institutions.

To this end, the reports handed over to Parliament and county assemblies by the AG are up to date – FY2022/2023. However, findings from the study show the latest audit report tabled in Parliament by the parliamentary committees for adoption is for the FY2018/2019 Audit Report, contrary to the Constitution.

3.5 Functions and Roles, Independence, Accountability, and Effectiveness of Public Accounts Committee & Parliamentary Budget Office

3.5.1 Public Accounts Committee (PAC)

The National Assembly exercises oversight over national revenue and its expenditure under Article 95(4)(c) of the Constitution through the Public Accounts Committee (PAC), which derives its mandate from Standing Order 205. The responsibility of the PAC is to examine the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may deem fit.

The PAC is, therefore, one of the three watchdog committees in Parliament that examines reports of the AG and COB laid before the National Assembly to ensure integrity, efficiency, and effectiveness in the use of public funds according to Article 229(8) of the Constitution.

In its operations, the committee holds hearings in respect of every account on which the AG and COB have issued a report. It provides recommendations both at a general level – thematic issues that it identifies from its work – and about each account on which the AG or COB issues a report. Based on the PAC findings and recommendations, the Budget and Appropriations Committee considers its audit recommendation to justify the allocation of further

resources to the entities concerned/affected. In the Senate, the county public accounts and audit committee has the mandate to exercise oversight over national revenue allocated to the counties; examine the reports of the AG and COB on the annual accounts and special reports on county government funds; reports of Auditor-General on county public investment and exercise oversight over county public accounts and investments.

Key Findings

a. Below-par Performance by the Public Accounts Committee

Upon submission of the AG report to the National Assembly, the PAC is expected to debate and consider the reports and take appropriate action resulting from a comprehensive audit process that is guided by legislation policies and resolutions.

However, the study revealed that the PAC has not been effective in its oversight role as it has failed to interrogate anomalies underscored in the Auditor General's reports effectively, undermining the principle of checks and balances and the need for accountability. Further, the study noted that the tabling and debate of AG reports have not often kept the stipulated time frames as the PAC gets faced with several challenges in conducting its mandate. They include delayed submission of audit documents, reorganization of government MDAs, undue political influence, advancement of selfish interests, reluctance by the accounting officers to adhere/follow through recommendations, misuse/abuse of legal process, and the endemic conflict between the functions of Public Accounts Committee and Public Investments Committee.

Because of the above, Parliament has not been effective in its oversight role, resulting in recurring audit issues that include the management of the growing public debt, runaway pending bills, commitment fees, delayed completion of and stalled/incomplete projects, consequently affecting other processes which include equitable revenue sharing. The Constitution provides that the equitable share of the revenue raised nationally and allocated to the national and county governments is to be calculated based on the most recent audited accounts of revenue received, as approved by the National Assembly; thus, the preceding amounts to frustrating the financing of devolution.

3.5.2 Parliamentary Budget Office (PBO)

The Parliamentary Budget Office is meant to support respective parliaments in the budget process. PBO is a non-partisan professional office headed by a Director-General who reports directly to the Speaker of the National Assembly to provide an independent and continuous review of the budgets of the National Government, including monitoring of existing and proposed programs and budgets.

The office is obligated to provide objective analysis of the budget, government estimates, economic trends, fiscal policy, and the financial implications of government proposals to the legislature. In addition, PBO assists all committees in both chambers of the National Assembly, including information concerning the budget and all Bills

relating to new budget heads, estimated future revenue, and changing revenue conditions. The office also provides technical support on Public Financial Management (PFM) matters and financial oversight to all MPs, departmental committees, and select committees.

Key Findings

a. Limited Uptake of Advice of the PBO By Parliament

The creation of PBOs within parliaments was an institutional innovation to enable the legislature to engage in the budget scrutiny process in an objective, effective, and responsible manner. It, therefore, requires a binding governance structure that allows it to carry out its functions effectively.

The office should be legislatively mandated to obtain free and timely access to data, including access to any Integrated Financial Management Information Systems (IFMIS) used by government departments from the Executive to carry out its mandated functions. The PBO conducts budget-related research of its initiative and proposes, and where necessary, it offers alternative scenarios for macroeconomic variables in respect of any financial year. It also assists the Budget and Appropriations Committee by providing timely and objective analysis concerning the national budget and economy. However, the study observed that the Standing Orders do not provide an explicit process for dealing with the reports from the COB and question whether the office has sufficient capacity to deal with in-year budget reports that are not discussed in Parliament.

The PBO's effective operations are closely linked to the political will of parliamentarians to utilize its services and act on its recommendations.

The research findings show there has been minimal uptake of evidence-based advice from the PBO by the parliamentarians, thus limiting the impact of the work of the PBO.

3.6 Extent to Which the Institutions Are Funded and Their Financial Independence

The Constitution obligates Parliament to allocate adequate funds to sustain the operations of the independent fiscal institutions. In addition, the Constitution envisaged that remuneration and benefits payable to a commissioner or the holder of a separate office should be a charge on the Consolidated Fund aimed at removing the commissioners' remuneration from the political sphere and avoiding the use of remuneration as a bargaining tool to reward or punish commissioners. In practice, this works out by the National Assembly considering the request for funding by independent institutions in the light of competing national interests, thus requiring the National Assembly to afford the independent institutions adequate opportunity to defend their budgetary requirements.

Moreover, the resourcing of independent institutions should reflect the stature and significance of their role with the standard of sufficiency negotiated between independent institutions and the National Assembly.

Table 3.7: Recurrent and Development Allocation to Select Institutions: 2013/2014 to 2022/2023

Inst.	Vote	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23
CRA	Rec. Est.	294.64	509	557.15	595.87	664.65	536	550	577.32	537.74	554.59
	Rec. All.	319.28	331.26	344.09	347.97	361.94	376	387	396.81	410.45	423.12
	Dev. Est.	0	0	0	0	0	0	0	0	0	0
	Dev All.	0	0	0	0	0	0	0	0	0	0
SRC	Rec Est.	346.87	782	851.50	958	744.2	941	968	825.77	853.45	869.18
	Rec All.	247	372.63	386.34	405.08	500.2	563	579	459.73	474.86	489.39
	Dev. Est.	0	0	0	0	0	0	0	0	0	0
	Dev All.	0	0	0	0	0	0	0	0	0	0
OCOB	Rec Est.	391.51	783.2	874.4	918.1	652.4	623	650	787.84	819.34	852.12
	Rec All.	256	429.9	445.31	464.09	476.44	593	610	648.97	671.24	691.95
	Dev. Est.	0	0	0	0	0	0	0	0	0	0
	Dev. All.	0	0	0	0	0	0	0	0	0	0
OAG	Rec. Est.	2,181	5,424	6,508.8	7,810.6	6,596.7	7,945	8,737.0	7,930.44	8,525.77	9,300.3
					0	0					
	Rec. All.	2,096	2,231	2,312.9	2,424.5	2,859.7	4,404	4,536	5,599.12	5,784.85	5,962.0
					7	6					
	Dev. Est.	500	2,000	2,000	2,000.0	3,500.0	1,650	1,815	956	1,051.60	1,156.8
					0	0					
	Dev All.	0	450	466.23	454.62	497.05	735	846	46.67	68.2	93.26

Source: National Treasury, 2013-2023

From the above table, the commissions and independent offices received insufficient resources to fulfill their mandate. The estimated expenditure compared to the allocation shows a significant deviation for all the selected institutions, as only AG has a development budget out of the four institutions. Further, despite the AG being responsible for auditing and reporting on the entire national budget, the office receives, on average, less than 50% of the budget allocation, which is inadequate. Others receive between 60% and 80% of the planned budget, as further illustrated below.

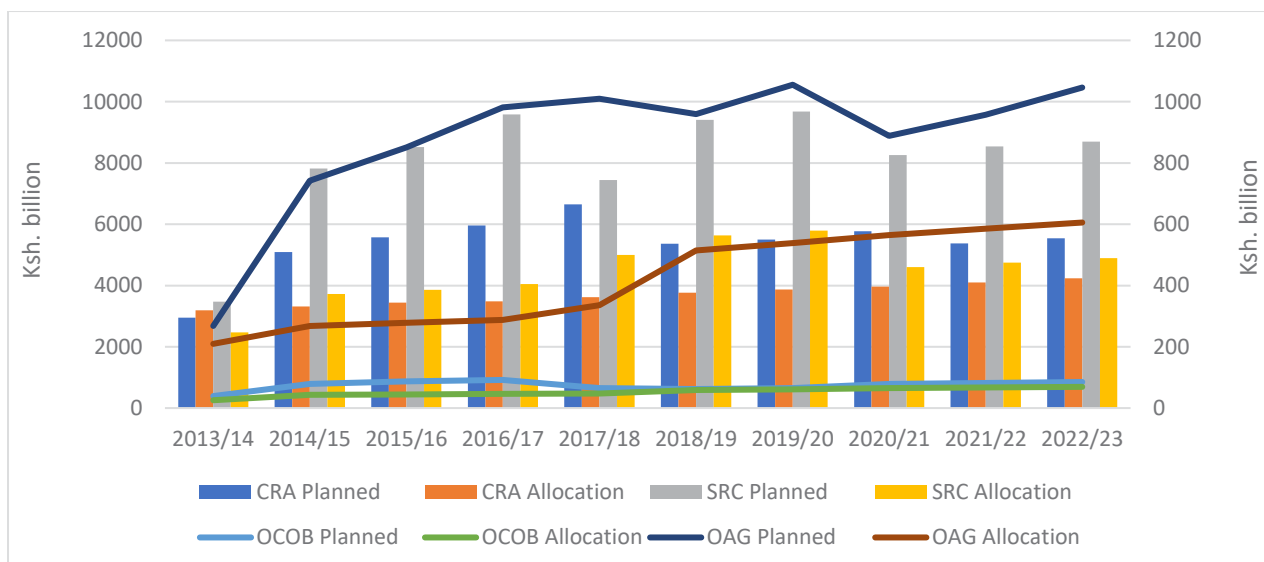


Figure 3.3: Funds Planned vs Allocation to Select Institutions 2013/2014 to 2022/2023

Based on the data presented in the bar graph above, it is evident that OAG, SRC, and CRA are significant recipients of inadequate funding. Only OCOB receives allocations that approach the planned budget, although they still fall short of the requested amount. Notably, these allocations exhibit instability, with consistent declines in funding to IFIs over time, in contrast to the sector and the overall government budget, which continues to expand annually.

This brings the question of the adequacy of budgetary allocation to independent institutions to enable them to perform their functions. It is important to note that the performance of functions and exercise of powers of these IFIs requires a robust institutional framework equipped with relevant technology and trained and skilled personnel supported by a comprehensive legal framework. While the Constitution and legal framework may safeguard the OAG and the protection of the other IFIs from undue influence, the degree of protection is less if they are not adequately resourced.

3.7 Effectiveness of the Oversight Role of Parliament Concerning the IFIs

Chapter 8 of the Constitution establishes Parliament, which consists of the National Assembly and the Senate. Article 94 provides that the legislative authority of the republic is derived from the people and, at the national level, is vested and exercised by Parliament. The National Assembly represents the people of the constituencies and special interests and deliberates on and resolves issues of concern to the people. The National Assembly is also mandated with enacting legislation, determining the allocation of national revenue between the levels of government, appropriation of funds for expenditure by the national government and other national state organs, as well as overseeing national revenue and its expenditure. The upper house also determines the allocation of national revenue among counties and oversees national revenue allocated to the county governments. The Senate, on the other hand, represents the counties and serves to protect the interests of the counties and participate in the law-making function of Parliament by considering, debating, and approving the bills about counties.

Article 254(1) of the Constitution provides that independent institutions report to Parliament every financial year, including on special requests. The requirement envisages that the reports will enable Parliament to detect and prevent abuse, arbitrary behavior, or illegal and unconstitutional conduct on the part of an independent institution and to hold the independent institution accountable for how money allocated to the commission is utilized. The Constitution assigns the National Assembly a crucial function in removing a commissioner through consideration of petitions and recommending the formation by the President of a tribunal to investigate the matter.

Despite the laudable benefits of parliamentary oversight over independent institutions, the study noted that the exercise of this mandate has been marred with challenges, including interference with the independence of the IFIs. During the appointments of commissions' chairpersons – a process in which the President plays a critical role in nominating candidates subject to approval by the National Assembly, and should the assembly reject any presidential nominee, the matter goes back to the nominating panel.

Once appointed, a commissioner can be removed by a process that again gives the President and the assembly significant roles. This procedure has been prone to political manipulation as the National Assembly, in carrying out its crucial role, has always kowtowed to the President's demands due to, among others, the domination of Parliament by the ruling party. Further, evidence from the study shows commissioners' appointments failed to guarantee the absence of patronage, with the appointment procedure flawed and used to gain influence in institutions. This resulted in the risk of state capture as the appointees were likely to be sympathetic to the President's line of thinking to be approved by Parliament and act in his interest.

The application of operational independence of IFIs is illustrated through a dispute related to the operations of the Auditor General, which is affected by the Public Audit Act (PAA) enacted by the National Assembly in December 2015. Sections 4 (2) and 8 of the Public Audit Act provide that the Auditor General's staff could be delegated from other state organs and the Public Service Commission, in contravention of Article 252(1)(c) of the Constitution, which empowers each Commission and Independent Office to recruit their staff. This scenario gives the Executive some measure of control over an independent officeholder, compelling the Auditor General to appoint staff that they had not chosen.

In a further attempt to whittle away the operational independence of the Auditor General, Sections 25, 26, and 27 of the Public Audit Act, 2015 create and give the Audit Advisory Board power to advise the Auditor General on the performance of his duties. However, the High Court adjudicated a dispute relating to the constitutionality of these provisions. It declared them unconstitutional for violating Article 249(2)(b) of the Constitution, which envisages that independent institutions are not subject to the direction or control of any person or authority.

The study also established an instance where Parliament has used its oversight role to undermine the independence of constitutional institutions. A case in point is a court case involving the Salaries and Remuneration Commission vs the Parliamentary Service Commission (PSC). The SRC accused the PSC of a unilateral decision to determine and

operationalize a housing allowance for MPs without consulting the SRC. The court declared the action unconstitutional by observing that only the SRC has the requisite power to determine allowances and benefits of MPs.

In early 2013, SRC published through a gazette notice the remuneration of various categories of state officers, including MPs. The then MPs protested the SRC decision by nullifying all the notices contained in the Special Gazette Issue, a matter that was resolved by the court, which held that the SRC was exercising its constitutional mandate and function regarding the remuneration of state officers when it issued the Special Issue of the Kenya Gazette and found the National Assembly Remuneration Act unconstitutional.

The lack of an effective mechanism for follow-up on the implementation of recommendations by CRA and OCOB is of particular interest in the study. Most audit queries recur in subsequent audit reports due to a lack of adequate action. The law requires that within six months after the end of each financial year, the Auditor-General conducts an audit and report, in respect of that financial year, on the accounts of any entity that public funds support. Audit reports are submitted to Parliament or the relevant county assembly not later than six months after the closure of the financial year. Within three months after receiving an audit report, Parliament or the county assembly should debate and consider the report and take appropriate action. However, there are observed delays in discussing audit reports in Parliament, as the latest Audit Report tabled in Parliament by the Parliamentary Committees for adoption is for FY2018/2019. The delays in the review of audit reports and implementation of recommendations by IFIs have resulted in recurring audit queries.

The Constitution imposed an obligation on Parliament to allocate adequate funds to sustain the operations of the commissions and independent offices. This makes it a constitutional imperative for Parliament to ensure the institutions are sufficiently resourced to perform their functions. However, the current situation is that these institutions are lumped together with other MDAs in sector working groups. They present their budget in the sector working groups with ceilings already given by the National Treasury, which also approves the IFIs proposals before submitting them to Parliament. The OAG's budget has gone up in the last two fiscal years contrary to the ceilings initially proposed by the National Treasury, an attempt to glorify independence from a financial perspective and the operational aspect of the IFIs. The study also observed that Parliament has sometimes reduced the IFIs' budgets as a revenge mechanism for actions that bruise them to curtail and sabotage these institutions.

Chapter Four:

STUDY RECOMMENDATIONS AND CONCLUSION

4.1: Conclusion

The demand for the constitutional entrenchment of commissions and independent offices was triggered by the long tolerance of a culture of impunity by the Kenyan government, especially in fiscal management. The institutions were established to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles, and promote constitutionalism. In this regard, the independence of IFIs is guaranteed in the law on the basis that they are not subject to direction or control by any person or authority and should be adequately funded. Their salaries are charged from the consolidated fund. Further, Article 254 of the Constitution provides for their accountability. One cross-cutting theme and finding in this study is that most of the commissions and independent offices have not delivered on their specific mandates, mainly because they have not been provided with the necessary resources.

In conclusion, this study shed light on the state of independent institutions and commissions in Kenya, revealing both areas of strength and areas in need of improvement. The findings have underscored the critical role that these institutions play in upholding democracy, promoting accountability, and safeguarding the rights of Kenyan citizens. While the country has made significant strides in establishing a framework for these institutions, including a robust legal foundation, it is evident that challenges persist that continue to hinder the achievement of IFIs mandates given Kenya's political culture and practice.

The study has underscored the urgency of addressing these challenges with the recommendations put forth in this, offering a roadmap for meaningful reforms. Strengthening the legal framework to enhance the independence and accountability of these institutions is paramount and equally crucial in ensuring adequate funding, which will empower these bodies to fulfill their mandates effectively.

4.2 Study Recommendations

- There is a need to enhance the independence and autonomy of IFIs by safeguarding their decision-making processes from political interference by revising relevant legislation to strengthen their mandate and freedom. For example, CRA's recommendation on the division of revenue should be legally binding and complied with, thus leaving no room for politicization by other actors. More specifically, where CRA and treasury differ, there should be a requirement that both parties are invited to Parliament to be heard before the passage of the Division of Revenue Bill.
- There is a need to review relevant legislation to free the appointment process of commissioners and chairpersons to the IFIs from political interference. The appointment process should guarantee a rigorous, impartial, and non-partisan procedure to ensure commissioners do not feel indebted to those who will be affected by their decisions. So, they do not kowtow to those with the power to remove them from office.
- A review and re-establishment of the National Treasury to delink it as part of the Executive with capabilities to serve all arms of government and state organs equally should be considered.
- The Auditor General's reports should never be mere allegories. There is an urgent need to clear the backlog of the Auditor General's reports and make them up to date to actualize the implementation of the provisions of Article 226 (5) of the Constitution by directly apportioning culpability to various public officers and offices by examining books of accounts in real-time. This will also enable the sharing of revenue between the two levels of government based on current audited accounts as required by law. To realize this, there is a need to create a high-level team drawn from Parliament, OCOB, and OAG, who shall work comprehensively to follow reports and recommendations and ensure needed actions are undertaken.
- To enhance public accountability through Parliament, there is a need for a legal obligation for Parliament to debate the reports in a restricted time frame. In addition, members of these commissions and offices should also be required to appear before the relevant parliamentary committees to discuss the reports. Currently, there is no explicit obligation in law on what should happen once Parliament receives the annual reports from some of the select institutions. In most cases, the reports are not tabled for discussion in relevant parliamentary committees and the House.
- There is a need to entrench, through civic education, the merits of the electorate by putting in office leaders who offer good leadership, promote supportive norms, and uphold solid values and public ethics, without which political threats will abound.

- Amend Article 223 of the Constitution that states that the National Government may spend money that has not been appropriated due to insufficiency of budgeted amount or expenditure that has arisen for a purpose for which no amount has been appropriated. As much as expenditures under this Article are approved within two months after the first withdrawal by Parliament, the National Government has used this Article as a loophole to occasion supplementary budgets that negate prudent fiscal planning and implementation.
- One main challenge to the independent fiscal institutions' independence is the inadequate resources to fulfill their mandate. The institutions have been experiencing perennial budget shortfalls, thus affecting the timely execution of their mandate. As such, minimum resource allocation for the IFIs should be based on a particular law provision to enable them to carry out their mandate and to be better protected against potential attempts to defund them.
- Since constitutional commissions and independent offices are linked to Parliament through representation and oversight, any attack on them from the Executive or any other organization must be an affront to the institution of Parliament. Parliament must robustly defend and protect them if the watchdog role is to be felt. Parliament should always guard against unwarranted attacks, especially from persons or entities under scrutiny.
- The PBOs should be provided unrestricted access to information in a free and timely manner in electronic and paper formats to discharge their responsibilities. PBO requires the power and autonomy to initiate reports and programs as mandated. While drafting specific requests to a government department, the PBO should be detailed and thorough in the data needed. In its response, government entities should take less than two weeks to provide the data requested in machine-readable formats.
- The commissions and independent offices can utilize enhanced multi-agency and multilateral collaborations for better management of public resources and peer-to-peer support in the discharge of their mandates. SRC, for example, should work closely with the Public Service Commission and the county public service boards to deal with the recruitment of public servants towards rationalization of the country's wage bill.
- The Judiciary should ensure consistent and impartial adjudication of independent offices and commission cases. The outcome from the courts should be in the interest of the public and strictly conform to the rule of law.



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