The Role of the Constitutional Implementation Oversight Committee: Has Parliament Abdicated Responsibility in the Implementation of the Constitution?

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Abstract

The 2010 Constitution of Kenya has been described as transformative in nature and is in its fifteenth year of implementation. The transformative nature of the Constitution must manifest itself through implementation because Constitution making, and Constitution building do not end with the adoption of the Constitution—they continue with the interpretation, application, and implementation of the Constitution through mechanisms such as policies and legislation. The framers of the Constitution provided in the 2010 Constitution a process of implementation of the Constitution with various institutions expressly and implicitly assigned specific roles to play. Parliament as a legislative and oversight institution was assigned a critical role to play in this process to implement the Constitution and oversee the consolidation of the new constitutional dispensation and transformation of the Kenyan society. One of the institutions expressly established by the constitution is a Parliamentary Select Committee known as the Constitutional Implementation Oversight Committee (CIOC) which is assigned critical responsibility to coordinate Parliament and other institutions responsible for the implementation of the Constitution to ensure transition from the centralized system to the devolved system of government and the social, economic and political transformation of the Kenyan society. This article posits that Parliament in general and this CIOC in particular have abdicated this responsibility. To demonstrate how Parliament seems to have abdicated responsibility, this essay focuses on the examination of this committee, its establishment, constitutional functions, and how it has performed since the promulgation of the Constitution. However, because the need for a Parliamentary Select Committee to oversee the implementation of the

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Constitution was informed by the critical role such committee played in the constitution-making process, the article begins with the examination of the historical role of the Parliamentary Select Committee in the Constitution-making process before zeroing in on the CIOC and its role in the implementation of the Constitution, and concluding with what needs to be done to rectify the situation.

Keywords: The 2010 Constitution, Devolution Parliamentary select committee oversight.

1. Introduction

Kenya adopted a new transformative supreme Constitution on 27 August 2010 and is in its fifteenth year of implementing it through various mechanisms envisaged by the Constitution. This is because Constitution-making and Constitution-building do not end with the adoption of the Constitution—they continue with the interpretation, application, and implementation of the Constitution through mechanisms such as policies and legislation. Admittedly, it is one thing to adopt a new Constitution and yet another to carefully manage its implementation and transition to the new constitutional dispensation and its values. Fifteen years since the promulgation of the Constitution, the Kenyan people are starting to feel that the Constitution has either failed to deliver the promise of social transformation or is delivering the promise in a very slow manner whose impact is not sufficiently felt. The fundamental question is why? While there may be many reasons why the Constitution has failed to deliver or is delivering the promise of fundamental transformation at a snail's pace, this article identifies and examines Parliament's seeming abdication of constitutional responsibility in the implementation of the Constitution as a major cause of the failure or slow pace of delivering on the promise. The hypothesis of this paper is that Parliament was assigned critical constitutional responsibility to implement the Constitution and to oversee its implementation in general and devolution in particular, as well as the management of transition to the new constitutional dispensation and devolution, which it seems to have abdicated.

The framers of the 2010 Constitution provided a process of implementation with various institutions expressly and implicitly assigned specific roles to play. Parliament as a legislative and oversight institution has a critical role to play in this process to implement the Constitution and oversee the consolidation of the new constitutional dispensation and transformation of Kenyan society. One

of the institutions expressly established by the constitution is a Parliamentary Select Committee known as the Constitutional Implementation Oversight Committee (CIOC) which is assigned critical responsibility to coordinate Parliament and other institutions responsible for the implementation of the Constitution to ensure transition from the centralized system to the devolved system of government and the social, economic and political transformation of the Kenyan society. To demonstrate how Parliament seems to have abdicated responsibility, this article focuses on the examination of this committee, its establishment, constitutional functions, and how it has performed since the promulgation of the Constitution. However, because the need for a Parliamentary Select Committee to oversee the implementation of the Constitution was informed by the critical role such committee played in the Constitution-making process, the paper begins with the examination of the historical role of the Parliamentary Select Committee in the Constitution making process before zeroing in on the CIOC and its role in the implementation of the Constitution.

2. The Parliamentary Select Committee and its role in the constitution-making process

The idea of a constitutionally established Parliamentary Select Committee to play a critical role in the implementation of the Constitution drew lessons from the critical role played by a Parliamentary Select Committee in the Constitution-making process. The historical emergence and evolution of the Parliamentary Select Committee with a critical role in the Constitution-making process can be traced to the turbulent processes of establishing institutions and processes that were anchored in legislation, through which Kenya purposed to make a new Constitution.

2.1 The Constitution of Kenya Review Commission Act of 1997

The first legislation to provide for a formal process for the review of the Constitution was enacted by the 8th Parliament after its election in 1997. A bill to be enacted into the Constitution of Kenya Review Act was first published and introduced by the then Attorney General, Amos Wako, on 4 August 1997.[1] The bill, which was eventually enacted into law and assented to on 7 November 1997, established a twenty seven-member Commission including the Attorney

1 See Kenya Gazette Supplement No. 55 (Bills No. 13) of 1997 which published the Constitution of Kenya Review Commission Bill of 1997 on the 4 August 1997.

General as an *ex officio* member,[2] as the most important organ of review with responsibility "to facilitate the review of the constitution by the people of Kenya and eventual alteration of the constitution through Parliament"[3]. The Act, however, also identified some roles to be played by the then National Assembly including a select committee nominated by the National Assembly to undertake specific functions provided for by the Act.

First, while the Commission was required to complete its work and submit its report to the President within twenty-four months from the date of appointment; the National Assembly was empowered, if need arose, to through a motion by the Attorney General, extend this time for a period not exceeding twelve months.[4] Secondly, the President was required to transmit the report to the National Assembly,[5] whose Speaker was required to "forthwith refer the report to a select committee of not less than fifty members of the National Assembly especially nominated by the National Assembly for the purposes" of examining the Commission's report and making recommendations on the same to the National Assembly.[6] Thirdly, the select committee could, if it deemed it necessary, "refer any matter arising from the report back to the Commission for further study, investigation or inquiry", which would report back directly to the select committee.[7] The select committee was itself required to report to the National Assembly within ninety days of the date the Speaker referred the Commission's report to it.[8] Fourthly, The National Assembly was obligated to consider the Commission's report and the select committee's recommendations and make appropriate resolutions including a resolution for a Bill to alter the Constitution,[9] and a resolution inviting the "government to present to the National Assembly the necessary legislative programme that shall faithfully reflect the recommendations of the Commission as adopted by the National assembly"[10]. Fifthly, the Government was required to present to the National Assembly the relevant legislative programme including a bill to alter the

2 Sections 3 and 4 of the Constitution of Kenya Review Commission Act of 1997.

3 Section 3 of the Constitution of Kenya Review Commission Act of 1997.

4 Section 16(1) of the Constitution of Kenya Review Commission Act of 1997.

5 Section 16(2) of the Constitution of Kenya Review Commission Act of 1997.

6 Section 16(3) of the Constitution of Kenya Review Commission Act of 1997.

7 Section 16(4) of the Constitution of Kenya Review Commission Act of 1997.

8 Section 16(4) of the Constitution of Kenya Review Commission Act of 1997.

9 Section 16(5) of the Constitution of Kenya Review Commission Act of 1997.

10 Section 16(6) of the Constitution of Kenya Review Commission Act of 1997.

Constitution within sixty days of the resolutions by the National Assembly.[11] This 1997 Act did not lead to the Constitution of the Commission to facilitate the review of the Constitution until after some negotiated amendments to the Act, undertaken in 1998 and 2000.

2.2 The 1998 Amendments to the Constitution of Kenya Review Act

The 1997 Act was severely criticized for two reasons: One, providing for a Constitution of Kenya Review Commission that lacked appropriate independence since it was to be appointed by the President.[12] Two, despite the establishment of the Commission, Parliament had been assigned the fundamental role of altering the Constitution based on a Bill presented by the government.[13] This was perceived more as a Parliament-driven as opposed to a people-driven constitution review process. As a result, intense negotiations led to fundamental amendments to the Act in 1998.[14] The amendments included the following major changes: First, the slots in the Commission were shared among various interest groups such as political parties,[15] religious organizations,[16] women's organizations[17] and civil society organizations[18] which were granted power to nominate people to be appointed as Commissioners.[19] Second, the role of the

11 Section 16(7) of the Constitution of Kenya Review Commission Act of 1997.

12 Section 4(1) of the Constitution of Kenya Review Commission Act of 1997 read together with the First Schedule. Although section 2 of the First Schedule required the President to consult widely when making the appointments, and to seek a list of nominees for appointment from various bodies, institutions and organizations, the Kenya people led by the civil society, religious leaders and opposition political parties could not trust this process.

13 Sections 3 and 16 of the Constitution of Kenya Review Commission Act of 1997.

14 See Kenya Gazette Supplement No. 73 (Act No. 7) published on 30 December 1998.

15 Section 3(2)(*b*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated thirteen slots to political parties represented in the Inter-Parties Parliamentary Committee of whom at least two shall be women.

16 Section 3(2)(*c*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated one slot to the Muslim Consultative Council and the Supreme Council of Kenya Muslims; section 3(2)(*d*) allocated one slot to the Kenya Episcopal Conference; section 3(2)(*e*) allocated one slot to the Protestant Churches of Kenya represented by the National Council of Churches of Kenya, the Seventh Day Adventist Church, the Church of God, the Kenya Indigenous Christian Churches, and the Evangelical Fellowship of Kenya.

17 Section 3(2)(*f*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated five slots to the women's organization through the Kenya Women's Political Caucus.

18 Section 3(2)(*g*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated four slots to the civil society through the National Council of Non-Governmental Organizations.

19 Sections 3(2) and the First Schedule of the Constitution of Kenya Review Commission Act of 1997

President in the nomination and appointment of Commissioners was reduced to notifying in the Gazette, the appointment of the commissioners nominated by the nominating organizations.[20] Third, the role of Parliament was fundamentally reduced with section 2B of the amended Act expressly providing for three organs—the Commission; District Forums; and the National Forum, through which the review process was to be conducted. Parliament was not identified as one of the organs of review except that its members would merely be members of the District Forums of their respective areas[21] and *ex officio* members of the National Forum.[22] Despite the delicately negotiated amendments the Commission could not be constituted since some of the interest groups allocated slots in the Commission such as the Parliamentary political parties, the religious organizations and the women's organizations disagreed on how to share the slots among themselves. This led to a stalemate that forced the civil society organizations with the support of some opposition political parties to start the Ufungamano people-driven Constitution review process.[23]

2.3 The 2000 Amendments to the Constitution of Kenya Review Act

As part of the efforts to resolve the stalemate and jump start the constitutional review process, Hon. Raila Amolo Odinga whose National Development Party (NDP) had entered into a cooperation arrangement with President Moi's Kenya African National Union (KANU) moved a motion in Parliament to address the stalemate. The motion led to a resolution that a Parliamentary Select Committee be established to hear the views of Kenyans and constitutional experts on how to resolve the stalemate and jump start the review process. The resolution adopted on 15 December 1999, provided as follows:

> **That**, while noting that the Constitution of Kenya Review Commission (Amendment) Act, 1998 received Presidential Assent on December 30, 1998; cognizant of the fact that the implementation of the Act has been hampered by the disagreement over the nomination of Commissioners among some stakeholders,

as amended in 1998.

20 See section 4(3) and (4) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998.

21 Section 12A(1)(*d*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998.

22 See section 16A(*a*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998.

23 The initiative was called the Ufungamano people-driven Constitution making process because its activities were being undertaken at Ufungamano House in Nairobi.

> and concerned that the review process is now behind schedule as a result of the impasse; and in order to facilitate consensus building necessary to resolve the stalemate amongst the bodies specified in the First Schedule to the Act, the formation of a Review Commission and the co-ordination of the constitutional review process, this House resolves to establish a Select Committee comprising 27 Members to review the Constitution of Kenya Review Act according to the wishes of Kenyans and facilitate the formation of the Review Commission.[24]

Pursuant to the above resolution, a Parliamentary Select Committee was established with Honourable Raila Amolo Odinga becoming its first Chairperson, to undertake the following two Terms of Reference drawn from the above resolution: (i) To review the Constitution of Kenya Review Act, 1997 as per the wishes of Kenyans. (ii) To facilitate the formation of the Commission to review the Constitution. The Select Committee in execution of its mandate resolved to invite Constitutional Law experts to assist it in reviewing the Act to make it operational. The author of this paper, who was invited to appear before the Committee in January 2000, rendered advice and made recommendations on several matters, some of which were included in the resulting amendments of the year 2000.

One, the author advised against the establishment of a Commission comprising Commissioners that represent and are nominated by interest groups. Instead, the author recommended the establishment of a technical Commission comprising Commissioners appointed on merit based on applications and interviews conducted by the National Assembly through a Parliamentary Select Committee. Two, the author advised against the parallel constitutional review processes—the parliamentary-led process and the Ufungamano people-driven process, since these would not eventually lead to the adoption of a new constitution for the country. Instead, the author recommended that the Select Committee negotiates with the Ufungamano group with a view to a merger that would lead to a single constitutional review process. When asked what the Select Committee should do should the Ufungamano group refuse to come on board, the author recommended that if the Select Committee intended to have a Commission with a maximum of 27 members, out of which it could allow the Ufungamano group to have only 10 members, then the Select Committee should proceed to amend the Act reducing the Commission to 17

24 Quoted in a letter of the Clerk of the National Assembly dated 21 December 1999 addressed to the author of this paper inviting him as one of the constitutional experts to appear before the Select Committee on 13 January 2000 and assist the Committee in the review of the Constitution of Kenya Review Act of 1997 as amended in 1998 to facilitate the formation of the Commission to review the Constitution.

members. After which, constitute the Commission and start the process but in the meantime continue negotiations with the Ufungamano group to bring them on board. In the event that the Ufungamano group agreed to come on board, the Act would once again be amended to increase the membership of the Commission to 27.

After hearing the Kenyan people and the constitutional law experts, the Select Committee recommended amendments that resulted in the revised Constitution of Kenya Review Act, 2000. Fundamental changes introduced by these amendments included the following: Firstly, the members of the Commission were reduced from 27 to 17 comprising a Chairperson appointed from amongst the Commissioners; fifteen Commissioners nominated by the National Assembly and appointed by the President; and the Attorney General or his representative as an *ex officio* member.[25] Secondly, the National Assembly emerged as an institution assigned critical roles in the Constitution review process including advertising of positions for people to be appointed as commissioners;[26] receiving applications from applicants[27] and considering them,[28] shortlisting candidates, conducting interviews, nominating persons to be appointed commissioners,[29] and submitting their names to the Attorney General for transmission to the President[30] to notify their appointments in the Gazette.[31] It also retained the power to extend the period within which the Commission was required to finalize its work, if need arose.[32] The National Assembly was empowered to, in accordance with its Standing Orders, establish a Select Committee consisting of not less than five, and not more than twenty-seven members[33] through which the National Assembly would undertake all these functions. Section 10(3) of the revised Constitution of Kenya Review Act of 2000 set out the functions of the Select Committee as being: (i) To recommend to the National Assembly suitably qualified persons for appointment as Commissioners. (ii) To perform such functions as the National Assembly may, by resolution assign. The Act further empowered the National

25 See section 6(2) of the Revised Constitution of Kenya Review Act of 2000.

26 See section 7(1) of the Revised Constitution of Kenya Review Act of 2000.

27 See section 7(2) of the Revised Constitution of Kenya Review Act of 2000.

28 See section 7(3) of the Revised Constitution of Kenya Review Act of 2000.

29 See section 7(3) of the Revised Constitution of Kenya Review Act of 2000.

30 See section 7(5) of the Revised Constitution of Kenya Review Act of 2000.

31 See section 7(7) of the Revised Constitution of Kenya Review Act of 2000.

32 See section 26(2) of the Revised Constitution of Kenya Review Act of 2000.

33 See section 10(1) of the Revised Constitution of Kenya Review Act of 2000.

Assembly to, in accordance with its Standing Orders, establish machinery for the resolution of any disputes arising in the course of the review process.[34] From then onwards a Parliamentary Select Committee always played a critical role in the constitutional review process.

In November 2000, the Commission was constituted with the author being appointed one of the Commissioners and Professor Yash Pal Ghai appointed as the Chairperson. Professor Ghai declined to take the oath of office and embarked on negotiations to bring the Ufungamano group on board.

2.4 The 2001 Amendments to the Constitution of Kenya Review Act

The negotiations initiated by Professor Ghai yielded a tentative agreement for a single constitutional review process with a single Commission drawing additional members from the Ufungamano People's Commission. This would, however, be preceded by negotiated amendments to the Constitution of Kenya Review Act by a small group of five comprising Prof Ghai as Chairperson; two Commissioners from the parliamentary appointed Commission—the late Prof Okoth Ogendo and this author; and two Commissioners from the Ufungamano People's Commission—the late Dr. Oki Ooko Ombaka and Justice Abida Ali. While Prof Ghai, Prof Ogendo and the author would report progress to the Parliamentary Select Committee and eventually to President Moi; Dr. Ombaka and Abida Ali would report progress to the larger Ufungamano group.

The negotiations by this smaller group resulted in the Constitution of Kenya Review (Amendment) Bill of 2001 that was published on 22 March 2001.[35] The amendments were passed and assented to by the President on 16 May 2001. The fundamental changes introduced by these amendments included an expansion of the commission by twelve members;[36] a re-establishment of the Select Committee to assist the National Assembly in the performance of its functions under the Act;[37] and provision for the following five organs of review through which the review process should be conducted—the Commission; the Constituency Constitutional Forum; the National Constitutional Conference; the referendum; and the National Assembly.[38] The National Assembly through

34 See section 10(4) of the Revised Constitution of Kenya Review Act of 2000.

35 See Kenya Gazette Supplement No. 21 (Bills No. 7).

36 See section 6(4) of the Revised Constitution of Kenya Review Act of 2001.

37 See section 10 of the Revised Constitution of Kenya Review Act of 2001.

38 See section 4(1) of the Revised Constitution of Kenya Review Act of 2001.

the Select Committee retained the power to nominate persons to be appointed as Commissioners, and powers to extend the period, if need arose, within which the Commission was required to complete its work.

Pursuant to these amendments, a reconstituted and merged commission was established and undertook its work culminating in the referendum of November 2005 in which the people rejected the draft constitution since what was adopted by the Bomas National Constitutional Conference had been changed by the government through the Select Committee sitting in Kilifi. This stalled the constitutional review process until after the 2007 elections that were rocked by post-election violence.

2.5 The Constitution of Kenya Review Act of 2008

As part of the National Reconciliation Accord settlement that was signed to end the post-election violence, the need to conclude the constitutional review process was identified as one of the major activities to be undertaken by the coalition government of national unity. Consequently, a new Constitution of Kenya Review Act of 2008 was enacted by the 10th Parliament to revive and complete the constitutional review process. Section 5 of this Act provided for the following four organs through which the review of the Constitution shall be completed—the Committee of Experts; the Parliamentary Select Committee;[39] the National Assembly; and the referendum. It is notable that even at this point in the review process both the Parliamentary Select Committee and the National Assembly were found to be still critical in the Constitution-making process. While the National Assembly was granted power to, through the Parliamentary Select Committee, nominate persons to be appointed to the Committee of Experts;[40] the Parliamentary Select Committee was empowered to receive the draft Constitution and report of the Committee of Experts, deliberate and build consensus on the contentious issues, and make recommendations to the Committee of Experts.[41] From this history of the role of Parliament in general and the Parliamentary Select Committee in particular, in the Constitution -making process, coupled with the history of failure to implement the 1963 independence Constitution, the framers of the 2010 Constitution saw the need to provide for a Parliamentary Select Committee with mandate to oversee the implementation of the Constitution.

39 See also section 7(1) and (2) of the Constitution of Kenya Review Act of 2008 as revised in 2009.

40 See section 8(4) of the Constitution of Kenya Review Act of 2008 as revised in 2009.

41 See section 32(1)(*c*) of the Constitution of Kenya Review Act of 2008 as revised in 2009.

3. Establishment of the Constitutional Implementation Oversight Committee

In the efforts to examine the Constitution and understand the establishment of the Constitutional Implementation Oversight Committee (CIOC), a clear distinction must be drawn between—

1. Committees of Parliament established under the constitutional authority conferred by article 124 of the Constitution.
2. Committees of Parliament directly established by the Constitution itself under other provisions of the Constitution such as section 4 of the Sixth Schedule to the Constitution.

When seeking to understand this distinction, it must be appreciated that while committees of Parliament established under the authority of article 124 are creatures of the Constitution—namely creatures of Parliament through its Standing Orders; the CIOC established under section 4 of the Sixth Schedule is a direct creature of the Constitution itself. Article 124 forms part of Chapter eight of the Constitution which provides for the establishment and assignment of the functions of Parliament, and other related matters including the effective and efficient operation of Parliament. The article, which is titled "Committees and Standing Orders" provides at sub-articles (1) and (2) as follows:

1. Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.
2. Parliament may establish joint committees consisting of members of both Houses and may jointly regulate the procedure of those committees.[42]

These provisions do not directly establish committees; instead, they authorize and empower each House of Parliament to establish its own committees; and Parliament to establish joint committees. Under these provisions the committees are not established by the Constitution but by the Houses of Parliament, and in the case of joint committees, by Parliament itself. To constitutionally establish these committees, each House of Parliament, and in the case of joint committees, Parliament itself must interpret and apply these provisions and other constitutional provisions to—determine which committees to establish, and what functions of Parliament to assign to each of these committees. When establishing and assigning functions to these committees, the Houses of

42 Article 124(1) and (2) of the Constitution.

Parliament and Parliament itself must avoid—establishing committees that are duplicative of the CIOC; and assigning to any of these committees functions that the constitution has already assigned to the CIOC.

The Sixth Schedule to the constitution titled "Transitional and Consequential Provisions" which includes the relevant section 4, is linked to Article 262 that forms part of Chapter Eighteen of the Constitution which is also titled "Transitional and Consequential Provisions". Both Chapter Eighteen and the Sixth Schedule provide for the following two very important and critical matters in constitution making and constitution implementation and building:

1. Management of transition from the old constitution to the new constitution.
2. Management of the implementation of the new constitution and the consequences of the provisions of the new constitution including the transformation of society through the values established by the new constitution.

Section 4 of the Sixth Schedule which is titled "Parliamentary Select Committee" provides in relevant part as follows:

> There shall be a select committee of the National Assembly to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things….[43]

In the interpretation and application of this provision and the provisions of Chapter Eighteen and the Sixth Schedule, Parliament and the CIOC ought to appreciate the fact that while management of transition may be time-bound with some of the institutions established to manage this process having a fixed tenure that expires; management of implementation of the constitution and its consequences is not time-bound but a continuous process, and some of the institutions established to manage the process may exist in perpetuity. For example, while the term of the Commission for the Implementation of the Constitution established by the Sixth Schedule[44] is expressly limited to five years[45]; the term of the CIOC established by section 4 is not explicitly limited in this manner by any provision of the constitution. If the CIOC is

43 The Preambular part of section 4 of the Sixth Schedule to the Constitution.

44 See section 5(1) of the Sixth Schedule to the Constitution.

45 See section 5(7) of the Sixth Schedule to the Constitution.

established to oversee the implementation of the Constitution, what then does the implementation of the constitution entail?

4. Meaning and scope of implementation of the constitution

Before examination and understanding of the oversight functions of the CIOC over the implementation of the constitution, it is important to first examine and understand the meaning, scope, and process of implementation of the constitution. The 2010 constitution of Kenya is founded upon the sovereignty of the people[46] and the supremacy of the constitution.[47] Constitutional supremacy elevates the constitution to become the highest source of norms in the country and all other sources of norms such as policy, legislation, international law and ratified treaties, and culture are subordinated to the constitution.[48]

Such other sources of norms must therefore be consistent with the supreme constitution. From this perspective implementation of the constitution is the process of translating the provisions and intent of the constitution into the lived substantial realization of the constitutional purposes and reality. This requires the transformation of the policy, legal and institutional framework of governance of the country. This is realized through the following mechanisms that are in substance and manner of their adoption consistent with the constitution:

1. Formulation, development and adoption of policies and policy decisions.
2. Development and enactment of legislation required to implement the constitution.
3. Adoption of international law and ratified treaties that form part of the law of Kenya.
4. Establishment or constitution of new institutions such as commissions and independent offices that are required to undertake certain constitutional responsibilities.
5. Restructuring or abolition of old order institutions undertaking functions that have been assigned by the constitution to other institutions or structures, to align them to the constitution.

46 See article 1 of the Constitution.

47 See article 2 of the Constitution.

48 J Mutakha Kangu *Constitutional Law of Kenya on Devolution* (2015) Strathmore University Press at 19.

6. Comprehensive review of old order policies and legislation to align them to the Constitution or replace them with those consistent with the Constitution.
7. In the context of the devolved system of government, analysis, unbundling and transfer of functions to the two levels of government as well as establishment of infrastructure required by county governments.
8. Costing the functions of the two levels of government and ensuring the allocation and transfer of resources based on the principle of funds must match and follow functions.

Implementation of the Constitution through policies and legislation is necessary because of several reasons: First, a Constitution is incomplete without a policy and legal framework that are conducive to the realization of the objects, purposes and values prescribed and established by the Constitution. Secondly, policies and legislation implement the Constitution by elaborating on the constitutional provisions, requirements, text, norms, values and principles and establishing institutions with responsibilities to undertake certain required steps to realize the Constitution. Thirdly, by so doing policies and legislation complement the constitutional self-enforcement. Fourthly, given that Constitutions are ordinarily drafted in general terms it is through policies and legislation that much of the constitution is given its life. Fifthly, policies and legislation perform the function of constitution-building, some kind of continuing Constitution-making. Sixthly, in the context of constitutional supremacy and policy and legal continuity, promulgation of a new constitution requires—the adoption and enactment of new policies and legislation that are consistent with the new constitution; and the urgent comprehensive review of all the old order policies and legislation to replace them with those that are consistent with and fully aligned to the new Constitution. Although the Sixth Schedule to the Constitution provided for the continuity of all laws that were in force immediately before the coming into force of the Constitution and required them to be interpreted with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution,[49] this should have been a temporary measure as the comprehensive review of the laws is undertaken to align them to the Constitution. This is justified by the fact that many players who interpret and apply the Constitution are non-lawyers who may find it difficult to interpret and apply the old order laws with the

49 See section 7 of the Sixth Schedule to the Constitution.

necessary alterations, adaptations, qualifications and exceptions to bring them into conformity with the Constitution.

5. Process of implementation of the 2010 constitution

A key feature of the design of the 2010 Constitution of Kenya is the establishment of an elaborate scheme and process of constitutional implementation. This was informed by Kenya's constitutional history with the 1963 Constitution which saw the independence leadership deliberately fail to implement it, but instead, embarked on undermining it through numerous constitutional amendments and retention of the colonial laws. The scheme and process of constitutional implementation adopted by the 2010 Constitution includes:

1. Constitutional establishment of implementation structures and institutions, enforcement mechanisms, and oversight processes.[50]
2. Constitutional drawing of a distinction between constitutional implementation transition activities that are time-bound and continuous constitutional implementation activities that are not time-bound.
3. Constitutional requirement for implementation of certain policy, legal and institutional reforms and judicial enforcement of constitutionality, as part of management of transition and constitutional implementation.
4. Constitutional identification of specific legislation required to be enacted as part of managing transition and implementation of the Constitution.[51]
5. Constitutional identification of institutions such as constitutional commissions that ought to be constituted within specified timeframes to enable them to play their role in the transition and implementation of the Constitution.
6. Constitutional specification of timeframes within which certain legislation must be enacted and institutions constituted to undertake transition and constitutional implementation activities.[52]

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50 On the one hand, sections 5 and 6 of the Sixth Schedule to the Constitution, for example, establish the Commission on the Implementation of the Constitution with responsibility to monitor, facilitate and oversee the implementation of the Constitution. On the other hand, section 23 of the Sixth Schedule to the Constitution requires legislation to be enacted within one year to provide for the vetting of Judges and Magistrates to determine their suitability to continue serving in their offices.

51 See the Fifth Schedule to the Constitution which sets out the legislation required to be enacted and the timeframes within which they should be so enacted.

52 See the Fifth Schedule to the Constitution which sets out the legislation required to be enacted and

6. Challenges in the implementation process

The process of constitutional implementation which the CIOC is supposed to be overseeing has over the past fourteen years so far experienced the following challenges which ought to be addressed: First, there has been the challenge of quantity –vs- quality in the sense that enactment of legislation has easily become an end in itself, where parliamentary performance is measured by the quantity of implementing legislation enacted rather than the quality in terms of its compliance with the constitutional text, norms, values, principles and purposes. Second, there has been the challenge of a narrow view of required legislation in the sense that there has been a restrictive and narrow view that the legislation required to implement the Constitution is limited to the legislation mentioned in the Fifth Schedule to the Constitution. Third, there has been the challenge of narrowing implementation to transition in the sense that although constitutional implementation is broader than management of transition, many players have confused implementation with transition and wrongly concluded that since the transition period has ended, that constitutional implementation has also ended. Fourth, there has been the challenge of an institutional vacuum in the sense that following the expiry of the term of office of constitutional implementation institutions such as the Commission on the Implementation of the Constitution,[53] implementation of the Constitution has been slowed down due to the institutional vacuum created and which was not filled with alternative institutions. Fifth, there has been the challenge of policies that are not translated into legislation. Since the adoption of the 2010 Constitution, the national government has formulated and adopted very many policies that have not been translated into legislation to ease their implementation and enforcement. This is despite the fact that certain aspects of policies such as those that envisage the criminalization of certain actions accompanied by criminal sanctions and the imposition of fees, charges or fiscal penalties require to be translated into legislation.[54] Finally, there has been the challenge of failure to comprehensively review old order legislations to align them to the Constitution. In light of these challenges, the next section examines the functions of the Constitutional Implementation Oversight Committee to see whether it has done anything about them, and if not whether it can still do something to address them.

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the timeframes within which they should be so enacted.

53 The term of office of the Commission on Implementation of the Constitution expired on 29 December 2015.

54 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 42.

7. The Functions of the Constitutional Implementation Oversight Committee

The functions of the CIOC are set out by section 4 of the Sixth Schedule to the Constitution which is also the establishment provision of the CIOC in the following manner:

> There shall be a select committee of the National Assembly to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things—
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> (*a*) shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning—
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> (i) the preparation of the legislation required by this Constitution and any challenges in that regard;
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> (ii) the process of establishing new commissions;
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> (iii) the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfer of staff;
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> (iv) the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and
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> (v) any impediments to the process of implementing this Constitution;
>
> (*b*) coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of legislation required by this Constitution; and
>
> (*c*) take appropriate action on the reports including addressing any problems in the implementation of this Constitution.

From the name of the Committee, the Preambular part of the section and the detailed specific functions set out by this provision, it is apparent that the overall functions of the CIOC are oversight in nature. In the following sections an examination of the meaning and extent of these oversight functions is undertaken.

7.1 Meaning and scope of the oversight functions of CIOC

The functions of the CIOC are best described as oversight in nature for several reasons: One, the name of the Committee—Constitutional Implementation Oversight Committee—includes the word "oversight". Two, the Preambular part of the section makes it clear that the Committee "shall be responsible for overseeing the implementation of this Constitution". Three, the specific functions set out in the details point in the direction of oversight. For instance, the Committee was supposed to receive regular reports from the Commission on the Implementation of the Constitution on the implementation of the Constitution on various matters including preparation of required legislation and any identified challenges;[55] process of establishment of new commissions;[56] and any impediments to the process of implementation of the Constitution,[57] review them and take appropriate action. The Committee is also supposed to "coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of legislation required by this Constitution"[58] among others. The Committee is then required to "take appropriate action on the reports including addressing any problems in the implementation of this Constitution"[59].

Oversight in this case is defined as the process of taking steps and actions to review and monitor the process of the implementation of the Constitution to ensure that the objects, purposes, values and principles of the Constitution are realized. A closer examination of the scope of these oversight functions discloses the following three broad elements of the oversight functions:

1. Constitution impact assessment functions.
2. Constitution interpretation and application oversight functions.
3. Constitution implementation Audit and evaluation functions.

55 Section 4(*a*)(i) of the Sixth Schedule to the Constitution.

56 Section 4(*a*)(ii) of the Sixth Schedule to the Constitution.

57 Section 4(*a*)(iii) of the Sixth Schedule to the Constitution.

58 Section 4(*b*) of the Sixth Schedule to the Constitution.

59 Section 4(*c*) of the Sixth Schedule to the Constitution.

7.1.1 Constitution impact assessment functions

The Constitution impact assessment functions require the CIOC to undertake an assessment of all policies, legislation and institutional frameworks to determine their impact, both in substance and process, on the Constitution, its objects, values and principles. This impact assessment should focus on both draft policies and legislation, and the already existing policies and legislation whether adopted after or before the promulgation of the Constitution in 2010. Such impact assessments should evaluate the policies, legislation and institutional frameworks against various aspects of the Constitution including—

1. Respect for the sovereignty of the people.
2. The Bill of Rights and the human rights it establishes.
3. The devolved system of government and its objects, structures, functions and financial arrangements.
4. The national values and principles that are set out in article 10 of the Constitution.
5. Leadership and integrity and the responsibilities of leadership that are set out in Chapter Six of the Constitution.
6. Accountability, prudence and responsibility in the management and use of public financial resources.

7.1.2 Constitution interpretation and application functions

For the CIOC to be able to assess and evaluate policies, legislation and institutional frameworks for compliance with the Constitution, it must have responsibilities to interpret and apply the Constitution. Although the 2010 Constitution confers upon the Judiciary the ultimate authority to interpret the Constitution with finality, the Constitution requires all other institutions and persons working with the Constitution to interpret and apply it. Implied in the provisions of article 10(1) of the Constitution are the authority and responsibility on the part of all State organs, State officers, public officers and all people to interpret and apply the Constitution.[60] Any person or institution with authority to formulate policy and make policy decisions has a responsibility to interpret and apply the Constitution to ensure that the policy or policy decision made is consistent with the Constitution.[61] Similarly, any person or

60 Article 10 of the Constitution establishes the National values and principles of governance which bind all State organs, State officers, public officers and all persons.

61 Article 10(1)(c) of the Constitution.

institution with a mandate to make law has responsibility to interpret and apply the Constitution to ensure that the law made is consistent with the Constitution.[62] The CIOC, therefore, has a responsibility to interpret and apply not only the policies and legislation it is evaluating but also the Constitution against which the policies or legislation are being evaluated.[63] Ideally, a policy and legislation ought to identify the specific provisions of the Constitution they are seeking to give effect to, and the interpretation the drafter of the policy and the legislation has put on these constitutional provisions. Experience indicates that Memorandums of objects and long titles of proposed legislation hardly disclose the Constitutional provisions the legislation seeks to give effect to and the interpretation these provisions are assigned by the drafters of the policy and the legislation. For the CIOC to effectively discharge these Constitution interpretation and application functions, it must be guided by the doctrine of purposive interpretation provided for by article 259(1) of the Constitution.

Purposive interpretation is contextual in nature and takes into consideration both—intra-textual context, and extra-textual context. Intra-textual context requires the interpreter to restrict himself to the provisions of the Constitution but to interpret the Constitution as a structural whole going beyond the relevant specific provisions and taking into consideration other provisions of the Constitution including—the preamble; the Schedules; the objects and value setting provisions; and the rule setting provisions.[64] Extra-textual context requires the interpreter to go beyond the Constitution and take into consideration other sources outside the Constitution such as—historical drafting materials; jurisprudence generated by the courts; international law and ratified treaties; Constitutions of other countries and how they are interpreted; foreign law and court decisions; scholarly writings such as books and journal articles; and political, economic, social and cultural context.[65]

7.1.3 Constitution implementation audit functions

The CIOC established after the elections of August 2022 is a committee of the 13th Parliament, which embarked on its responsibilities twelve years since the commencement of the implementation of the Constitution. The oversight

62 Article 10(1)(b) of the Constitution.

63 Article 10(1)(a) of the Constitution.

64 See J. Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) Strathmore University Press at pp 32 to 42.

65 See J. Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) Strathmore University Press at pp 42 to 51.

functions of this CIOC, therefore, include a responsibility to audit the process of implementation of the Constitution to identify and determine the following matters: (i) The progress and any milestones made and make recommendations on how to consolidate such progress and milestones. (ii) Any missed steps and address them. (iii) Any challenges that require fixing. (iv) Any institutional vacuums arising out of institutions whose terms expired before the completion of the Constitution implementation process and consider how to fill them. (v) Any unfinished business such as comprehensive review of old order legislation and ensure their review to align them to the Constitution. (vi) Any gaps in the policies and legislation required to implement the Constitution. (vii) Any policies that have not been translated into legislation to ease implementation and enforcement.

7.2 Process of Constitution implementation oversight

The oversight process may be dichotomized into two types of processes—reactive oversight; and proactive oversight. Reactive oversight, on the one hand, refers to processes and actions that wait to receive one, reports from other institutions with Constitution implementation mandates and act on them, for example reports from the Commission on the Implementation of the Constitution or any of the constitutional Commissions and independent offices which also have a role in the implementation of the Constitution. Two, draft policies from institutions with mandate to formulate and develop policies and review and evaluate them for compliance with the Constitution. Three, draft legislation from institutions with mandate to conceive and draft legislation and review and evaluate them for compliance with the Constitution. Four, draft amendment Bills from institutions with mandate to initiate amendments to legislation and review and evaluate them for compliance with the constitution. Five, draft Bills introduced in Parliament for debate and passage from the relevant parliamentary committees, to review and evaluate them for compliance with the Constitution before they are passed by Parliament.

Proactive oversight, on the other hand, refers to situations where the CIOC does not wait for the King to come to the mountain, instead, the mountain goes to the king to raise issues and ask questions. In this case the CIOC may, first, coordinate with the Attorney-General or any ministry or government institution drafting a Bill to evaluate it for compliance before it is introduced in parliament. Secondly, the CIOC may also identify gaps in the legal framework and summon the relevant institution or ministry to find out why they are not introducing legislation required to implement the Constitution. Thirdly, the

CIOC may identify old order legislation that require comprehensive review to align them to the Constitution and summon the relevant ministry to come and explain why steps towards comprehensive review are not being taken. Fourthly, it may identify gaps in the policy framework and summon the relevant ministry or institution to explain why no action is being taken. Fifth, the CIOC may identify old order institutions that are duplicating roles and expenditures of the county governments and summon the relevant ministry or institution to explain. Sixth, it may identify old order institutions that require restructuring to avoid duplication and direct the relevant institutions to take appropriate action. Seventh, the CIOC may identify any impediments to the process of implementation of the Constitution and take or order appropriate action to be taken.

7.3 Oversight over whom?

The CIOC has a responsibility to exercise oversight over all the institutions that have some responsibility in the implementation of the Constitution. These include the Executive and its entities; the departmental committees of Parliament; constitutional Commissions and independent offices; and other statutory bodies established to play a critical role in the implementation of the Constitution.

7.3.1 Oversight over the Executive

The CIOC has a responsibility to exercise oversight over the Executive, which plays a critical role in the formulation and adoption of policies as well as development of draft Bills for introduction in Parliament to be enacted into legislation. This can be traced back to section 4 of the Sixth Schedule to the Constitution which identifies one of the responsibilities of the CIOC as being to oversee the implementation of the Constitution[66] including receiving regular reports from the Commission on the Implementation of the Constitution on the implementation of the Constitution.[67] The reports may concern matters that include the preparation of the legislation required by the Constitution and any challenges in that regard;[68] the process of establishing new Commissions;[69] the process of establishing the infrastructure necessary for the

66 See the Preambular part of section 4 of the Sixth Schedule to the Constitution.

67 Section 4(*a*) of the Sixth Schedule to the Constitution.

68 Section 4(*a*)(i) of the Sixth Schedule to the Constitution.

69 Section 4(*a*)(ii) of the Sixth Schedule to the Constitution.

proper operation of each county including progress on locating offices and assemblies and establishment and transfer of staff;[70] the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule;[71] and any impediments to the process of implementing this Constitution.[72] Although the Commission on the Implementation of the Constitution no longer exists following the expiry of its term in December 2015, these are matters that are ordinarily undertaken by the Executive through ministries and ministerial agencies. In the absence of the Commission on the Implementation of the Constitution, the Executive which through line ministries and ministerial agencies that develop policies and draft Bills should be required to file regular reports with the CIOC. This is further underscored by the fact that the constitutional provisions confer responsibility on the CIOC to coordinate with the Attorney-General, to ensure the timely introduction and passage of legislation required by the Constitution.[73] The Attorney General is not only a member of the Executive but also the legal adviser to the entire Executive on legal matters including draft policies and legislation.

7.3.2 Oversight over departmental committees of Parliament

The CIOC has a responsibility to exercise oversight over the departmental committees of Parliament which play a critical role in the processing of Bills in Parliament. The constitutional provisions confer responsibility on the CIOC to coordinate with the "relevant parliamentary committees", to ensure the timely introduction and passage of legislation required by the Constitution.[74] As already discussed, the CIOC is a special committee of Parliament directly established by the Constitution as opposed to the departmental committees which are established by each of the two houses of Parliament or Parliament itself through their Standing Orders under the authorization of article 124 of the Constitution. The functions of these departmental committees are conferred by the Standing Orders and include reviewing draft policies and Bills from the perspective of technical issues in the relevant sector. The CIOC on the other hand, has a constitutional responsibility to review all draft policies and Bills coming to Parliament from the perspective of their consistency with the

70 Section 4(*a*)(iii) of the Sixth Schedule to the Constitution.

71 Section 4(*a*)(iv) of the Sixth Schedule to the Constitution.

72 Section 4(*a*)(v) of the Sixth Schedule to the Constitution.

73 Section 4(*b*) of the Sixth Schedule to the Constitution.

74 Section 4(*b*) of the Sixth Schedule to the Constitution.

supreme Constitution and make recommendations to the houses of Parliament on constitutional compliance.

7.3.3 Oversight over constitutional commissions and independent offices

The CIOC has a responsibility to exercise oversight over Chapter Fifteen commissions and independent offices which have some responsibilities in the implementation of the Constitution. The role of constitutional commissions and independent offices in the implementation of the Constitution can be teased out of one, the general objects and functions of constitutional commissions and independent offices set out by the Constitution; and two, the mandates of the specific commissions and independent offices set out by the Constitution. In terms of article 249(1) of the Constitution, the objects of the commissions and independent offices are to protect the sovereignty of the people;[75] secure the observance by all State organs of democratic values and principles;[76] and promote constitutionalism.[77] In addition to these objects, article 252 sets out the general functions of commissions and independent offices as being to "conduct investigations on its own initiative or on a complaint made by a member of the public";[78] to undertake "conciliation, mediation and negotiation",[79] and to recruit their own staff.[80] These objectives and functions necessarily empower the Commissions and independent offices to interpret and apply the Constitution. Likewise, article 254 requires the commissions and independent offices to submit reports to the President and Parliament at the end of each financial year;[81] submit reports to the President, the National Assembly or the Senate if required at any time by the and one of these institutions on a specific matter;[82] publish and publicize every report required from them.[83]

These constitutional provisions suggest that commissions and independent offices have some oversight role over other State organs in the performance of their constitutional roles. The commissions and independent offices ensure accountability, protect rights, and promote good governance by monitoring

75 Article 249(1)(*a*) of the Constitution.

76 Article 249(1)(*b*) of the Constitution.

77 Article 249(1)(*c*) of the Constitution.

78 Article 252(1)(*a*) of the Constitution.

79 Article 252(1)(*b*) of the Constitution.

80 Article 252(1)(*c*) of the Constitution.

81 Article 254(1) of the Constitution.

82 Article 254(2) of the Constitution.

83 Article 254(3) of the Constitution.

compliance, conducting investigations, and advising the government. By fostering transparency and public participation, they uphold constitutional rights and reinforce the rule of law, ultimately enhancing effective governance and implementation of the constitution. While the constitutional commissions and independent offices have some oversight role over other State organs in the performance of their constitutional roles including implementation of the Constitution, the CIOC has oversight responsibilities over these commissions and independent offices. The anchorage for this proposition is partly traceable to article 254 which requires each commission and the holder of each independent office to submit an annual report to the President and Parliament.[84] Similarly, the provisions empower the President, the National Assembly or the Senate to, at any time, require a commission or holder of an independent office to submit a report on any particular issue.[85] It is submitted that since commissions and independent offices play some oversight function over the other State organs particularly on matters of observance of the Constitution, the commissions and independent offices have a role in the implementation of the Constitution. Likewise, since the reports of commissions and independent offices to Parliament ordinarily touch on observance of the Constitution, the CIOC is the right Committee of Parliament to evaluate these reports especially on matters relating to constitutional compliance and implementation of the Constitution. It should also be the responsibility of the CIOC to handle matters of financing of these commissions and independent offices to ensure their independence. This is critical since finance is a tool of political patronage which is used by other State organs, particularly the Executive to deny these commissions and independent offices the required independence they need to effectively oversee these other State organs. Budgets of the commissions and independent offices should be considered and approved by the CIOC as part of its oversight to ensure implementation of the Constitution. This is necessary since CIOC may need to rely on the support of these commissions and independent offices in the discharge of its constitutional implementation oversight responsibility. It may require any of these commissions and independent offices to undertake investigations or research into any specific matter and report back to the CIOC.

84 Article 254(1) of the Constitution.

85 Article 254(2) of the Constitution.

7.3.4 Oversight over statutory bodies

In addition to constitutional commissions and independent offices, there are numerous bodies established by legislation which have been assigned responsibilities that touch on the implementation of the Constitution. For example, the Intergovernmental Relations Act establishes the Intergovernmental Relations Technical Committee with responsibility to facilitate intergovernmental relations and dispute resolution;[86] the National Government and County Governments Coordinating submit as the apex intergovernmental structure;[87] the Council of Governors is another important structure for intergovernmental relations.[88] The effective performance or otherwise of these bodies has a bearing and impact on the implementation of the Constitution. The Public Finance Management Act also establishes the Intergovernmental Budget and Economic Council with responsibility to address issues of equitable sharing of revenue raised nationally among the national and county governments and among the 47 counties.[89] These are bodies over which the CIOC should exercise oversight as part of overseeing the implementation of the Constitution.

8. Historical evolution of the CIOC

It has already been observed that the need to have a Parliamentary Select Committee to oversee the implementation of the Constitution was informed by and drew lessons from the fact that a parliamentary select committee played a critical role in overseeing the Constitution-making process. From this history of the role of Parliament in the Constitution-making process, coupled with the history of failure to implement the 1963 independence Constitution, the framers of the 2010 Constitution saw the need to provide for a parliamentary select committee with a mandate to oversee the implementation of the Constitution.

8.1 CIOC between 2010 and 2013 under the 10th Parliament

The first CIOC was constituted in 2010 after the promulgation of the Constitution and was chaired by Honourable Abdikadir who later became a Presidential advisor to President Uhuru. This committee played a critical role in one, overseeing the implementation of the Constitution during these very early

86 See sections 11 and 12 of the Intergovernmental Relations Act of 2012.

87 See sections 7 and 8 of the Intergovernmental Relations Act of 2012.

88 See sections 19 and 20 of the Intergovernmental Relations Act of 2012.

89 Section 187 of the Public Finance Management Act of 2012.

stages. Two, coordinating with the Attorney-General and the then Ministry of Justice and Constitutional Affairs to ensure the introduction and enactment of most of the laws required to implement the Constitution and listed in the Fifth Schedule to the Constitution. Three, coordinating and overseeing the constitution of the various constitutional commissions such as the Constitution Implementation Commission (CIC) and the Commission on Revenue Allocation (CRA) established to play a critical role in the implementation of the Constitution. Four, overseeing the appointment of certain office holders to their respective new constitutional offices such as a new Chief Justice and Attorney-General among others. Five, overseeing the commencement of the process of vetting of judges and magistrates.

8.2 CIOC between 2013 and 2017 under the 11th Parliament

After the elections of March 2013, the 11th Parliament for unknown reasons decided not to reconstitute the CIOC. Could the 11th Parliament have wrongly thought that the process of implementation of the constitution had been completed? Could the 11th Parliament have wrongly thought that the Justice and Legal Affairs departmental committee established under the authority of article 124 was the CIOC? Whatever the reason, this was an unprecedented abdication of critical constitutional responsibilities by Parliament. Because of the failure to reconstitute this committee very many important issues regarding the implementation of the Constitution have fallen through the cracks. For example, when the term of the Commission on the Implementation of the Constitution expired, there was no CIOC to determine whether there was need to extend its term or not;[90] and whether to assign the functions of the defunct CIC to any other organ or not. This failure occasioned an institutional vacuum in the process of the implementation of the Constitution with very negative consequences to the process. Secondly, after the expiry of the term of the CIC many institutions responsible for initiating comprehensive review and amendments of old order legislation have resorted to piecemeal amendments which fail to align the laws to the Constitution. Notably, CIC was critical in reviewing and auditing draft policies and legislation to ensure compliance with the Constitution before they could be submitted to cabinet and subsequently, to Parliament for enactment. Thirdly, because of the failure to comprehensively review the old order legislation, many old order institutions have continued

90 Section 5(7) of the Sixth Schedule to the Constitution had provided that the National Assembly could, by resolution, extend the life of the Commission, if need arose.

to operate and duplicate roles and expenditures in functions the Constitution assigned to county governments. Fourthly, when the term of the Transition Authority expired, there was no CIOC to manage transition of the remaining functions to the Intergovernmental Relations Technical Committee which has struggled with very limited financial resources to undertake the functions left by the Transition Authority.

8.3 CIOC between 2017 and 2022 under the 12th Parliament

After the elections of 2017 the 12th Parliament reconstituted the CIOC to continue with its oversight role in the implementation of the Constitution. A scrutiny of the exit report of the committee signed by the chairperson on 8 June 2022 suggests that the committee had a very narrow view of its oversight functions. The report indicates that one, the CIOC drafted a number of legislative proposals and submitted them to the Speaker for consideration. Two, the CIOC introduced a number of Bills and legislative proposals dealing with the implementation of the Constitution. Three, the CIOC developed a number of Bills seeking to amend or to implement various articles of the Constitution.

What is conspicuous, however, is that the report does not disclose:

1. Whether the CIOC reviewed any Bills introduced in Parliament to evaluate them for their compliance with the Constitution.
2. Whether the CIOC at any time during its five-year tenure coordinated with the Attorney-General to ensure timely introduction and passage of the legislation required by the Constitution.
3. Whether the CIOC at any time coordinated with the Attorney-General during the drafting of any Bill to ensure that it is consistent with the Constitution.
4. Whether the CIOC at any time coordinated with any relevant parliamentary committee to ensure that any Bill under consideration by the committee is in compliance with the Constitution.
5. Whether at any time the CIOC conducted any audit to determine the gaps in the policy and legal framework required to implement the Constitution.
6. Whether the CIOC at any time summoned any ministry or government officials to find out why policies and legislation required to implement the Constitution were not being introduced.

7. Whether the CIOC at any time undertook review and evaluation of any draft policy developed and policy adopted by any government department to ensure their compliance with the Constitution.
8. Whether the CIOC at any time reviewed reports of the constitutional commissions and independent offices in respect of matters touching on the implementation of the Constitution.
9. Whether the CIOC has at any time sought to protect the financial independence of the constitutional commissions and independent offices as part of their overseeing the implementation of the Constitution.
10. Whether the CIOC at any time undertook an assessment to determine which old order legislation require comprehensive review to align them to the Constitution.
11. Whether the CIOC at any time conducted an assessment to determine any impediments to the process of implementing the constitution.

Without evidence on these matters, it becomes apparent that the CIOC had a very narrow view of its mandate which translates into an unknowing abdication of responsibility in constitutional implementation.

8.4 The nature and composition of CIOC 2022 and beyond

Against this background, there is an urgent need to rethink the nature and composition of CIOC 2022 and beyond to ensure that the 13th Parliament and subsequent Parliaments secure the realization of the objects, purposes, values and principles of the Constitution. In addition to rethinking the meaning and scope of the Constitution implementation oversight functions of the CIOC, there is need to re-examine the nature and composition of the committee. In this regard the first disturbing issue is the fact that the lawyers in the National Assembly, including the very senior and respected ones do not seem to see the critical role of this committee and therefore, have not sought to be members of this committee to use it to steer the country in the right constitutional direction that the framers of the Constitution intended. Further, an examination of the nature and scope of the committee must raise and answer the following three disturbing questions that provide three options to be considered:

1. Does the Constitution envisage a committee of the National Assembly?
2. Does the Constitution envisage a joint Committee of the National Assembly and the Senate?

3. Does the Constitution envisage a committee for each of the two houses of Parliament?

8.4.1 Does the constitution envisage a committee of the National Assembly?

Section 4 of the Sixth Schedule establishes the Committee in the following terms:

> Parliamentary Select Committee
>
> 4. There shall be a select committee of the National Assembly to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which…..

The interpretation that the Constitution envisages a committee of the National Assembly would be based on the fact that the section itself talks of "a select committee of the National Assembly". This approach may, however, be criticized for several reasons. First, this would be criticized for being narrow and literalist; and secondly, for failing to consider article 259 which provides for a purposive interpretation of the Constitution. Thirdly, the approach would be criticized for reading section 4 in isolation without considering other provisions of the Constitution such as the title of the provision which talks of "Parliamentary Select Committee" and article 93 which establishes a bicameral Parliament. Fourthly, the approach would be criticized for failing to consider the history of the Kenyan Parliament under which, before the adoption of the 2010 Constitution, there was a unicameral Parliament referred to interchangeably as Parliament or the National Assembly. Fifth, the approach is open to criticism for failing to consider the nature of the oversight function including coordination with relevant parliamentary committees which may include committees of the Senate. Informed by these factors, this approach does not commend itself as the correct way to approach this matter.

8.4.2 Does the Constitution envisage a joint committee of the National Assembly and the Senate?

An interpretation that the Constitution envisaged a joint committee of the National Assembly, and the Senate may be based on grounds that: One, section 4 must be interpreted in a purposive manner, taking into consideration the title context of a bicameral Parliament and the fact that the title of the section

refers to parliamentary select committee. Two, the bicameral Parliament is part and parcel of the devolved system in which the Senate protects the interests of counties and county governments which ought to be protected through and during the implementation of the Constitution. Three, the historical context in which the unicameral parliament was interchangeably referred to as Parliament and the National Assembly. Four, the nature of the constitution implementation oversight functions which envisage oversight by Parliament and not just one of the houses of Parliament. Five, the elevated status of the CIOC which includes oversight over the other relevant parliamentary committees. Six, the ability for this approach to provide institutional infrastructure through which the two houses can start building mutual trust, consensus and the spirit of working together to find solutions to the country's problems as opposed to the current adversarial relations that have become divisive and obstructive to effective implementation of the Constitution. This approach commends itself as the best purposive interpretation and will require the Speakers of the two houses to consult and agree on how to amend the Standing Orders of the respective houses to facilitate the formation and effective functioning of a joint CIOC.

8.4.3 Does the Constitution envisage a committee for each of the two houses of Parliament?

An interpretation that the Constitution envisaged a committee for each of the two houses of Parliament may be based on grounds that: One, a purposive interpretation taking into consideration the context of the bicameral Parliament should read section 4 together with the title that talks about Parliamentary Select Committee and determine that the section should be a basis for each house of Parliament to form its own Constitutional Implementation Oversight Committee. Two, both Houses of Parliament have a role to play in overseeing the implementation of the Constitution. Three, the Bicameral Parliament is part and parcel of the devolved system in which the Senate protects the interests of counties and county governments which ought to be protected through the implementation of the Constitution.

This may, however, be criticized on the grounds that: one, the approach will lead to operational challenges, especially where the two houses arrive at different interpretations of the same provisions. Two, the approach will encourage continued adversarial relations between the two houses of Parliament which undermine the need for swift and concerted efforts to implement the Constitution. This approach does not commend itself as the best purposive interpretation.

9. Conclusion and recommendations on the way forward for the CIOC

This paper has demonstrated that although Parliament through the CIOC was intended by the framers of the Constitution to play a critical oversight role in the implementation of the Constitution, Parliament in general and CIOC in particular, have abdicated responsibility. This abdication is one of the reasons why the Constitution has failed to deliver or is delivering the promise of fundamental transformation at a very slow pace. Therefore, Parliament urgently needs to pause and reflect on its proper role in the implementation of the Constitution and urgently rectify its missteps.

It is therefore recommended that first, the current CIOC should consult with, brief and or advise the Speaker/Speakers of the two houses of Parliament to agree on what type of committee and or committees to constitute. Second, the current CIOC should identify and advise the Speakers on the kind of required amendments to the Standing Orders of the two houses of Parliament to facilitate the operations of the Committee/Committees. Third, the current CIOC should identify and advise the Speakers on the required capacity to facilitate the operations of the committee. These should include one, the technical capacity of the committee and its members. Two, Think Tank capacity including constitutional interpretation expertise to serve as a technical advisory unit to the committee/Parliament. Three, financial resources capacity involving mobilization of financial resources both internally within Parliament and externally from development partners given the magnitude of the work that remains undone in the implementation of the Constitution. Fourth, the current CIOC should develop a Strategic Plan for the Committee for the next five years to guide its oversight activities and the overall implementation of the Constitution. Fifth, the current CIOC should advise the Speakers on the need to develop a Strategic Plan and legislative agenda for Parliament for the next five years aimed at the full implementation of the Constitution.