

2-7-2020

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Recommended Citation

Li, Siyu (2020) "An Alternative Constitutional Implementation Mechanism? A Case Study of Kenya's Commission for the Implementation of the Constitution.," *Indiana Journal of Constitutional Design*: Vol. 4 , Article 2.

Available at: <https://www.repository.law.indiana.edu/ijcd/vol4/iss1/2>

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An Alternative Constitutional Implementation Mechanism? A Case Study of Kenya's Commission for the Implementation of the Constitution.

SIYU LI*

INTRODUCTION

In the last several decades, the common experience for many new states was the promulgation of a constitution that facially embraced the core values of liberal democracy, but was followed by total failure in bringing provisions and the spirits of the constitution into reality. This shows the difficulty of constitution making and the importance of constitution implementation in modern times for young and struggling democracies.

This Paper analyzes the independent implementation commission of Kenya and its work in facilitating the implementation process of the 2010 Kenyan Constitution, and further evaluates the effectiveness of such implementation mechanism. The case study of the Kenyan Constitution implementation shows that an independent implementation commission established by the constitution can have substantially positive impact over the implementation process. To design a successful commission, it is crucial to ensure its institutional independence, legal and enforcement power, and collaboration with civil society.

I. THE CHALLENGES OF CONSTITUTION IMPLEMENTATION

Without effective implementation, the constitution remains merely “a piece of ‘printed futility.’”¹ A major failure of constitution-making in modern times is the failure of implementing the constitution² and making the constitution a living document as it is in fully developed

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¹ Charles M. Fombad, *Problematizing the Issue of Constitutional Implementation in Africa*, in THE IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS: CHALLENGES AND PROSPECTS 10 (Charles M. Fombad ed., 2016).

² Charles M. Fombad, *Introduction*, in THE IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS: CHALLENGES AND PROSPECTS 1, 3 (Charles M. Fombad ed., 2016).

democracies. The failure of constitution implementation is an especially acute problem in post-independence states that adopt constitutions incorporating liberal democracy principles but do not have a long history of embracing democratic values in their societies. This is because they are mostly likely to face a number of common challenges in the process of constitution implementation.

First, the constitution implementation process is more likely to be compromised in young, post-independence democracies as the culture of constitutionalism is largely absent from such societies. The culture of constitutionalism tends to safeguard the implementation of the constitution since it emphasizes the integrity of the constitution and subsequently promotes a general respect to the constitution in all levels from a society. It prompts the government to be bound by limitations prescribed by the constitution and provides grounds for the people to compel government to act within its constitutional boundaries.³

This commitment to constitutionalism had the opportunity and time to be developed and embodied in Western states, but it is much less developed in post-colonial states, even if comprehensive and democratic constitutions are adopted in those states. Especially in today's young democracies, it is a vastly shared experience that the "post-independence constitutionalism is generally nipped in bud by leaders" who consistently ignore their constitutional obligations.⁴ Without the protection of constitutionalism, the constitution itself will hold little influence and is much more vulnerable to illegal political manipulation.

Second, social elites in young and struggling democracies often have strong self-interests in maintaining their social status and "us[ing] constitutionalism and democracy as a smokescreen" to disguise their real intentions to perpetuate their power and personal gain.⁵ For them,

³ Charles M. Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFFALO L. REV. 1007, 1014 (2011).

⁴ Fombad, *supra* note 2, at 2.

⁵ Fombad, *supra* note 1, at 22.

constitutional reforms are not sought so much for the actual “reform” of the constitution but rather for the “legitimized” access to political power.⁶ A common phenomenon in post-colonial Africa consists of social elites using the constitution as a mere political instrument to concentrate power in their own hands, with no regard for constitutionalism principles. Imagine a constitution promulgated as the result of social elites’ compromise under popular pressure and thus containing provisions embracing constitutionalism principles. If such a constitution is fully implemented, it would substantially curtail not only the power held by the elites but also any further possibility of regaining such power. Social elites would have a particularly strong incentive to neglect or even obstruct the implementation of that constitution.

Third, a constitution is not a self-implementing instrument, and constitutions are usually silent about their own implementation mechanisms. The absence of any formal institution responsible for the constitution implementation process leads to undervaluation of the importance of implementation processes after a constitution is promulgated. Consequently, the level of public scrutiny of the implementation process is lowered. To ensure implementation of the constitution, public oversight and “an active and vibrant citizenry” is required.⁷ This is especially true for states that lack the culture of constitutionalism and have a class of elites incentivized to jeopardize the implementation process. Public oversight and vigilance are particularly important because of the additional accountability provided in this crucial stage of constitution implementation.

II. CASE STUDY OF THE KENYAN COMMISSION FOR IMPLEMENTATION OF THE CONSTITUTION

Kenya’s Commission for Implementation of the Constitution (CIC) provides a good example of an honorable effort in confronting the challenges of constitution implementation in a

⁶ See, e.g., Charles Mutasa, *Introduction: Revisiting Civil Society and Constitution Making in Africa*, in CIVIL SOCIETY AND CONSTITUTIONAL REFORMS IN AFRICA 12 (Tyanai Masiya & Charles Mutasa eds., 2014); H. Kwasi Prempeh, *Africa’s ‘Constitutionalism Revival’: False Start or New Dawn?*, 5 INT’L J. CONST. L. 469, 501 (2007).

⁷ *Id.* at 5

young and struggling democracy that lacks a deep root of constitutionalism and has a class of social elites averse to liberal democracy and constitutionalism. The creation of an implementation commission is a rather novel idea in the realm of constitution implementation. The essential idea of the CIC was to delegate an independent commission to oversee and facilitate the overall constitution implementation process of the new 2010 Kenyan Constitution. This case study examines the structure and functions of the CIC on the page versus the CIC in practice, as well as its achievements and obstacles. Despite a few defects, the CIC made a great contribution to the constitution implementation process of Kenya.

A. Overview of Kenya's Constitution Making History

Kenya had a bumpy journey in constitution making and democratization. The undisputable fact about this nation, as Professor Lumumba pointed out, was “the elusiveness of attaining a viable constitutional dispensation.”⁸ The British Colonial Government of Kenya, in order to smoothly implement constitutional change, created a new middle class through education, land, and agrarian reforms, resulting in the middle class joining the mainstream settler economy and the government.⁹ These new African elites who acquired control of land and economic infrastructure had little incentive to dispense political power to the rest of the population.¹⁰ As a consequence, the Independence Constitution lacked popular support and a foundation for the sprout of democratic constitutionalism.¹¹

From the time of Kenya's independence in 1963 until 1989, Parliament amended the Constitution twenty-four times.¹² These piecemeal amendments were motivated by ruling elites'

⁸ P.L.O. Lumumba, *A Journey Through Time in Search of a New Constitution*, in *The Constitution of Kenya: Contemporary Readings* 1, 13 (M.K. Mbondenyi et al. eds., 2011).

⁹ CHARLES O. OYAYA & NANA K. POKU, *THE MAKING OF THE CONSTITUTION OF KENYA: A CENTURY OF STRUGGLE AND THE FUTURE OF CONSTITUTIONALISM* 71 (2018).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 89.

selfish desire to secure their political and economic benefits¹³ and had the effect of concentrating power in the national government and the executive branch.¹⁴ The constant violation of constitutional norms by these amendments had negative impact on the sanctity of the constitution and obstructed any possible consolidation of the culture of constitutionalism in the society.¹⁵

Kenya's struggle for democratic constitutional reform began in 1989. President Moi agreed to repeal the constitutional provision of single-party rule and opened the political platform for multiparty elections in 1992, under pressure from former elites who were excluded from the mainstream politics, the international community, and the wave of democratization elsewhere in Africa.¹⁶ Though the new multiparty system introduced some political competition, the people demanded deeper constitutional reforms.¹⁷

Old elites, namely the Kenyan African National Union (KANU) government that ruled Kenya since its independence, wanted minimal reforms that did not compromise their hold on power. New elites and opposition politicians wanted reforms necessary to remove KANU from the seat of power, but were not seeking the structural constitutional reforms demanded by the people.¹⁸ As a result, both the old and the new political elites pretended to agree to the reforms that were popular, but often viewed the democratic constitutional reform process as a threat to their power and consequently abandoned the reform process numerous times.¹⁹

On the other hand, the idea of constitutional reform gained massive support from the people and civil society in Kenya. Between 1997 and 2001, the Constitution of Kenya Review Act set out

¹³ *Id.*

¹⁴ FRANCES MCEVOY, AN EVALUATION OF CONSTITUTIONAL IMPLEMENTATION IN KENYA 2, <https://pdfs.semanticscholar.org/35cb/bc21073388f3003b440a6d7d7d841f1024be.pdf> (last visited Nov. 16, 2019).

¹⁵ OYAYA & POKU, *supra* note 9, at 89.

¹⁶ CHRISTINA MURRAY, POLITICAL ELITES AND THE PEOPLE: KENYA'S DECADE LONG CONSTITUTION-MAKING PROCESS 1 (2018) (available at: <http://dx.doi.org/10.2139/ssrn.3147154>).

¹⁷ *Id.*

¹⁸ MAKAU MUTUA, KENYA'S QUEST FOR DEMOCRACY: TAMING LEVIATHAN 118 (2008).

¹⁹ OYAYA & POKU, *supra* note 9, at 106.

the legislative framework for the constitutional reform process²⁰ and turned the review process in to “an ambitious and idealistic three-stage process which was to be ‘people driven.’”²¹ The Review Act of 2001 authorized the Constitution of Kenya Review Commission (CKRC), in consultation with the people, to draft bills to reform the constitution and submit the draft to the National Constitutional Conference (NCC)²² for revision and approval.²³ Once approved, the NCC would submit the draft to Parliament to adopt and the President to sign.²⁴ The CKRC included civil society members, which allowed significant public participation in the constitutional reform process.²⁵

However, after the 2002 election in which a political opposition coalition terminated the KANU’s decades-long political domination, the new government and the new elites abandoned their enthusiasm for further constitutional reform once they gained the power that they long sought.²⁶ Not long after, a series of changes were enacted that severely endangered the established constitutional reform process.²⁷ A backsliding constitution referendum²⁸ was introduced in 2005 that stimulated campaigns from both proponents and opponents of the referendum.²⁹ The campaigns deepened the existing political disagreement about the constitutional reform among the

²⁰ *Id.* at 114.

²¹ MURRAY, *supra* note 16, at 1–2.

²² The NCC is a huge institution that included politicians from the national level (all Parliament members) to local level (representatives from administrative districts) as well as from registered political parties; it also included representatives from various civil society groups and NGOs. *Id.* at 2–3.

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *Id.* at 3.

²⁷ The Review Act was amended to allow the Parliament to make changes to the reform draft with a simple majority; a Kenyan High Court case decided that the Constitution could only be replaced with a referendum, raising the difficulty of the proposed replacement of some constitutional provisions; a later decision suspended all NCC works and effectively suspended the process generating reform drafts. *Id.* at 4.

²⁸ Unlike the prior NCC proposal, the 2005 referendum sought to concentrate power to the executive branch (once again) and to concentrate power to the national level (rather than to disperse power in a multilevel system government). *Id.*

²⁹ *Id.* at 4–5.

politicians and elites. The polarized social tension erupted into unprecedented violence immediately after the allegedly rigged and flawed 2007 election.³⁰

The mediation effort led by international actors resulted in a power sharing agreement and a new Constitution of Kenya Review Act in 2008; the new constitutional reform process that secured the elite consensus and invited public participation finally produced the 2010 Kenyan Constitution.³¹

The new Constitution generally receives widespread recognition and is viewed as a progressive and successful reform compared to the efforts made before. It ensures a bicameral system of parliament (Senate and National Assembly), the principle of separation of powers, and an independent judiciary.³² It also emphasized the devolution of government by creating a two-tier system of government composed of the national and the county levels. Furthermore, it addresses ethnically divisive politics, provides a fair system for resource and power sharing among different ethnic groups and between the central and county governments, and promotes accountability and public participation.³³

The new Constitution pays particular attention to its implementation and values the implementation process as a matter necessary to be addressed in the constitution itself. Such special attention to constitution implementation is demonstrated by creation of the CIC by Kenya's 2010 Constitution. Mandated by the constitution in Section 5 of the Sixth Schedule, the CIC was charged with duties of monitoring, overseeing, and facilitating the implementation of the new Constitution.³⁴ It is designed to serve as an independent implementation mechanism to ensure the

³⁰ *Id.* at 6; *see also* MUTUA, *supra* note 18, at 246–47.

³¹ MURRAY, *supra* note 16, at 7, 11–12.

³² Jane Serwanga, *The Use of Specialised Commissions for Constitutional Implementation: An Outsider View of the Kenyan CIC*, in *THE IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS: CHALLENGES AND PROSPECTS* 197, 199 (Charles M. Fombad ed., 2016).

³³ *Id.*

³⁴ CONSTITUTION art. 262, § 5 (2010) (Kenya).

principles and provisions of the new Constitution to be realized, after two decades of struggle in constitutional reforms.³⁵

B. The Organization of the CIC

1. Structure and Membership

i. Structure

The CIC consisted of one Chairperson and eight members, as required by the Constitution³⁶ and the Commission for the Implementation of the Constitution Act,³⁷ and at least five members, including the Chairperson, were required to serve on a full-time basis.³⁸ The chairperson supervised and directed all the work of the CIC and served as the spokesperson of the CIC.³⁹ The CIC adopted a “thematic approach,” which identified eight separate subject matters of the Constitution implementation and delegated each subject matter to each one of the eight Commissioners and their offices.⁴⁰

The CIC was allowed to hire staff to better exercise its functions, including researchers, experts, or consultants to provide the CIC with necessary knowledge and skills.⁴¹ It devised a secretariat, including a chief executive officer and two directorates, for general administration tasks of the CIC.⁴²

³⁵ COMM’N FOR THE IMPLEMENTATION OF THE CONSTITUTION, END TERM REPORT § 1.2.1 (Dec. 2015) [hereinafter END TERM REPORT].

³⁶ CONSTITUTION art. 262, § 5(2) (2010) (Kenya).

³⁷ The Commission for the Implementation of the Constitution Act (2012) Cap. 9 § 6 (Kenya) [hereinafter CIC Act].

³⁸ *Id.* § 5(2).

³⁹ *Id.* § 9(3).

⁴⁰ END TERM REPORT, *supra* note 35, § 1.2.5.

⁴¹ CIC Act, *supra* note 37, § 15.

⁴² END TERM REPORT, *supra* note 35, § 1.2.5.

ii. Eligibility requirements

The Constitution provides that the members of the CIC should include “persons with experience in public administration, human rights, and government.”⁴³ Section 7 of the CIC Act further specified that the candidates for both the Chairperson and members would be eligible if the person (a) is a citizen of Kenya, (b) holds a degree from a recognized university, and (c) has knowledge, experience, and a distinguished career of at least five years in fields such as law, public administration, economics, human rights, and government.⁴⁴

Furthermore, in order to be eligible, the Chairperson must be qualified to hold a position as a judge of the Supreme Court under the Constitution.⁴⁵ This means that the Chairperson was required to have at least fifteen years of experience in the field of law as a judge, judicial officer, or legal practitioner.⁴⁶ Additionally, the disqualification clause in the CIC Act provides that if a person is a state officer or a member of a local authority, or if the person is bankrupt, the person would not be qualified to serve on the CIC.⁴⁷ A state officer is any person holding a state office, and it includes people who work under the executive and legislative branch, such as the attorney general and members of the Parliament.⁴⁸

The constitutional and statutory eligibility requirements of CIC membership helped build the CIC as a group of experts with strong backgrounds in multiple areas. The diverse expertise provided the CIC with leadership that possessed solid legal experience and knowledge. The disqualification clause that forbid government employees was essential for the maintenance of

⁴³ CONSTITUTION art. 5(3)(a) of sched. 6 (2010) (Kenya).

⁴⁴ CIC Act, *supra* note 37, § 7(1).

⁴⁵ *Id.* § 7(2).

⁴⁶ CONSTITUTION art. 166(3) (2010) (Kenya).

⁴⁷ CIC Act, *supra* note 37, § 7(3).

⁴⁸ CONSTITUTION art. 260 (2010) (Kenya).

independence of the CIC and helped to combat executive and legislative influence over members of the CIC.

iii. Appointment Process and the Final Composite of the CIC

Sections 8 and 9 of the CIC Act set out the appointment process of the Chairperson and members. First, applications for CIC membership were forwarded to the Public Service Commission and the names of all applicants were to be published in the Gazette. Applications could be made by any qualified person or by any person, organization, or group proposing a qualified person. Next, the Public Service Commission convened a committee consisting of representatives of the Cabinet, Prime Minister, Ministry of Justice, State Law Office, Ministry of State for Public Service, and Public Service Commission. The Committee considered the applicants and picked at least three people qualified for the Chairperson and eighteen people qualified for the members. The committee subsequently submitted the lists to the President and the Prime Minister, who, in consultation with each other, nominated one Chairperson and eight members of the CIC and forwarded the names to the National Assembly. The National Assembly could then either approve or reject the nominations. If a nominee was rejected by the National Assembly, the President and the Prime Minister would submit a new nomination from the list provided by the Committee. A person was appointed upon receiving approval from the National Assembly.

The Commissioners took oath of the office on January 4, 2011 and commenced their work immediately after.⁴⁹ The members of the CIC were selected to form a body with diverse expertise and broad social representation.⁵⁰ The Chairperson, Charles Nyachae, was a practicing lawyer and

⁴⁹ END TERM REPORT, *supra* note 35, at 1.2.3.

⁵⁰ Serwanga, *supra* note 32, at 202.

the son of renowned former cabinet minister.⁵¹ He possessed substantial experience in human rights and electoral laws and was also perceived at the time as an apolitical figure who “had a firm grasp of the substantive legal issues and provided intellectual leadership.”⁵² After the CIC dissolved, he was nominated and appointed as a judge of the East African Court of Justice and sworn in the seat in early 2018.⁵³ The rest of the CIC body was equally impressive and consisted of lawyers, law and science professors, scholars, analyst experts, arbitrators, civil society consultants, and commissioners of various independent commissions; overall, the body had vast expertise in constitutional law, human rights, conflict resolution, public policy, civil society, environment, administration, and institutional development.⁵⁴

2. *Life Span*

The Constitution provides that the CIC would be dissolved five years after its establishment or “at the full implementation of this Constitution as determined by Parliament, whichever is sooner.”⁵⁵ If at the end of five-year deadline Parliament decided that the Constitution was not fully implemented, the National Assembly could extend the life of the CIC through resolution.⁵⁶

The CIC term was set to expire on December 29, 2015. The CIC itself did not seek extension of its term because, as Mr. Nyachae explained, the decision had to be made by Parliament, and the Commissioners wanted to avoid any inference that they intentionally delayed

⁵¹ *Id.*

⁵² *Id.*

⁵³ Kamau Muthoni, *Nyachae Lands Job as East African Court Judge After Missing EALA Appointment*, THE STANDARD (Feb. 24, 2018), <https://www.standardmedia.co.ke/article/2001270915/nyachae-sworn-in-as-judge-of-east-african-court>.

⁵⁴ For a full biography of the Commissioners of the CIC, see <https://web.archive.org/web/20121208042318/http://www.cickenya.org/index.php/about-us/staff>

⁵⁵ CONSTITUTION art. 262, § 5(7) (2010) (Kenya).

⁵⁶ *Id.*

the implementation process in order to keep their jobs by advocating for an extension.⁵⁷ In early December 2015, the Senate approved a two-year extension of the CIC term.⁵⁸ The Senate took this position because several bills mandated by the Constitution had not yet been passed, but the National Assembly took the contrary position and opposed an extension of CIC's term.⁵⁹ Through a Parliament select committee called the Constitutional Implementation Oversight Committee (CIOC), Parliament recommended disbanding of the CIC and that the Attorney General (AG) should take over the unfinished tasks of the CIC.⁶⁰ Jane Serwanga, a renowned Kenyan legal advocate with specializations in human rights and gender justice, commented that "[i]n view of the tense relationship between the CIC and the executive, particularly the AG, one cannot help but see political machinations behind this decision."⁶¹ Ultimately, the term was not extended and the CIC is now defunct.

3. *Financing*

Article 249, Section 3 of the Constitution provides the "Parliament shall allocate adequate funds to enable [the CIC]⁶² to perform its functions."⁶³ The CIC Act also allows the CIC to accept money from other sources such as donations or loans.⁶⁴ The CIC had significant trouble securing adequate funding from the government. The CIOC initially estimated that the government needed to allocate about 4 billion Kenyan shillings for the whole implementation process, while the CIC

⁵⁷ Reselyne Obala, *We will not seek extension of our mandate, says Commission for the Implementation of the Constitution Chairman*, STANDARD DIGITAL (Sept. 16, 2014), <https://www.standardmedia.co.ke/article/2000135093/we-will-not-seek-extension-of-our-mandate-says-cic-chairman>.

⁵⁸ Roselyne Obala, *Senate Approves CIC Term Extension*, STANDARD DIGITAL (Dec. 4, 2015), <https://www.standardmedia.co.ke/article/2000184434/senate-approves-cic-term-extension>.

⁵⁹ *Id.*

⁶⁰ Serwanga, *supra* note 32, at 213.

⁶¹ *Id.*

⁶² CONSTITUTION art. 262, § 5(4) (2010) (Kenya).

⁶³ *Id.* art. 249.

⁶⁴ CIC Act, *supra* note 37, § 21.

estimated 3.6 billion shillings for the first two years of its work.⁶⁵ As the work began, an even smaller amount of budget was allocated.⁶⁶ In addition, the government delayed paying the Commissioners' salaries until months after their work commenced and took a long time to approve the CIC budget proposals for hiring staff.⁶⁷

In addition to the frustrations explained above, the CIC faced threats of budget cuts from Parliament when tensions arose between the two, so the CIC also relied on financial aid from development partners.⁶⁸ For example, the CIC partnered with the United Nations Development Program (UNDP) and received funds from countries including Sweden, the Netherlands, and Japan.⁶⁹ The USAID also provided 2.5 million U.S. dollars to assist the constitution implementation process in Kenya and to fund the CIC's operation.⁷⁰

4. *Supervision of the CIC*

The CIC was designed as an independent commission that was only answerable to “the Constitution and the law” and was “not subject to direction or control by any person or authority.”⁷¹ Accordingly, the CIC planned its agenda and took actions on its own initiative according to the Constitution's requirements. However, the accounts and finance of the CIC was required to be

⁶⁵ Kamotho Waiganjo, *The Use of Specialised Commissions for Constitutional Implementation: An Insider View of the Kenyan CIC*, in IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS: CHALLENGES AND PROSPECTS 177, 187 (Charles M. Fombad ed., 2016). See also Oliver Mathenge, *Taxpayers Face New Sh4b Bill for Constitution*, DAILY NATION (Oct 19, 2010), <https://www.nation.co.ke/news/Taxpayers-face-new-Sh4bn-bill-for-constitution/1056-1035580-2phh3x/index.html>.

⁶⁶ Waiganjo, *supra* note 65, at 187.

⁶⁷ Gakuu Mathenge, *Nyachae-Led Team Yet to Be Paid Salaries*, STANDARD DIGITAL (July 3, 2011), <https://www.standardmedia.co.ke/article/2000038274/nyachae-led-team-yet-to-be-paid-salaries?pageNo=2>.

⁶⁸ Serwanga, *supra* note 32, at 202.

⁶⁹ Maria-Threase Keating, Remarks at the UNDP Launch of the 2014/2015 Annual Report of the Commission for the Implementation of the Constitution (CIC) (Aug. 17, 2015) (transcript available at <http://www.ke.undp.org/content/kenya/en/home/presscenter/speeches/2015/launch-of-the-2014-2015-annual-report-of-the-commission-for-the-.html>).

⁷⁰ SUPPORTING THE KENYAN CONSTITUTIONAL IMPLEMENTATION PROCESS, USAID, <https://www.usaid.gov/documents/1860/supporting-kenyan-constitutional-implementation-processmarch-2013> (last visited Nov. 12, 2019).

⁷¹ CONSTITUTION art. 262 & art. 249(2) (2010) (Kenya).

audited and submitted for the Auditor General's review after each fiscal year.⁷² Furthermore, if a member was suspected of gross misconduct, violated the Constitution or any other law, or became incapable of carrying out his or her duties as a Commissioner, the National Assembly was authorized to submit a petition to the President, and the President could call for a tribunal (composed of at least one judge and two persons who are qualified to be appointed as judges) to investigate the matter, report its findings, and make recommendation for the next step, which the President must follow.⁷³

C. The Functions and Duties of the CIC

Schedule Six of the Constitution provides that the basic functions of the CIC are to⁷⁴

- a. monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;
- b. co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution;
- c. report regularly to the Constitutional Implementation Oversight Committee on
 - i. progress in the implementation of this Constitution; and
 - ii. any impediments to its implementation;
- d. work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.

According to the Constitution, the roles of CIC may be put into three general categories: monitoring and overseeing the implementation process, facilitating the implementation process, and reporting the implementation progress to the CIOC.

Before each function of the CIC is examined, it is important to note that the implementation of the Constitution has two major facets: timing of legislation and substance of legislation. First, the Fifth Schedule of the Constitution sets out deadlines of each piece of legislation to be enacted

⁷² CIC Act, *supra* note 37, § 24.

⁷³ CONSTITUTION art. 251 (2010) (Kenya); CIC Act, *supra* note 37, § 11.

⁷⁴ *Id.* art. 262.

by Parliament, and full implementation of the Constitution entails compliance with the deadlines established by the Constitution.⁷⁵ Second, full implementation of the Constitution also entails that enacted legislation embodies the correctly interpreted principles and spirit of the Constitution, and no legislation is enacted in violation of the Constitution.⁷⁶ These two parts of Constitution implementation were the two main themes of the CIC's work and functions.

1. Monitoring and Oversight Function

The monitoring and oversight function began with inquiries made by the CIC to relevant stakeholders about a certain constitutional mandate.⁷⁷ The CIC then analyzed and evaluated the implementation progress based on the given information.⁷⁸ Upon its conclusion about the implementation progress, CIC then exercised its functions of facilitation, if necessary, and its duty of reporting.

2. Implementation Facilitating Function

CIC facilitated implementation according to both substantive requirement and deadlines set by Schedule Five of the Constitution. First, the CIC paid special attention on whether legislations were enacted on time as mandated by the Constitution.⁷⁹ Second, according to its mandate in the Constitution, the CIC also exercised its facilitation function through reviewing the substance of drafted bills and ensuring that the bills complied with the Constitution both during and after the legislation process. If the CIC believed any drafted or enacted legislation or any part of a (drafted or enacted) legislation was not compliant with the Constitution, it would try to the legislation in track with the Constitution through the exercise of the powers described below.

⁷⁵ *Id.* art. 251.

⁷⁶ *Id.*

⁷⁷ See Serwanga, *supra* note 32, at 203.

⁷⁸ *Id.*

⁷⁹ END TERM REPORT, *supra* note 35, § 1.2.4

3. Reporting Duty

The CIC's reporting duty is further defined in the CIC Act enacted in 2010. Section 25 of the Act provides that CIC shall report quarterly to the CIOC, the President, and the Prime Minister, and the report should include information on (1) the progress of the Constitution implementation, (2) any impediments to the Constitution implementation, and (3) legal and administrative recommendations to address CIC's concerns.⁸⁰ CIC also has the duty to present annual reports to the President and Parliament about the financial status of the CIC, activities of the CIC, and the like.⁸¹ Furthermore, for both quarterly and annually reports, the CIC should also make sure that the reports are published in the Gazette and thereby accessible by the public.⁸²

D. Competence of the CIC and Measures Adopted by the CIC in Fulfillment of its Functions

In general, Section 25 of the CIC Act provided that the CIC was entitled to "all powers generally necessary for the execution of its functions under the Constitution and [the CIC] Act,"⁸³ but this vague provision is often unclear regarding what powers the CIC possessed and what measures the CIC could use to fulfill its duties of monitoring and facilitating the implementation process. Thus, more specific powers and tools of the CIC were used in practice and are described below.

1. Review Proposed Legislation and Prepare Tabling Before the Parliament

As the Constitution required, the CIC and the AG, in consultation with each other, prepared bills for tabling before Parliament.⁸⁴ The CIC consulted the AG and reviewed bills for constitutionality and timing compliance under the authority of the Constitution. The CIC's role of

⁸⁰ CIC Act at § 25

⁸¹ *Id.* at § 26.

⁸² *Id.* at §§ 25(3), 26(4).

⁸³ *Id.* at § 5(1).

⁸⁴ CONSTITUTION art. 261(4)(ii) & art. 6(b) of sched. 6 (2010) (Kenya).

reviewing proposed laws can be better understood in the context of the law-making process of Kenya under the new Constitution. First, once a bill is drafted, it is presented to the Attorney General's⁸⁵ office and the Kenya Law Reform Commission (KLRC),⁸⁶ who, after revising the draft, would forward the draft to the CIC. Then, the CIC would evaluate the draft and consult with multiple stakeholders, including the AG and the KLRC, about whether the bill is compliant with the Constitution and, if not, what changes are necessary to make the bill constitutional. Once the discussion reaches an agreement among the stakeholders, the CIC would forward the bill to the AG for a final drafting.

In the next step, the AG would present the bill to the Cabinet for approval or suggestion of revision. Once approved, the bill would be published by the AG and tabled for parliamentary debate. The CIC would prepare an advisory note to Parliament if the bill contained provisions that were not compliant with the Constitution. The advisories would include the clauses that the CIC viewed as unconstitutional and provided explanations of why the discussed clauses should be deleted or revised.⁸⁷ Finally, after passing the parliamentary debate, the bill would be presented to the President for his or her assent for passage.⁸⁸

2. Monitor and Assess the Implementation of Enacted Legislations

After a legislation is enacted, the CIC monitored the implementation progress of the law by making inquiries to relevant public officials. For example, after the Transition to Devolved Government Act was enacted in 2012, the CIC exercised its monitoring function by assessing how

⁸⁵ The AG is the principal legal advisor and counsel of the Government and is appointed by the President with approval of the National Assembly. CONSTITUTION art. 156 (Kenya) (2010).

⁸⁶ The KLRC is a commission that facilitates law reforms in Kenya and ensures proposed laws are properly compliant with the spirit of the Constitution. *Mandate and Core Functions*, KENYA LAW REFORM COMM'N, <http://www.klrc.go.ke/index.php/about-klrc/mandate-and-methods-of-work>. (last visited Nov. 12, 2019).

⁸⁷ See *CIC Advisory on Parliamentary Powers and Privilege Bill*, CIC, <https://www.scribd.com/document/238611970/CIC-Advisory-on-Parliamentary-Powers-Privileges-Bill>.

⁸⁸ See Serwanga, *supra* note 32, at 204.

well the decentralized government system was implemented in county governments (the second tier government and one part of the devolved government) for the period from March 2013 to March 2014.⁸⁹ The CIC drafted and administered questionnaires to governments officials such as the county secretaries, county assembly clerks, and secretaries to the county public service board, successfully targeting all forty-seven Kenyan counties.⁹⁰ The CIC then analyzed the collected information from these questionnaires and composed the Assessment of the Implementation of the System of Devolved Government, which explained the challenges in the implementation process and made recommendations in all aspects of the implementation of government devolution.⁹¹

The CIC Act imposed “a duty to cooperate” on public officers, state organs, and state offices to make sure that these stakeholders responded to inquiries from CIC and reported to CIC about implementation status with respect to the inquiries.⁹² Public officers who violate the CIC Act, especially the duty to cooperate, would be deemed “in contempt of Parliament” and could be convicted with punishment of fine or imprisonment up to one year, or both.⁹³ The duty to cooperate was an important statutory requirement that safeguarded the monitoring and overseeing function of the CIC. In order to gain detailed information necessary to evaluate the implementation progress and the constitutionality of each proposed bill, it was crucial for the public officers and state organizations to respond to and fully address inquiries from the CIC. The negative consequence and liability imposed on violators also deterred noncompliance of the government and its agents when the CIC performed its monitoring function.

⁸⁹ See CIC, *Assessment of the Implementation of the System of Devolved Government* (June 2014), <https://devolutionhub.or.ke/resource/assessment-of-the-implementation-of-the-system-of-devolved-government>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² CIC Act, *supra* note 37, § 27(1).

⁹³ *Id.* § 27(2).

3. *Judicial Intervention*

When the CIC perceived that a passed law, policy, or administrative procedure was unconstitutional, the CIC sought judicial intervention. The CIC had petitioned lawsuits (usually against the Attorney General and the Parliament), submitted amicus curiae briefs, and joined cases as an interested party. For example, the CIC initiated legal actions challenging the constitutionality of the National Assembly's Standing Order No. 66 in 2015,⁹⁴ and in 2013, the CIC joined as interested party in the judicial procedure that decided the unconstitutionality of the Constituency Development Fund due to its violation of multiple constitutional principles.⁹⁵

4. *Stakeholder and Civil Society Engagement*

The CIC organized and held stakeholder engagement activities, such as consultative meetings, forums, workshops, and seminars, to advise public officials (who are also the implementors of the Constitution) on the implementation requirements for various pieces of legislation.⁹⁶ For example, the CIC held the Consultative Forum on Access to Justice in Nairobi in June 2013.⁹⁷ Additionally, the CIC participated in conferences, workshops, and retreats, and gave presentations to stakeholders. The CIC also invited civil society groups of different areas to discuss the implementation process and to solicit additional knowledge in areas including judicial reforms, transition to a more devolved government system, and property rights.⁹⁸ When the CIC reviewed

⁹⁴ *Implementation of the Constitution v. Speaker of the National Assembly* (2016) Petition 403 of 2015 (H.C.K.). Other examples of legal actions initiated by the CIC: Petition 145 of 2011, Petition 268 & 398 of 2012, Petition 454 of 2012, etc.

⁹⁵ Waiganjo, *supra* note 65, at 188. *See also* The Institute for Social Accountability & Anor v. The National Assembly & 2 others (2015) Petition No. 71 of 2013 (H.C.K.).

⁹⁶ END TERM REPORT, *supra* note 35, § 1.2.4.

⁹⁷ CIC, *Quarterly Progress Report April to June 2013*, KENYA GAZETTE, Vol.CXVI-No.94, 2006 (available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTA2Mg--/Vol.CXVI-No.94/#GAZETTE%20NOTICE%20NO.%205506).

⁹⁸ Serwanga, *supra* note 32, at 206.

proposed legislation, it carried out consultations with representatives from civil society, religious organizations, and nongovernmental actors to discuss the bills.

5. Public Engagement

The CIC maintained an interactive website during its service and shared information about its work and constitutional implementation in Kenya. It published drafts of proposed laws once the CIC received them from the AG and the KLRC and invited the public to comment on these drafts.⁹⁹ Its website also provided a bill tracker which reported the status of the passing of legislation and published CIC's implementation assessments reports in specific areas of constitution implementation and CIC's periodical reports on implementation activities in general.

In addition, the CIC issued statements and advisory opinions and conducted media briefings to the public to express its concerns and positions about various constitutional or constitutional implementation issues and to call on different actors for support.¹⁰⁰ The Chairperson appeared frequently in the news to voice CIC's criticism of the government with respect to implementation of the Constitution.

E. The Achievements of the CIC

The most important achievement of the CIC is that it was successful in actually implementing the Schedule Five on mandated legislations in the Constitution. At the end the fifth year of CIC, except for a few laws that were delayed till after the CCI became defunct, almost all of the legislation mandated by the Constitution had been enacted within the within the time limit. The CIC also facilitated the creation of some institutions that are essential for the constitution

⁹⁹ CIC, *Audit Report on the Acts Enacted by Parliament* (Aug. 26, 2011), <https://devolutionhub.or.ke/resource/audit-report-on-the-acts-enacted-by-parliament>.

¹⁰⁰ CIC, *Annual Report 2011/12*, KENYA GAZETTE, Vol. CXV-No. 73 (May 10, 2013), 2655 (available at: http://kenyalaw.org/kenya_gazette/gazette/volume/NzU4/Vol.%20CXV-No.%2073/).

implementation, including the National Police Service Commission, the National Land Commission, and the Kenya National Commission on Human Rights.¹⁰¹ The result that it delivered—the actual implementation of the new Constitution—is the most basic and critical building block for the establishment of constitutionalism in Kenya. Furthermore, the CIC’s effort in encouraging and creating avenues for public engagement on constitutional issues also contributed to increasing public awareness of such issues as well as the accumulation of a culture of constitutionalism.

The CIC was also successful in placing an effective check and creating accountability on the government and political elites therein by participating independently in the legislation process, initiating judicial interventions to challenge unconstitutional laws when necessary, and publicly criticizing the government when it or its members acted solely based on its own interest. The CIC played the role as a fearless watchdog of the Constitution and protected the integrity of the Constitution against any potential threat of constitution encroachment from the political elites.

Finally, the creation and success of the CIC revealed the importance of constitution implementation process in young democracies and a clear advantage of having an independent entity for the implementation process of a newly promulgated constitution, especially in countries that do not have a deep root of constitutionalism and are subject to elite manipulation of the constitution. The Kenya CIC is successful in certain aspects of its institutional design and serves generally as a good example for other constitution implementation commissions that share the same goals with the Kenya CIC.

¹⁰¹ Waiganjo, *supra* note 65, at 188.

1. Constitutional Mandate

The CIC is mandated by the Kenyan Constitution, the most fundamental law of the country. The Constitution's mandate of CIC places much more assurance of the creation and durability the CIC during its term than if the CIC is mandated by a bill of Parliament. The CIC's constitutional mandate also provides the CIC with more prestige, which contributes to its power of persuasion in front of the government, the court, and the public.

2. Independence

The CIC was given a special status that makes it directly subject to the Constitution and only answerable to the Constitution. This strengthens the independence of the CIC by eliminating any direct political control from any of the three branches of the government. If the CIC was subject to and managed by the government, there would be a great risk of manipulation from the government on the agenda, operation, and even standpoints of the CIC.

The membership requirements of the CIC contributed to its independence as well. The disqualification clause that precludes all serving public officers to apply for the commissioner positions helped to cut off relation and dependency between the CIC and the government. The Chairperson is also held up to the same qualification as appointees to the Supreme Court judges, subject to an even higher independence standard.

The member selection process involved wide range of stakeholders and was collaborated (and checked) by multiple levels of both the executive branch and the legislative branch. This minimized the risk of staffing the CIC with "favored" persons or even political puppets of any office in the government.

F. The Challenges Faced by the CIC

The process of implementation of a new reformist constitution is not an easy one and always invites the dangers of “political manipulation, political sabotage, or political frustration of the process for personal, partisan, sectarian, and selfish gains.”¹⁰² In the context of Kenya, the CIC noted that the implementation process had suffered from challenges including¹⁰³

Selective reading and misinterpretation of provisions of the Constitution by implementing agencies, deliberate misinformation to members of the public by some members of both the Executive and the Legislature, a lack of guidance from the Office of the Attorney-General in the process of implementation of the Constitution, political risk, and the increasing trend by the Executive and some members of the Legislature to create grey areas regarding the interpretation of the of the Constitution.

This Paper examines a few of the most important challenges faced by the CIC.

1. Independence

The CIC was established as an independent commission free from any undue influence from the government, and the general structure of the CIC ensured its independency during the five-year term. However, both the Constitution and the CIC Act are not clear about the budget of the CIC and therefore leave the Parliament an opportunity to control of the funding of the CIC. As a result, the CIC received both insufficient and delayed funding from the Parliament. The Members of the Parliament had threatened to cut down the budget allocation and the number of commissioners served in independent commissions, as a “revenge mission” understood by the CIC.¹⁰⁴ Possible design responses to strengthen the independence of an Implementation Commission will be discussed in the next section of this Paper.

¹⁰² Ben Sihanya, *Constitution Implementation in Kenya, 2010-2015: Challenges and Prospects*, FES Kenya Occasional Paper, No. 5, 2011, at 1, 22.

¹⁰³ *Id.* at 23.

¹⁰⁴ Alphonse Shiundu, *Kenyan MPs hit back in fight over pay*, EAST AFRICAN (May 30, 2013), <https://www.theeastafrican.co.ke/news/ea/Kenyan-MPs-hit-back-in-fight-over-pay/4552908-1867678-tng0ucz/index.html>.

2. *Life Span*

The CIC was only given five years of lifespan initially, and the extension of its term was subject to the will of the Parliament. This gave the Parliament the power to dissolve the CIC simply by declaring the completion of CIC's work. Considering that there were still several bills that did not make the constitutional deadlines, it seems that the Constitution underestimated the time required to pass the bills as well as potential obstacles that could delay bills. Therefore, the constitutionally mandated lifespan of the CIC could have been a few years longer than five years so that the CIC could remain independent from Parliament's will and safeguard the bills that needed to be passed under the Constitution.

3. *Collaboration with the AG*

The CIC's working relation with AG was not very smooth through implementation period. First, ambiguity in the language of mandates of the CIC caused some discrepancies in AG's and CIC's understanding the functions and powers of the CIC. The Constitution requires the CIC to work "in consultation" with the AG and KLRC but does not provide further specification, and this inadequacy caused problems to the work of CIC.¹⁰⁵ The AG interpreted the word "consultation" as follows:

What does consultation mean? We get the draft from the parent ministry, do the drafting, we share the draft with the CIC and tell them to quickly give their comments on it, and send the law back to us. If they make comments that we find inappropriate we will not agree with them.¹⁰⁶

This understanding of "consultation" gave the AG ostensible ground to ignore CIC's opinions with which the AG did not agree.

¹⁰⁵ Serwanga, *supra* note 32, at 203.

¹⁰⁶ *Id.* (citing Jason Lakin, *Rhetoric: What Githu Muigai, Omar Hassan can learn from JM Kariuki*, EAST AFRICAN (Jan. 15, 2012), <https://www.theeastafrican.co.ke/oped/comment/What-to-learn-from-JM-Kariuki-/434750-1306074-vkmqex/index.html>).

Second, the CIC often criticized the AG for delay in presenting bills to the Cabinet and Parliament and alleged that the AG even forwarded some bills to the Cabinet and Parliament without the consultation process with the CIC, as the Constitution mandated.¹⁰⁷ The AG's lack of compliance of the consultation process was identified as a major challenge faced by the CIC in many of CIC's quarter and annual reports.¹⁰⁸

It is similarly challenging to find a perfect resolution for the problem of AG's bypassing the CIC. The CIC directed most of the arguments with the AG to the CIOC for settlement, but some of the disputes were never resolved.¹⁰⁹ The best cure for this problem might not lie in the institutional design of the implementation commission. The CIC, through its Chairperson's media exposure and its periodic reports, had publicly condemned the AG for bypassing the CIC in some occasions, and, although the effect of such criticism on the AG might be too elusive to evaluate, it is not hard to imagine that such criticism did at least make some difference. On the other hand, if the draft's bypassing of the Commission was unconstitutional, the Commission could initiate legal action to challenge the constitutionality of the legislation after its enactment. Thus, the Commission is not depleted with its tools in safeguarding the implementation process just because the AG bypasses the commission in draft review from time to time.

III. LESSONS FROM THE CIC: ESSENTIAL ELEMENTS FOR FUTURE INSTITUTION DESIGN

The journey of the CIC in Kenya serves as an inspiration for the implementation of other later newly reformed or established constitutions. Through the CIC experience, there are a few elements can be identified to contribute to the success of an implementation commission.

¹⁰⁷ Sihanya, *supra* note 95, at 28.

¹⁰⁸ CIC, *Annual Report 2012-2013*, KENYA GAZETTE, Vol.CXVI-No.103, (Aug. 29, 2014), § 4.1(ii) of Chapter Four (available at: http://kenyalaw.org/kenya_gazette/gazette/notice/165140).

¹⁰⁹ Waiganjo, *supra* note 65, at 190.

A. Constitutional Mandate

Having a constitutional mandate of the implementation commission is crucial to the success of the commission. The constitution can safeguard at least the birth of such a commission and increases the probability of institutional durability due to its higher resistance against careless or hostile amendments.¹¹⁰ Additionally, it highlights the importance of the implementation process as well as of the role of such a commission, so the commission's work and opinions are respected and weighted in the law-making process by both the government and other stakeholders.

B. A Complete Scheme that Guarantees the Independence of the Commission

Having a detailed constitutional mandate of the commission with emphasis on its independence will help to minimize political pressure over the commission. The independence of such commission in general can be better achieved by paying close attention to all elements contributing to its independence and eliminating possible influence at each element in the mandate of the commission.

First, the commission needs to be only answerable to the constitution, and no other political organ can directly or indirectly interfere with its work. This requires the constitution to be clear and precise about the commission's independent identity and to confer upon the commission a right to bring legal action (such as an injunction) against a party (such as the attorney general) when such party intrudes upon the operation of the commission.

Second, like the CIC, the implementation commission should hire only non-government officials to ensure that the commissioners are independent and nonpartisan. This can reduce the

¹¹⁰ Charles M. Fombad, *Designing Institutions and Mechanisms for the Implementation and Enforcement of the Constitution: Changing Perspectives in Africa*, 25 AFR. J. INT'L & COMP. L. 66, 85 (2017).

risk that the work or ideas promoted by the commissioners is contaminated by their possible political self-interests.

Third, the constitution should give a specific demand on the budget funding of the implementation commission, such as a minimum amount of annual allowance and/or a method of allowance calculation. Since the commission itself is usually most familiar with its own activities and the amount of funds needed, the budget proposal by the commission should be account for in the calculation of the final decision by the legislature and can only be denied by compelling reasons, whose validity should be subject to the determination of a tribunal (which can be either an existing court in the judicial system or a temporary tribunal called by the commission and composed of serving judges).

Fourth, in case of any possible delay, which is quite likely to happen in any constitution implementation process, it would be better to set the initial lifespan of the implementation commission longer than the anticipated time of the full implementation. But the commission cannot keep operating and being unable to be shut down if by any chance all the implementation work is finished on time. One solution to this problem is placing an additional strict rule so that as long as the implementation process is ongoing, the implementation commission cannot be disbanded. If this solution causes too much concerns in budgeting of the parliament, the constitution can alternatively set a fixed dismissal time that is a few (two or three) years later than the supposed completion time of the constitution implementation and give the parliament the authority to dismiss the commission at a point before the fixed dismissal time but after the implementation deadlines, if all relevant works are completed.

C. Some Enforcement Power

A successful implementation commission needs at least some real political and legal powers to carry out its functions. Ability to seek judicial interventions gave the CIC the power and option to present its opinions in the courts, but this is not the most efficient way to prevent an attorney general from bypassing the implementation commission in preparation of tabling before the parliament. In the event of disagreement over the constitutionality of a bill, it would be harder for the government to ignore an implementation commission's opinion or bypass the commission altogether, if the mandate of that commission were to specify more duties of compliance on the side of the government.

One way to promote government compliance can be done by replacing ambiguous phrases like "in consultation with" with more stringent ones like "upon reaching consensus/mutual understanding with." Such a phrase indicates that much more communication and collaboration are required on the part of the attorney general before it can pass a draft forward and that it would be a more serious violation of the constitutional mandate if the attorney general chooses to bypass the commission. A change like this, however, grants the implementation commission, a small group of people who are not directly accountable to the people, a veto-like power over a bill that might be supported by the democratically elected representatives in parliament. Thus, this solution could have a hard time passing the counter-majoritarian difficulty of the implementation commission.

Another way to promote government compliance is allowing the implementation commission to seek judicial intervention during the bill-reviewing process. The commission can be allowed to ask the court for an injunction commanding the attorney general to withdraw the bill submission from the parliament whenever it fails to consult with the commission. However, this

option can potentially cause overflowing of litigation since the number of bills mandated by the constitution is usually massive, as does the number of potential violations of legislative procedure. This can also substantially increase the commission's spending due to these lawsuits and place an even heavier burden over the budget problem of the commission. An alternative option is to permit the commission to apply for court orders nullifying bills that are enacted by the parliament without proper constitutionally mandated draft-review procedure. This option provides a similar deterrence effect on the attorney general, and significantly decreases potential caseloads to the courts and the commission since number of bills passed by the legislature is much smaller than number of bills presented to the legislature. This type of legal action is different from other lawsuits initiated by the commission contesting constitutionality of legislations because here the commission only needs to establish the unconstitutional bill-review process instead of the unconstitutional substance of the legislation. Granting the commission some legal power in this regard strengthens its ability in enforcement. It also effectively increases the government's cost of noncompliance and thus provides the government more incentive to comply.

D. Collaboration with Civil Society

Many of the achievements of the CIC relied on the support of other actors such as other independent commissions and offices, civil society, and foreign partners. Implementation commissions, like the CIC, will naturally tend to seek collaboration and partnership with other organizations because such commission is so small that it is impossible to comprehend every aspect of a constitution without the expertise from those who specialize in certain areas. The CIC maintained great relationships with these entities and benefited tremendously from these working relationships, but at the same time, it also shows the importance of having a robust civil society and/or independent commission system in the implementation process.

To further enhance the connection between the commission and civil society, the mandate of the implementation commission can include civil society experience as one way to qualify a candidate for the commissioner position and require that at least one commissioner have extensive experience either within civil society or collaborating with civil society. This can help build a strong bond between the people in the commission and the civil society.

The institutional design of an implementation commission can also benefit from incorporating some of the CIC's practices into its mandate: the commission should be designed to include civil society in the bill reviewing process by listing all civil societies, categorizing them by their concerning areas (such as human rights or devolution of government), and inviting the ones of the area that related to the bill to the draft consultation meetings. The meeting can be mandatory for each time a bill is forwarded to the implementation commission, or it can be required to be arranged only for those fundamental or important legislations and leave the discretion of deciding what are the fundamental or importance bills to the commission because it might face time or budget constraints for hosting the meetings. The commission should also serve as a liaison between the law makers and civil society and assume a responsibility of summarizing and relaying the opinions from the civil society to the attorney general and the legislature during the commission's consultation with these stakeholders.

CONCLUSION

The implementation process is difficult to accomplish but is certainly crucial to the success of a new constitution, especially in a young, struggling democracy. The case of Kenya's CIC is generally a persuasive story of how a Constitution-mandated, independent implementation commission is of particular usage to the implementation process. Despite some defects, the CIC did manage to achieve the implementation of most constitutionally mandated legislation and

ensured constitutionality of most of the enacted legislation. The experience of the CIC shows that a similar constitution implementation can have positive impact in the building of culture of constitutionalism and in combating against elites' self-interests in the process of constitution implementation.

The experience of the CIC also shed some light on how to craft a successful implementation commission in countries like Kenya. In general, the success of such commission could be better obtained by having detailed Constitution provisions that assign (1) independence of the commission in terms of membership and funding; (2) a longer lifespan than the anticipated implementation period; and (3) some political powers to the commission and duties to comply to the government.