



University of Nairobi

**PARLIAMENTARY OVERSIGHT OVER NATIONAL REVENUE EXPENDITURE IN
KENYA: A STUDY OF THE PUBLIC ACCOUNTS COMMITTEE OF THE 11TH
PARLIAMENT (2013-2017)**

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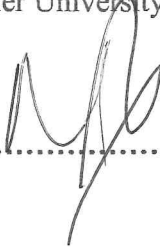
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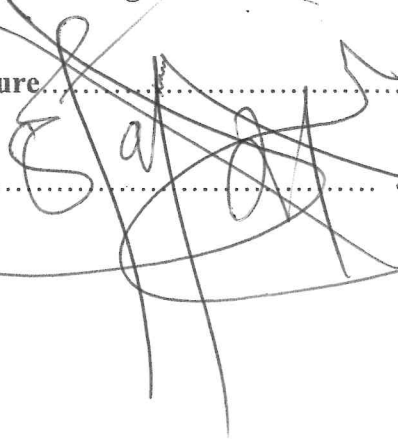

Declaration

I, **LEITORO CAROLYNE SEIN**, declare that this Dissertation is my own, unaided work. It is submitted in fulfillment of the requirements of the degree of Master of Laws (LLM) in the Faculty of Law at the University of Nairobi. It has not been submitted before for any degree or examination in this or any other University.

Signature..........Date.....8/09/2021.....

This project has been submitted for examination upon my approval as the University supervisor

Prof. Githu Muigai

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Date..........

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I am also grateful to my family for their support.

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ABSTRACT

Historically within the Kenyan context, the legislature was viewed as a ‘rubber-stamp’ to the executive agenda and was therefore believed to be incapable of exercising its oversight role. The drafters of the Constitution of Kenya, 2010 therefore identified and incorporated the need for an accountable government, a prudent public financial management system and the important role parliamentary oversight in ensuring the same as crucial in achieving constitutional reform agendas. While it is generally believed that the Constitution of Kenya, 2010 would hail the shift towards a well-endowed National Assembly with the capability of exercising fiscal oversight, the same has remained an elusive dream. Therefore, this paper will demonstrate that the National Assembly of the 11th Parliament (2013-2017) through the Public Accounts Committee has been largely unsuccessful in the exercise of oversight over national revenue expenditure on account of structural and operational challenges of the Public Accounts Committee and shortcomings in the enabling statutory framework. In making this argument, the paper will employ a multi-pronged methodology which will include doctrinal research methodology by mapping out the constitutional and legal framework of parliamentary oversight and analysing the committee’s reports, case study approach by interrogating the operations of the National Assembly’s Public Accounts Committee of the 11th Parliament and lastly a comparative approach in identifying some best practices in other jurisdictions to inform the recommendations towards strengthening the committee. This study has the potential of informing legal or policy reforms through identifying the challenges of fiscal oversight by the Public Accounts Committee under the new constitutional dispensation and proposing solutions for the same with a view to realize the constitutional spirit on accountability and transparency.

CHAPTER ONE: INTRODUCTION

1.1 Background

Prior to the Constitution of Kenya, 2010, the independence of the legislature had been diluted by a series of Executive-led constitutional amendments initiated which consolidated power in the Executive and more specifically to the presidency¹ for example the President could suspend the proceedings of and dissolve the legislature.² The effect of these provisions was that the “Executive was able to violate fundamental freedoms and liberties in the full view of a disempowered legislature.”³

In an attempt to limit the power of the Executive, the Constitution of Kenya 2010 therefore set out to define the powers and the limits of the three arms of government that is the legislature⁴, the executive⁵ and judiciary⁶ under the principle of separation of powers. Therefore, Prof. Migai Akech has also lauded the new constitutional text as a useful means for regulating the collective power of the Executive by making it accountable to the Legislature⁷.

The interrelationship between the Legislature and the Executive with regards to financial accountability is best explained by the concept of horizontal accountability which is the relationship in which one government entity holds another government entity to account⁸. Some

¹Migai Akech, ‘*Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability*’ (2011) 18 *Indiana Journal of Global Legal Studies* 55.

²Constitution of Kenya 1963, s 59(1), (2).

³Morris K Mbondenyi and John O Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (LawAfrica Publishing Ltd 2012) 76 <<https://www.lawafrica.com/?product=the-new-constitutional-law-of-kenya-principles-government-and-human-rights>> accessed 2 April 2021.

⁴ Constitution of Kenya 2010, Art 93.

⁵ Ibid Art 130.

⁶ Ibid Art 159.

⁷Akech (n 1).

⁸ Paschal B Mihyo, Herman Musahara and Truphena Eshibukule Mukuna, ‘Horizontal Accountability of the Executive to the Legislature in Africa: A Case Study of Kenya’ (Organization for Social Science Research in Eastern and Southern Africa (OSSREA) 2016) <<http://www.ossrea.net/images/ossrea-report.pdf>> accessed 16 June 2020.

examples of mechanisms of horizontal accountability that are regular features of modern budget processes in commonwealth countries include the powers of parliamentary budget (and audit) committees and supreme audit institutions i.e the office of the auditor general to approve, oversee, and audit the executive's management of public finances.⁹

This form of accountability has historically been referred to as the parliamentary 'power over the purse' i.e oversight over national revenue¹⁰. The origins of the parliamentary power over the purse has been located in ancient Greece before the European parliament was formed¹¹. Aristotle highlighted the obligation of protecting public funds from embezzlement, the obligations to divulge financial activity to the citizens and the pledge to post extracts of expenses accounts for viewing by the people.¹² In the United Kingdom, parliament, for centuries, had been responsible for raising revenue and approving expenditure but their control and audit of public spending was wanting. However, in the 1860s, major steps were taken towards ensuring appropriate financial accountability to Parliament by the then Chancellor of Exchequer, William Gladstone who initiated the Exchequer and Audit Departments Act of 1866 which laid down a cycle of accountability for public funds in which The House of Commons approved expenditure, the Comptroller and Auditor General managed the disbursement of funds, and accounts were prepared by government departments and submitted to and audited by the Comptroller and Auditor

⁹ Kristin Mckie and Nicolas Van de Walle, *Toward an Accountable Budget Process in Sub-Saharan Africa: Problems and Prospects* (New School for Social Research, 2010) 57 Vol 77 Iss 4 <<https://go.gale.com/ps/anonymous?id=GALE%7CA253056457&sid=googleScholar&v=2.1&it=r&linkaccess=abs&isn=0037783X&p=AONE&sw=w>> accessed 2 April 2021.

¹⁰ May Yee Cheryl Siew, 'Power of the Purse in Singapore: Who Controls the Controllers?' (Ph.D, Harvard Law School 2019) 24 <https://scholar.harvard.edu/files/briefingpapers/files/71_-_siew_cheryl_-_power_of_the_purse_in_singapore.pdf> accessed 27 March 2020.

¹¹ Ibid

¹² Ibid

General.¹³ The power over the purse has since been held by legislatures around the world as an integral part of parliamentary oversight.

In Kenya, the exercise of parliament's power over the purse can be traced back to 1948 when the inaugural Public Accounts Committee was formed by the Legislative Council.¹⁴ This was formed at the behest of the British Government which required the colonies to account for the revenues and grants they were receiving from the colonial government. Mr. Troughton, the then Finance Secretary argued that the council members 'did not take enough interest in what happens to the money once it was voted' into the budget.¹⁵

The Public Accounts Committee therefore became the mechanism for awakening this interest which was expected to translate to probity in public finance. The Committee was to discharge its role through examining expenditure of appropriated monies.¹⁶ This purpose seemed to have remained the same despite the numerous reforms to the government of Kenya. However, at independence, Kenya inherited most of the colonial governance system with its shortcomings including adopting a 'rubber stamp'¹⁷ policy for the Executive agenda¹⁸ which became a key motivator for the push for constitutional reforms.

¹³ Mbogo AG Ochilo, *The Effectiveness of the Oversight Role of the Kenyan Parliament: A Case Study of the Public Accounts & Investment Committees in the Ninth Parliament* (Thesis, University of Nairobi 2010) 6 <<http://erepository.uonbi.ac.ke/handle/11295/16148>> accessed 2 April 2021.

¹⁴ Robert Ochoki Nyamori and Bosire Nyamori, *Making Governments Accountable: The Role of Public Accounts Committees and National Audit Offices* (1st Edition, Routledge, Taylor & Francis, 2015) 19

¹⁵ Ochilo (n 13).

¹⁶ Ibid.

¹⁷ 'Rubber stamping' in this context refers to approval of bills/budgets brought to the House/parliament without interrogation or critical review. An assessment of the Kenyan National Assembly conducted in 1999 by Joel Barkan noted that parliament was 'neither independent nor effective'.

¹⁸ Samuel N Njuguna and Phyllis Makau, *The Parliamentary Budget Oversight in Kenya: Analysis of the Framework and Practices since to Date* (Institute of Economic Affairs 2009) 99 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwimm87Wz9_vAhWcTRUIHQLwAxQQFjAAegQIAxAD&url=https%3A%2F%2Fwww.ieakenya.or.ke%2Fdownloads.php%3Fpage%3DThe-Parliamentary-Budget-Oversight-in-Kenya.pdf&usg=AOvVaw1KMLiaHri6iN3r6Wddq2p_> accessed 2 April 2021.

Therefore, the promulgation of the Constitution of Kenya, 2010 was thought to be the pioneer for change in the governance framework with the numerous provisions on parliamentary oversight particularly as regards the budget formulation process and the audit process. Under the Constitution of Kenya, 2010, the legislative and oversight function has been bestowed upon Parliament which consists of the National Assembly and Senate.¹⁹ The National Assembly, with regard to management of public finance, has the constitutional mandate of revenue mobilization through the imposition of taxes, apportionment of national revenue across government entities, appropriation of funds and overseeing the expenditure thereof.²⁰

This ‘power over the purse’ in the Kenyan context is therefore evidenced by the National Assembly’s role in the budget formulation stage where the Cabinet Secretary, National Treasury tables estimates of the National Government’s budget before the National Assembly two months prior to the end of each financial year.²¹ The National Assembly then deliberates and approves the same upon the recommendation of the Budget and Appropriations Committee of the National Assembly.²² The Committee has the mandate to discuss and review the estimates and make recommendations to the House.²³ Thereafter, the National Assembly passes the Appropriation bill through which the authority is granted to the National government to access the approved amount from the Consolidated Fund.²⁴

¹⁹Constitution of Kenya 2010, Art 93.

²⁰ Ibid Art 95(4),(5) ; 96(4) ; 209(2).

²¹ Parliament of Kenya, ‘The National Assembly and Budget Making’ (The National Assembly Fact Sheet No. 29, 2017) <http://www.parliament.go.ke/sites/default/files/2018-04/29_The_National_Assembly_and_Budget_Making.pdf> accessed 1 May 2021.

²² Ibid

²³ National Assembly Standing Orders (4th Edition 2013) Order No. 207.

²⁴ This Parliamentary approval has equally been referred to as the ‘Rule of Law in Finance’ which implies that the budget and utilization thereof do not become valid until they are approved by parliament through legislation.

Additionally, the House is also expected to debate and approve supplementary budgets.²⁵ This provision gives parliament the power to determine the manner and purpose in which withdrawal of monies from the consolidated fund or any other funds of the government can be done.²⁶ The Constitution also mandates Parliament to prescribe conditions for borrowing by the National government.²⁷

In the budget execution stage, the Constitution establishes the office of the Controller of Budget who is mandated to monitor budget utilization by the government through allowing withdrawals which are authorized by law²⁸ and applying any expenditure ceilings imposed by Parliament.²⁹ The Controller is expected to furnish the National Assembly with reports on quarterly basis of the allocated budget, the withdrawals and the absorption rate.³⁰ The Controller is also required to submit special reports regarding any funds withheld by the Cabinet Secretary, National Treasury or any investigations conducted in relation to the budget expenditure.³¹ Therefore, the National Assembly can use the Controller's reports to interrogate government entities on any irregularities such as over-expenditure and provide avenues through which the National Assembly can intervene in case of irregularities without necessarily waiting for the end of year audit.

Further, the Constitution also establishes the Office of the Auditor General which is required to audit the expenditure of government entities and submit a report of the same to Parliament.³² The

²⁵ Constitution of Kenya, 2010 (n 19). Supplementary budgets covers monies that were not subjected to previous parliamentary approval during the initial budget process.

²⁶ Ibid Art 206.

²⁷ Ibid Art 211; Art 213

²⁸ Ibid (n 19).

²⁹ Controller of Budget Act 2016, s. 5.

³⁰ Ibid. s. 9.

³¹ Ibid.

³² Constitution of Kenya 2010, Art 229. These reports are to be submitted six months after the end of the financial year.

Auditor General's reports are meant to confirm whether public monies have been applied lawfully and in an effective way.³³

The reports of the Controller of Budget and the Auditor General are tabled to the National Assembly through the Public Accounts Committee established by the House's standing orders which has the responsibility of the examining the reports and making appropriate recommendations to the House.³⁴ The Committee heavily relies on these reports to conduct expenditure oversight in the monitoring and evaluation phase. Additionally, The Committee has the powers to summon government officials to attend hearings and give evidence, explanations or information or any other person to assist it in relation to the evidence or information given.³⁵

The National Assembly therefore seems to have the necessary legal avenues for the exercise of oversight over national revenue expenditure. However, these avenues seem to have been unsuccessful in inspiring prudent utilization of national revenue. During the period under review (2013-2017) the Country witnessed major 'scandals' relating to pilferage of public funds. In 2014, the Kenyan government floated the Eurobond on the Irish stock to raise money for infrastructural development in Kenya. The Auditor General raised concerns regarding the expenditure of the Eurobond fund as he was unable to ascertain the utilization of the same.³⁶

Again, an audit conducted by the Auditor General of the National Youth Service (NYS) accounts in 2016 revealed the misappropriation of Kshs1.9 billion. The Public Accounts Committee report stated that the sum which may have been misappropriated could be Kshs 23 billion for the whole ministry with over Kshs. 10 billion traceable to NYS and recommended the conduct of further

³³ *ibid.* Art 229.

³⁴ National Assembly Standing Orders (4th Edition 2013) Order No. 205.

³⁵ *Ibid.*

³⁶ National Assembly Public Accounts Committee, 'Report on the Examination of the Reports of the Auditor General on the Financial Statements for the National Government for the FY Ending 30th June, 2015' (National Assembly 2018).

investigations by the Director of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC). The committee also recommended that the then Cabinet Secretary, Ministry of Devolution & Planning “be barred from holding public office, if found guilty after due process, in light of her overall leadership failures at the Ministry.”³⁷ The Cabinet Secretary was later cleared by the Ethics and Anti-corruption Commission. The committee further found that the then Principal Secretary should be held liable for the misappropriation and proposed that further investigations and initiation of criminal charges against those involved in the scandal.³⁸ While the study acknowledges the existence of a robust constitutional framework on the exercise of the fiscal oversight by the National Assembly, the success or failure of the constitutional text is dependent external factors such as institutional capacity, political interests and good will and reforms to the enabling statutory framework.³⁹ The study therefore argues that the actual exercise of fiscal oversight by the National Assembly under the new constitution has been largely unsuccessful due to the structural and operational challenges of the Public Accounts Committee and the shortcomings of the enabling statutory framework. In making this argument, the study embarks on an analysis of the constitutional foundations and legal framework for exercise of parliamentary oversight over national revenue expenditure. The study then examines the set up and operations of the Public Accounts Committee of the 11th Parliament. Lastly, we will draw comparisons in other jurisdictions and propose reforms for an ideal Public Accounts Committee that will effectively carry out its mandate.

³⁷ National Assembly Public Accounts Committee, ‘Report on Special Audit Report on National Youth Service’ (National Assembly 2017)

³⁸ Dorothy Otieno, ‘Before You Vote: The Truth about Money Lost in the NYS Scandal’ *Daily Nation* (24 June 2017) <<https://nation.africa/kenya/newsplex/before-you-vote-the-truth-about-money-lost-in-the-nys-scandal-415390>> accessed 2 April 2021.

³⁹ See Yash Pal Ghai ‘Constitutions & Constitutionalism; The fate of the 2010 Constitution’ in Godwin Murunga, Duncan Okello and Anders Sjogren (eds), *Kenya : The Struggle for a New Constitutional Order* (Zed Books London 2014) <<https://www.diva-portal.org/smash/get/diva2:775818/FULLTEXT01.pdf>> accessed 17 June 2020.

1.2 Statement of the Problem

Although, the National Assembly, under the Constitution of Kenya, 2010, has been granted the mandate of ensuring that public monies are efficiently utilized and are accounted for, nevertheless the same has failed to inspire and secure actual prudent utilization of national revenue. So where is the disconnect? Why is there a variance between the intentions of the written constitutional texts and the output that is a prudent and accountable financial management system? The study therefore seeks to identify the gap between the constitutional provisions of fiscal oversight as a means of realizing an efficient and accountable executive and its implementation thereof. The study will do so through examining the structure and operations of the National Assembly's Public Accounts Committee of the 11th Parliament and will make proposals towards closing this gap.

1.3 Justification of the Study

Constitutional law scholars have described constitutionalism to be a 'legal limitation on government and an antithesis of arbitrary rule'.⁴⁰ Therefore, effective parliamentary oversight over public expenditure is central to constitutionalism as it provides necessary checks and balances that are integral for a transparent and accountable Government. It ensures that goods and services are effectively delivered to the citizens.⁴¹ Taking cognizance of its importance, the Constitution of Kenya, 2010 incorporates the principles of parliamentary oversight as a means towards securing accountability from the Executive. However, implementation of the constitutional texts on fiscal oversight has remained a challenge. These challenges are a concern which require interrogation. The study therefore identifies impediments that face the actual practice of fiscal oversight despite the robust constitutional text and proposes reforms towards resolving the same. This study is the

⁴⁰ Ibid

⁴¹ Samuel N Njuguna and Phyllis Makau (n 18).

first to analyze shortcomings of the Public Accounts Committee under the new constitutional dispensation. Additionally, the study has the potential of informing legal and policy reforms that will ensure prudent use of taxpayers' monies which will eventually lead to an improved governance, transparency and accountability system.

1.4 Statement of the Objectives

The study interrogates the success of the National Assembly's Public Accounts Committee of the 11th Parliament in the exercise of fiscal oversight under the Constitution, 2010.

Specifically, this study aims;

1. To establish the Constitutional foundations and legal framework of parliamentary oversight national revenue expenditure in Kenya under the Constitution of Kenya, 2010.
2. To examine the successes or failures of the National Assembly Public Accounts Committee of the 11th Parliament in overseeing national revenue expenditure.
3. To make proposal towards the strengthening of the Committee.

1.5 Research Question

To realize these objectives, the study intends to respond to the following research questions:

1.5.1. Main Research Question

1. How successful was the 11th Parliament through the Public Accounts Committee in the exercise of fiscal oversight?

1.5.2. Sub-Research Question

1. What are the constitutional and legal provisions on parliamentary oversight over national revenue expenditure in Kenya?
2. What were the successes of failures of the Public Accounts Committee of the 11th Parliament in the exercise of oversight over government expenditure?

3. What are the possible reforms that will sufficiently strengthen the functions of the Public Accounts Committee?

1.6 Theoretical Framework

This study applies a critical constitutional theory and government accountability. Firstly, the critical constitutional theory offers a justification for the need to analyze the constitutional text vis-à-vis its actualization. Secondly, the study relies on principal-agent theory to explain the obligation of government entities to account to the citizenry and the role of the legislature in securing the same.

1.6.1 Critical Constitutional Theory

The debate on constitutional theories has played out in two basic forms; the conservative constitutionalism which lays emphasis on protection of property rights and embraces the notions of inequality and the liberal constitutionalism which emphasizes the need for a fixed government formed through regular popular vote by empowered citizens in the protection of individual freedoms.⁴² This constitutional struggle has been witnessed even in the Kenyan context over the years.⁴³ Liberals have been at the forefront in advocating for improved governance, human rights, gender equality and social justice, equitable sharing of resources and devolution of power.⁴⁴

Over time constitutional scholars have shifted emphasis to a more critical constitutional theory which represents a progressive development of constitutional theory and urges that ‘no law is value free and that a mechanical jurisprudence that views law in a simple cause and effect paradigm is

⁴² Charles O Oyaya, ‘Towards Constitutional Legitimacy a Study of the Principles and Processes of Constitutional Development and Constitution Making in Kenya from Colonial Times to 2010’ (Thesis, University of Nairobi 2013) <<http://erepository.uonbi.ac.ke/handle/11295/59185>> accessed 12 June 2020.

⁴³ Ibid

⁴⁴ Ibid

of little value to the analysis of constitutional problems'.⁴⁵ Scholars of the theory are drawn from the critical legal school of thought such as Robert Unger⁴⁶ who argue that dominant groups have used the law including constitutional law as a powerful tool to protect their status against the disadvantaged.⁴⁷

According to this theory, rule of constitutional law entails values on the structure of political power and the organization of social life.⁴⁸ Therefore, progressive constitutional law scholars are required to investigate the connection between constitutional text and substance, to explore and explain the gap between constitutional ideas and their implementation and to investigate the interconnection between the structure of government established by the constitution and the social-economic and cultural order of the people it governs.⁴⁹ We can best explain this lacuna by interrogating the notions of constitutionalism and its criticisms.

Charles Fombad asserts that constitutionalism is a doctrine that governs the legitimacy of government action and is a system that should ideally guarantee accountability of the government to the people by ensuring periodic free and fair elections and to clearly define and limit the powers of the organs of state through a system of checks and balances and the separation of powers. It is said to encompass a limited and accountable government.⁵⁰ He adds that constitutionalism entails certain core irreducible minimums of values with a well-defined process and procedure for holding the government accountable.⁵¹ Hilaire Barnette contends that constitutionalism embraces the

⁴⁵ Ibid

⁴⁶ Roberto Mangabeira Unger, *'The Critical Legal Studies Movement: Another Times, A Greater Task'* (1983) Harvard University Press.

⁴⁷ Ibid

⁴⁸ Charles Oyaya (n 42)

⁴⁹ Muigai Githu, *'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997) a Study in the Politics of the Constitution'* (Thesis, University of Nairobi 2001) <<http://erepository.uonbi.ac.ke/handle/11295/15784>> accessed 2 April 2021.

⁵⁰ Charles Manga Fombad, *'The Constitution as a Source of Accountability: The Role of Constitutionalism'* (University of Cape town 2009) <<https://repository.up.ac.za/handle/2263/17022>> accessed 12 June 2020.

⁵¹ Ibid.

limitation of powers (limited government), separation of powers (checks and balances) and an accountable government.⁵²

Gichira Kibara has also been defined constitutionalism as the practice of politics according to the constitution; an assortment of written or unwritten fundamental rules and principles that provide restraint on the government and other political actors from exercising power arbitrarily.⁵³

Traditionally, constitutionalism made emphasis on constitutional supremacy as a governing tool then later the purpose shifted to focus on limitation of state power.⁵⁴ Currently, the concept has evolved to refer to transformative constitutions which requires the state to actively ensure nation building, participatory democracy, allocation of state power and resources, guarantee and protection of rights and prevention of corruption.⁵⁵

The generalization of the notions of constitutionalism has had its fair share of criticism. Firstly, constitutional law scholars have defined constitutionalism according to practice within western democracies which have not received universal recognition. In support of this criticism, Okoth Ogendo documents two misconceptions in African Constitutionalism which have existed since colonialism. He argues that the first fallacy was that a unitary constitution was the answer to achieving national integration and the second was that democracy was only achievable through embracing western constitutional order.⁵⁶ Jackton B. Ojwang argues the disconnection between

⁵² Hilaire A Barnett, *Constitutional and Administrative Law* (3rd edition, Cavendish 2000) 38.

⁵³ Gichira Kibara., 'The State of Constitutionalism in Kenya, 2003' in Benson Tumasirwe (eds,) *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003* (Fountain Publishers 2005)
<<http://www.kituoachakatiba.org/publications/annual-state-constitutionalism-papers/constitutionalism-east-africa-progress-challeng-3>> accessed 2 April 2021.

⁵⁴ Ibid

⁵⁵ Yash Pal Ghai , 'Constitutionalism; African Perspectives,' in Patricia Kameri-Mbote and Collins Odote (eds), *'Essays in Honour of HWO Okoth-Ogendo'* (University of Nairobi School of Law 2017)
<<http://www.ielrc.org/books/b1702.htm>> accessed 2 April 2021.

⁵⁶ HWO Okoth-Ogendo, 'The Quest for Constitutional Government' in Goran Hyden, Dele Olowu and HWO Okoth-Ogendo (eds), *African Perspectives on Governance* (Africa World Pr 1999). 33

the ‘popular reality’ and management of public affairs in Africa can be attributed to the failure to consider the unique political, cultural and socio-economical structure of each state or community.⁵⁷ Additionally, constitutional scholars have more often than not confused the concept of constitutionalism with the notions of a constitution.⁵⁸ To put this into perspective, Charles Oyaya poses the question, ‘is the mere existence of a constitution proof of commitment to the principles of constitutionalism?’⁵⁹ Professor Yash Pal Ghai clarifies that constitutions can be without constitutionalism in two senses; the first being that the text does not aim for constitutionalism and the second which refers to instances where the constitution promises principles of towards realizing constitutionalism but little is done to implement them.⁶⁰ This problem cannot be well explained in the African and Kenyan context without reference to Okoth-Ogendo’s ‘Constitutions without Constitutionalism: An Africa Political Paradox’ where he contends that Africa governments are ‘committed to idea of constitution but reject the classical notation of constitutionalism’.⁶¹ Albert Chen equally argues that while it is easy to formulate a constitution, it is difficult to realize its implementation which goes to the core of constitutionalism.⁶² He also contends that western notions of constitutionalism have been transplanted across the rest of world with little regard to their socio-political structures.⁶³

Professor Ghai argues that the successes of a constitution are determined by external factors such as political good will, socio-economic structures, the practice of constitutionalism and by its

⁵⁷Jackton B Ojwang, ‘*Constitutional Development in Kenya: Institutional Adaptation and Social Change*, Nairobi, ACTS Press, 1990, 257 Pp.’ (Cambridge University Press 1991) 213 35 Journal of African Law
DOI: <https://doi.org/10.1017/S0021855300008470>.

⁵⁸ Gichira Kibara (n 53)

⁵⁹ Charles Oyaya (n 42)

⁶⁰ Yash Pal Ghai, ‘*Constitutionalism; African Perspective*’ (n 55)

⁶¹ HWO Okoth-Ogendo, ‘Constitutions without Constitutionalism: an African political paradox’ in Douglas Greenberg, S.N. Kartz, B. Oliviero and S.C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York OUP: 1993) Chap 4

⁶² Albert HY Chen, ‘*Constitutionalism in Asia in the Early Twenty-First Century*’ (2014) Cambridge University Press.

⁶³ Ibid

institutional framework.⁶⁴ In view of the foregoing, the critical constitutional theory justifies the argument that realization of the principle of parliamentary oversight as a concept under constitutionalism goes beyond provision of the same within the constitutional texts. In order to actualize the constitutional text, it is crucial that we identify the challenges of implementation and offer solutions towards achieving a ‘constitution with constitutionalism’.

1.6.2 Principal-Agent Theory

As discussed above, constitutionalism encompasses a limited and accountable government⁶⁵. Accountability comprises a sense of mechanism and institutions which are intended to constrain government in order to prevent arbitrariness⁶⁶ and can be enforced through numerous means, including elections, promotion and discipline, financial accounting, right to recall and referendum.⁶⁷ Accountability mechanisms are designed to achieve four primary goals; firstly, these mechanisms provide the means through which the public can hold public officers accountable. The people, who are regarded as the primary principals have transferred their sovereignty to their elected representatives usually the legislature (the primary agents). In turn, the legislature has transferred some of its authority to the bureau consisting of ministers and public servants, the executive (the secondary agents). These mechanisms allow the public to hold these agents accountable as they exercise delegated powers, enables the exposure of illegitimate and arbitrary exercises of governmental power,⁶⁸ impose a high threshold of fiscal responsibility over the agents and provide means of overseeing prudent use of public monies.

This then introduces the principal-agent theory which provides insight on the complexity surrounding the concept of government accountability. Principal agent theory has its roots in

⁶⁴ *Yash Pal Ghai*, ‘Constitutions and Constitutionalism: the Fate of the 2010 Constitution’ (n 39)

⁶⁵ *Hilaire Barnett* (n 52)

⁶⁶ *Mckie and Van de Walle* (n 8).

⁶⁷ *Ibid.*

⁶⁸ *Akech*, ‘Abuse of Power and Corruption in Kenya’ (n 1).

Economics, where its original proponents applied the theory to the subject of insurance but was later adopted by political scientists.⁶⁹ In the political realm, the theory was first applied in American politics in the study of the connection between congress and delegated legislative power to the courts.⁷⁰ The theory has been traced back to Rousseau's interpretation of delegation of powers who posits that the people are the principals as they hold sovereign power and their representatives i.e. the legislature and executive are mere agents.⁷¹ This element of Rousseau's theory constitutes the core intentions of the principal-agent theory.⁷²

The theory becomes apposite to explain the accountability interrelationship between the people as principals and the executive and the legislature as agents on one hand and between the legislature elected as principals on behalf of the people and the executive on the other hand.⁷³ The executive accounts to the people through elections and to the legislature during oversight.⁷⁴ Pelizzo & Stapenhurst argue that to better align principal-agent interests, greater transparency in the activity of agents is required coupled with holding the agents accountable for their actions⁷⁵ hence the need for oversight.

The criticisms of the theory are more relevant to the legislative-executive relationship than the general sense of it. The first criticism is that citizens(principals) are not always aware of the deliverables expected from the agents which allows the agents to pursue their own self interests.⁷⁶ Secondly, there is a substantial information asymmetry where the legislature(agent) has more

⁶⁹ Tom Delreux and Johan Adriaensen, (eds), *The principal agent model and the European Union* (Palgrave Macmillan, Cham 2017) <https://link.springer.com/content/pdf/10.1007%2F978-3-319-55137-1_1.pdf> accessed on 22nd March, 2020

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

⁷³ Riccardo Pelizzo and Frederick Stapenhurst, *Parliamentary Oversight Tools, A Comparative Analysis* (Routledge 2013) <<http://books.google.co.ke>> accessed on 10th March, 2020

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

information than the citizen and the executive has even more information than the legislature and the citizen.⁷⁷ However, the criticisms do not necessarily negate the theory but rather inspire the development of oversight mechanisms that the principal can use to hold the agents to account.⁷⁸ The theory and its criticisms offer a justification for the principle of parliamentary oversight and similarly identify the challenges that hamper the effective exercise of oversight including the heavy reliance on information presented by the Executive which affects meaningful scrutiny.

1.7 Research Methodology

The study adopts a mixed methodology approach involving doctrinal methodology, case study and a comparative approach as it attempts to draw the variance between the law in books and the law in practice and recommend solutions towards bridging the gap. Doctrinally, the study examines the Constitutional text and its aspirations, statutory provisions, decided cases and literature on parliamentary oversight over national revenue expenditure. Acknowledging that doctrinal method has been criticized for disregarding external factors that affect implementation of the positive law, the study conducts a case review of the operations of the PAC of the 11th Parliament to establish the challenges of implementation fiscal oversight. The Study then draws recommendations through conducting a comparative assessment of best practices in other jurisdictions to inform means of strengthening the committee.

1.8 Literature Review

Introduction

This section explores the works of scholars on the constitutionalism, good governance and accountability and the role of parliament and the public accounts committee in exercising oversight. Primarily, the review identifies the nexus between constitutionalism, good governance

⁷⁷ Ibid

⁷⁸ Ibid

and accountability within the Kenyan context. The review also examines role of parliament through the public accounts committee in furthering the concept accountability and the challenges that faced the committee in the exercise of its mandate prior to the Constitution of Kenya, 2010.

Constitutionalism, Good Governance & Accountability: The Linkage

It is widely known that in the context of good governance,⁷⁹ the right to govern is derived from the consent of the governed usually through popular vote except in cases of military rule or dictatorship.⁸⁰ By conceding to be governed, the governed create an obligation to the governing to account to the governed.⁸¹

Professor Migai Akech therefore states that accountability is the cornerstone of good governance and serves the purpose of legitimizing the functions of the government, securing public confidence in the government of the day and bridging the gap between the citizens and the government.⁸²

Otiende Amollo expounds the concept of accountability further by adding that central to it is the provision of checks and balances against abuse of power by public officers. It assesses the effect of government action on society, helps ensure that sufficient resources are provided to realize government programmes, identifies the negative consequences of government policy and actions and monitors the achievement of national and international commitment.⁸³

⁷⁹ It is said that good governance has not been achievable in Africa as a result of Authoritarian constitutions which ignore the basic tenets of constitutionalism and vest unfettered powers in one arm of government to the disadvantage of others. The clamor for constitutional reforms resulted from the detest of abuse of executive power with the belief that comprehensive constitutional reforms can ensure sustainable constitutionalism and bring an end to the abuse of executive power.

⁸⁰ Tom Delreux and Johan Adriaensen, (eds) (n 69)

⁸¹ Ibid

⁸² Akech, 'Abuse of Power and Corruption in Kenya' (n 1).

⁸³ Otiende Amollo, 'Accountability & Oversight' (International Governance Summit, Leisure Lodge & Golf Resort, 7 November 2018) <https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Oversight_and_Accountability_-_Hon._Otiende_Amollo_60.pdf> accessed 26 March 2020.

Accountability is critical to democracy because it ensures that those who wield power and whose exercise may adversely affect the vital interests of citizens are accountable for its exercise.⁸⁴ In the context of democracy, Professor Migai Aketch contends that major goals of accountability institutions or mechanisms include providing means through which the public can call those in public office to account. Second, they also aim at preventing abuses of power and corruption.⁸⁵ Odhiambo-mbai in analyzing public service accountability in Kenya since independence argues that the demand for good governance was brought about by the need to improve the efficient and effective delivery of public service. The idea of good governance that was required was that which entailed multiparty politics for fair competition, accountability and transparency in public service, respect for human rights and structural reforms within the public service.⁸⁶

The Kenyan Context

In relation to Kenya, the 1963 Independence Constitution fell short of meeting the elements of constitutionalism and the aspirations of the Kenyans in enabling reforms to guarantee the protection of their socio-economic, political and civil rights.⁸⁷ During the 2005 constitutional review process, a major concern of the drafters was to develop a means through which constitutionalism could be facilitated and protected.⁸⁸

⁸⁴ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law* (East African Educational Publishers 2009).

⁸⁵ Akech, 'Abuse of Power and Corruption in Kenya' (n 1).

⁸⁶ Crispine Odhiambo-Mbai, 'Public Service Accountability and Governance in Kenya Since Independence' (2003) 8 Africa Journal of Political Science.

⁸⁷ Morris Odhiambo (ed), *The Annual State of Constitutionalism in East Africa 2010* (Fountain Publishers 2012) <https://www.kituoachakatiba.org/sites/default/files/publications/Annual%20State%20of%20Constitutionalism%20in%20the%20East%20African%202010_0.pdf>. accessed on 26th March, 2020

⁸⁸ Constitution of Kenya Review Commission (CKRC), 'The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission' (Constitution of Kenya Review Commission 2005) 311 <<http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf>> accessed 2 April 2021.

The Constitution of Kenya, 2010 therefore prescribes national values and principles that constitute its foundation. They include aspirations and ideals declared in the preamble as the general will of citizens and the national values and principles of governance. They also include the overarching principles that form the foundations of the constitutional design, including the need to establish a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity, accountability, separation of powers, and checks and balances between state organs among others.⁸⁹ This is an attestation of the elements of constitutionalism.

The struggle for Kenya's constitutional reforms throughout the years had several important agendas including the achievement of democracy, good governance and rule of law protected in part by the separation of powers and checks and balances.⁹⁰ Professor Yash Pal Ghai and PLO Lumumba hailed the Constitution of Kenya, 2010 for its advanced character, as a pivot for democratic reforms and good governance and as an instrument for fundamental change as it offered serious opportunities for an improved governance system.⁹¹

Professor Ghai adds that the provisions of the Constitution of Kenya 2010 seek to bring about fundamental change in nation and state and defines Kenya's democracy as a balance of different interests of communities and the protection of constitutional principles.⁹² He further states that the Constitution is well-endowed in values and principles and sets high standards of integrity, fairness, probity and accountability in public finance.⁹³ It is evident therefore that the Constitution of

⁸⁹ Constitution of Kenya Review Act 1997 (No. 13 of 1997); Constitution of Kenya Review Act (Cap 3A Laws of Kenya) ; Constitution of Kenya Review Act (No. 9 of 2009), all repealed.

⁹⁰ Joseph Kwaka & Thurania Mutunga, 'Contemporary Kenya & its leadership' in Duncan Okoth-Okombo and others (eds), *Challenging the Rulers: A Leadership Model for Good Governance* (East African Publishers Rwanda Ltd 2011) 1 <<http://erepository.uonbi.ac.ke/handle/11295/51520>> accessed 2 April 2021.

⁹¹ PLO Lumumba, 'The leadership Kenyans Reserves' in Duncan Okoth-Okombo (Ibid) 38. See also Yash Pal Ghai 'Constitutions & Constitutionalism; The fate of the 2010 Constitution' (n 64)

⁹² Yash Pal Ghai, 'Constitutionalism; African Perspective' (n 55)

⁹³ Ibid

Kenya, 2010 provides a robust legal framework for good governance and its underlying principles of accountability.

Parliamentary oversight in promoting accountability

The role of parliament in ensuring accountability specifically of the executive remains undisputed. Chen Friedberg and Reuven Hazan rely on John Stuart Mill's distinction between the functions of executive and legislative branch who conceptualizes the legislative branch's role to oversee government as the appropriate office to oversee government, to force full account of irregularities, to impose sanctions to those found liable and expel them.⁹⁴ To this end, Chen and Reuven argue that objectives of transparency and accountability enumerated by John Stuart Mills still stand in the modern era and are protected by the role of parliamentary oversight.⁹⁵

Professor Migai Aketch contends that the distinction between the executive and legislative power under the principle of separation of powers enables healthy differences between the legislative and executive branches of government which eventually enables the legislature to scrutinize executive activities thus preventing corruption and abuse of power.⁹⁶

The United Nations Economic Commission for Africa(UNECA) accurately espouses that the legislature being the people's elected representatives becomes the principal forum to exercise oversight over executive power, and to ensure transparency and accountability in the management of the economy which makes the legislature viable in promoting good governance, democracy and rule of law.⁹⁷

⁹⁴ Chen Friedberg and Reuven Y Hazan, '*Legislative Oversight*' (Center for International Development 2012).

⁹⁵ Ibid

⁹⁶ Akech, '*Abuse of Power and Corruption in Kenya*' (n 1).

⁹⁷ Economic Commission for Africa Governance and Public Administration Division(GPAD), '*The Role of Parliament in Promoting Good Governance*' (UN.ECA 2013) <<https://repository.uneca.org/handle/10855/22131>> accessed 2 April 2021.

Bert Rockman argues that the definition of parliamentary oversight is said to depend on how many legislative activities it encompasses, the stages of legislative intervention, the tools employed, the types of controls and the supervision placed on the executive.⁹⁸ Allen Schick defines it to mean review of executive action after the fact emphasizing on the investigatory activity by committees of past administrative action.⁹⁹ Pelizzo & Stapenhurst have defined it to go beyond just supervision of the executive activities to include supervision of executive's legislative proposals particularly in jurisdictions where the executive can table bills for deliberation by the legislature.¹⁰⁰ However, Hironori Yamamoto seems to provide a broader definition by stating that parliamentary oversight involves the 'review, monitoring and supervision of government and public agencies including implementation of policy and legislation'.¹⁰¹ The definition covers the work of parliament in both the budgetary cycle¹⁰² and expenditure accountability.

On the goals of parliamentary oversight, Bert Rockman states that legislative oversight sets out to see that implementation of policy is done according with intent, to determine its effectiveness and impact and its alignment with congressional standards, to assure efficiency, to prevent abuse and to represent public interest by monitoring and constraining the executive.¹⁰³ Yamamoto makes an additional contribution by stating that the goals also include:

- a) To identify and stop arbitrary, illegal and unconstitutional conduct on the part of the executive. This function serves as a protection of citizens' liberties.

⁹⁸ Bert A Rockman, '*Legislative-Executive Relations and Legislative Oversight*' (1984) 9 *Legislative Studies Quarterly*.

⁹⁹ Allen Schick, '*Congress and the Details of Administration*' (1976) 36 *Public Administration Review*.

¹⁰⁰ Riccardo Pelizzo, Rick Stapenhurst and David Olson (ed) '*Parliamentary Oversight for Government Accountability*' (World Bank Institute 2006)

<https://ink.library.smu.edu.sg/soss_research?utm_source=ink.library.smu.edu.sg%2Fsooss_research%2F137&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 6 April 2021.

¹⁰¹ Hironori Yamamoto, *Tools for Parliamentary Oversight: A Comparative Study of 88 National Parliaments* (Inter-Parliamentary Union 2007). p. 9.

¹⁰² Ibid.

¹⁰³ *Rockman* (n 98). p. 417

- b) To call the executive to account in respect to expenditure. It deters misappropriation within the government.
- c) To guarantee the delivery of policy announcements made by government and approved by parliament; and
- d) To improve the transparency and enhance public confidence in the government.¹⁰⁴

Additionally, Samuel Njuguna and Phyllis Makua acknowledge that effective parliamentary oversight over public funds guarantees an improved budget management system as well as secures the notions of democracy through ensuring that the government is called to account for its expenditure.¹⁰⁵ Parliament, under the concept of checks and balances, can support Government departments in planning and implementation of budgets more effectively and efficiently which translates to the curbing of corruption and the reduction of the gaps between planned and actual budgets.¹⁰⁶

A review of these literature is significant in that it reveals that a properly conducted oversight would be able to create a more transparent, accountable, and democratic government. Accordingly, we can establish that the principles of good governance and accountability are linked to the purpose of parliamentary oversight.

How then is oversight conducted? Pelizzo and Stapenhurst state that in performing the oversight role including over budget formulation and implementation, parliaments across the world use various tools depending on the written constitutional texts and rules that govern parliamentary procedures such as standing orders.¹⁰⁷ The most common tools are committee hearings, plenary

¹⁰⁴ Yamamoto (n 101).

¹⁰⁵ Samuel N. Njuguna and Phyllis Makau (n 18).

¹⁰⁶ Ibid.

¹⁰⁷ Riccardo Pelizzo and Frederick Stapenhurst, 'Tools for Legislative Oversight: An Empirical Investigation' (World Bank Institute 2004) 3388 <<http://hdl.handle.net/10986/14143>> accessed 6 April 2021.

sessions of the house, the setting-up of inquiry committees, interpellations, questions, the Ombudsman, the Auditor General and the Public Accounts Committees.¹⁰⁸ Stapenhurst et al state that most commonwealth countries have in place an Auditor General and the Public Accounts Committee which are responsible for examining public expenditure and holding government to account for that expenditure.¹⁰⁹

Yamamoto states that oversight tools are mostly grouped along two scopes, the first depending on the time of oversight such as those done before the government implements a specific policy usually referred to as instruments of control ex ante which includes hearings in committees and those done after enactment of policies to check whether the policies are properly implemented referred to as instruments of control ex post which includes interpellations.¹¹⁰ He adds that the second dimension on oversight tools depends on the place whether inside or outside parliament. Internal tools include questions, hearings, public accounts committee while the ombudsman and auditor general are external tools.¹¹¹ The focus of this study are the internal tools more particularly instruments of control ex post specifically the Public Accounts Committee in the Kenyan context.

The Public Accounts Committee

Robert Nyamori and Bosire Nyamori while assessing the evolution and effectiveness of the parliamentary accounts committee in Kenya state that the purpose of the committee remains to examine the government accounts so as to ascertain whether the government has spent money for its intended purpose in the budget and whether the same has been spent economically.¹¹²

¹⁰⁸ *ibid*

¹⁰⁹ Rick Stapenhurst et al, '*Scrutinizing Public Expenditures Assessing the Performance of Public Accounts Committees*' (2005) SSRN Electronic Journal <<http://www.ssrn.com/abstract=754229>> accessed 11 April 2021.

¹¹⁰ Yamamoto (n 101)

¹¹¹ *Ibid* p. 11.

¹¹² Zahirul Hoque (ed), *Making Governments Accountable: The Role of Public Accounts Committees and National Audit Offices* (1st edition, Routledge 2015). 276

Odhiambo-mbai states that parliament, through the Public Accounts Committee (PAC) and the Public Investment Committee (PIC) is theoretically supposed to ensure accountability.¹¹³ Once the offices of the Controller and Auditor-General (now referred to as the Office of the Auditor General) have concluded the annual audit exercise of government entities, they submit these reports to PAC and PIC depending on the nature of the Audit. The two committees are then required to consume the report and carry out enquiries on the irregularities raised and thereafter proposed recommendations to parliament.¹¹⁴

Challenges facing the Public Accounts Committee

The fulfillment of this parliamentary mandate of oversight requires an enabling environment, essential organizational and resource capacity which has been a major challenge in Africa. Other major obstacles for the effective functioning of the legislature include constitutional dominance of the executive which marginalizes the role of parliament and comes about as a result of a fragmented parliament that is subject to political manipulation by the Executive.¹¹⁵

A major influence to this study is credited to Ochilo's paper on the effectiveness of the Public Accounts and Investment Committee of the 9th parliament(2003-2007).¹¹⁶ He indicts the independence constitution and its subsequent amendments for the ineffectiveness of the committee.¹¹⁷ He contends that the independence constitution was not explicit on the oversight role of parliament and failed to confer authority to parliament to sanction executive institutions that failed to comply with its resolutions.¹¹⁸ It further merged the executive with the legislature as the constitution of the cabinet was drawn from parliament on the appointment by the President.

¹¹³*Odhiambo-Mbai* (n 86).

¹¹⁴ *Ibid.*

¹¹⁵ *Economic Commission for Africa Governance and Public Administration Division(GPAD)* (n 97).

¹¹⁶ *Mbogo AG Ochilo* (n 13)

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid*

Additionally, the President controlled the business of the Parliament, appointed and removed the Comptroller & Auditor General (CAG) without Parliament's input and failed to guarantee the financial and administrative independence of the CAG.¹¹⁹ By extension he also argues that the enabling statutory framework failed in ensuring effective exercise of oversight.¹²⁰ Lastly, he argues that political party interests affected exercise of oversight in that firstly the Committee faced internal wrangles between the coalition parties that formed the government hence there was no distinction between the ruling party and opposition parties in the composition of the committee.¹²¹ Secondly, the whip system affected objectivity of the members of the committee. Thirdly, the existence of an imperial presidency created the crave for political patronage from parliamentarians rendering the house incapable of conducting oversight.¹²²

Odhiambo-mbai notes that parliament has the power to order the detention and prosecution of a public officials on account of abuse of office. However, instances of abuse of public office have been prevalent since 1963, so far there are no cases where parliament has ordered the arrest and prosecution of public officers.¹²³

Robert Nyamori and Bosire Nyamori establish that the Public Accounts Committee has over the years addressed a narrow range of issues including the continued excess government expenditure without parliamentary approvals. They assert that the fact that the committee has continued to identify the ills of the executive an indication that it was diligently discharging its function. However, this did not change government behavior. It is their contention that parliament has become assertive thus enhancing capacity of the committee in discharging its duties effectively

¹¹⁹ Ibid

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid

¹²³ *Odhiambo-Mbai* (n 86).

but note that this, coupled with effectiveness of other organs of the government, are the factors necessary for better accountability and management of national revenue.¹²⁴

Samuel Njuguna and Phyllis Kamau rightly state that whereas management of public funds is a mandate of the Executive, the Legislature is the arm of government to which the Executive is required to account to in the course of implementing the budget. Accordingly, the determinant of realization of transparency is the responsiveness and attitude of the Executive to accountability and oversight.¹²⁵ They conclude that political good-will on the part of the legislature and the executive and the acknowledgement and respect to the principle of separation of powers will support the role of oversight.¹²⁶ Professor Migai Akech postulates that the major hindrances to oversight include the lack of capacity,¹²⁷ time constraints and information asymmetry.¹²⁸

Pascal Mihyo, Herman Musahara and Turphena Mukuna suggest that reports of the Parliamentary Accounts Committee for the period 2011 to 2013 reveal the inadequacy of the committee and the budget office in performing oversight. The study concludes that this inadequacy was as a result of technical incapacity of the committee, its staff and financial auditors, excessive workload as the committee's functions covers all government ministries, parastatals and state-owned enterprises, late submission of reports by the office of the Auditor general and lastly the non-binding nature of parliamentary recommendations from the exercise of financial oversight.¹²⁹

Prof. Attiya Waris argues that the past administrative functions in Kenya have resulted in tax and debt management issues being conducted by the executive, with the role of parliament being

¹²⁴ Zahirul Hoque (ed) (n 112).

¹²⁵ Samuel N. Njuguna and Phyllis Makau (n 18).

¹²⁶ Ibid.

¹²⁷ Akech, 'Abuse of Power and Corruption in Kenya' (n 1).

¹²⁸ Ibid.

¹²⁹ Paschal B Mihyo, Herman Musahara and Truphena Eshibukule Mukuna, '*Horizontal Accountability of the Executive to the Legislature in Africa: A Case Study of Kenya*' (Organization for Social Science Research in Eastern and Southern Africa (OSSREA) 2016) <<http://www.ossrea.net/images/ossrea-report.pdf>> accessed 16 June 2020.

relegated to post action audit reports that are traditionally subjected to long administrative delays. She adds that this was further exacerbated by the lack of technical capacity to quickly scrutinize financial data, conduct analysis and make pertinent conclusions. Therefore, upon passing of a tax law, the only check or balance on its effectiveness, efficiency or pertinence in the country is assessed, on average, three years later when an audit report is filed.¹³⁰

These scholars make several recommendations towards the improvement of effectiveness of parliaments. In order to improve the functions of these committees, Odhiambo-mbai recommends the empowerment of the PAC and PIC to enable them to prosecute public servants involved in the misappropriation of public funds and the inclusion of civil society organizations and the media in the role of oversight.¹³¹

Samuel Njuguna and Phyllis Kamau recommend the creation of independent research budget analysis units attached to the audit and budget related committees in parliament. Additionally, they also suggest that selection of Member of Parliament to serve on a specific committee should be based on experience and background in as far as it can be practical to do so and background adding that this will improve the capacity of committees to scrutinize the budget.¹³²

Further, scholars in recognizing the interdependent relationship between parliament and the office of the Auditor General agree that it is necessary to evaluate the connection between the office of the Auditor General and parliament. John Hatchard, for example, argues that retaining a close working relationship between the office of the Auditor General and parliament regarding financial matters remains paramount. Parliament offers support to the office by scrutinizing the Auditor's

¹³⁰ Morris K Mbondenyei and others, *'Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal'* [2015] Pretoria University Law Press <<https://www.pulp.up.ac.za/component/edocman/human-rights-and-democratic-governance-in-kenya-a-post-2007-appraisal>> accessed 16 February 2021.

¹³¹ *Odhiambo-mbai* (n 86).

¹³² *Samuel N Njuguna and Phyllis Makau*, (n 18).

reports and follow up implementation of its recommendations and it also holds the Auditor's office to account should there be a delay in submission of reports¹³³.

Ochilo recommends amendment of the Constitution of Kenya to explicitly confer the power of oversight to parliament and the authority to sanction the executive individually and collectively.¹³⁴ He also recommends clear separation of powers among the three arms of government with emphasis on the autonomy of the parliament with respect to finances, membership, operations and implementation of resolutions.¹³⁵ He recommends that appointment to oversight committee should be based on experience and the committee should be converted from an ad-hoc committee to a standing committee serving the entire term of parliament. Additionally, the standing orders should provide means of measuring effectiveness, delineate debate of committee's reports, establish a committee to follow up implementation of house resolutions and obligate whips to ensure adequate staffing and funding of the committee.¹³⁶ In terms of the office of the CAG, he recommends amendment of the Constitution and enabling statute to involve parliament in the identification, approval and removal of CAG, define the mandate of CAG, provide powers to sanction accounting officers who fail to cooperate and grant immunity to the office and entrench its financial and administrative independence.¹³⁷ However, Ochilo notes in his postscript that the challenges experienced by the ninth parliament have been addressed by the provisions of Constitution of Kenya, 2010.¹³⁸ Whether or not this is true forms the basis of this study.

¹³³John Hatchard, *The Role, Independence and Accountability of the Auditor General: A Comparative Constitutional Analysis* (2018) 51. 30 The Denning Law Journal.

¹³⁴ *Mbogo AG Ochilo* (n 13)

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

This study is therefore a build up to the above review as it intends to further explore the legal provisions on national revenue expenditure oversight especially under the Constitution of Kenya, 2010 and its actual implementation. It will also attempt to establish whether the challenges identified in the literature review subsisted in the exercise of the public accounts committee function by the 11th parliament despite enactment of a new constitutional framework.

1.9 Limitations

The study has been restricted to the 11th Parliament of Kenya more particularly the Public Accounts Committee of the National Assembly because this was the first parliament that operated under the Constitution of Kenya, 2010. Therefore, the researcher adopted the use secondary sources of data for reasons that the term of the 11th Parliament came to an end in 2017 and the collection of field data with respect to the Public Accounts Committee of the 11th Parliament will not be possible.

1.10 Hypothesis

The study hypothesizes that;

- 1.The Constitution of Kenya, 2010 has granted Parliament through its Public Accounts Committee the mandate and sufficient mechanisms to ensure fiscal accountability of the Executive.
- 2.The Committee has been largely unsuccessful in achieving its mandate due to the shortcomings in its structure, its operations and enabling legal framework.

1.11 Chapter Outline

The study features the following chapter breakdown;

Chapter 1: Introduction

Chapter 2: Constitutional Foundations & Legal Framework of Parliamentary Oversight Over National Revenue Expenditure

Chapter 3: The National Assembly Public Accounts Committee of the 11th Parliament

Chapter 4: Strengthening the Public Accounts Committee

CHAPTER TWO: CONSTITUTIONAL FOUNDATIONS & LEGAL FRAMEWORK FOR PARLIAMENTARY OVERSIGHT OVER NATIONAL REVENUE EXPENDITURE

2.1. Introduction

In this chapter, we locate the concept of parliamentary oversight over national revenue expenditure within constitutional reform agendas that informed the Constitution of Kenya, 2010. We also discuss its manifestation in the Constitution of Kenya, 2010 and the supporting legal framework. The Chapter also discusses relevant international instruments that validate the importance of a parliamentary fiscal oversight. Lastly, we will analyze judicial decisions that have interpreted the constitutional role of parliament in exercising oversight generally and in particular public fiscal oversight including the interrelationship between parliamentary oversight and the principles of accountability and good governance.

2.2. Constitutional Foundations of Parliamentary Fiscal Oversight in Kenya

Since independence, Kenya has been dogged with several challenges including corruption, poverty, social injustice, lack of national cohesion and integration, impunity among office holders and the failure or ineffective delivery of service to the citizenry.¹³⁹ In recognizing these problems, the clamor for Constitutional reform led to an agreement on the procedure and the agenda of the reform which was given life by the Constitution of Kenya Review Commission (CKRC) Act, 2000.¹⁴⁰ It should be remembered that these agenda remained the same even for the 2008 constitutional review process.

¹³⁹ Duncan Okoth-Okombo and others (eds), *Challenging the Rulers: A Leadership Model for Good Governance* (East African Publishers Rwanda Ltd 2011) 1 <<http://erepository.uonbi.ac.ke/handle/11295/51520>> accessed 2 April 2021. These problems have largely been attributed to an imperial president who seems to be above the limits of the constitutional texts and unchecked by other arms of government.

¹⁴⁰ *Constitution of Kenya Review Commission (CKRC)* (n 88)

The Constitution of Kenya Review Commission in conducting a general assessment of the independence constitution concluded that the most unresolved of these challenges remained the dominance by the executive especially the President over the constitutional structures.¹⁴¹ The independence constitution vested abundant powers to the President exercisable at his or her pleasure. The resultant effect of this concentration of power in the President is that he or she dominated all other organs of the state without due regard to the principles of separation of powers and checks and balances¹⁴² for example the powers of suspending and dissolving Parliament weakened the ability of the National Assembly to check the executive.¹⁴³ Therefore, the concept of parliamentary oversight over the executive and more so in relation to public fiscal management was weak if not non-existent in practice.

The objects and goals of the review therefore included amongst others, the achievement of democracy, good governance and rule of law protected in part by the separation of powers and checks and balances. The new Constitution needed to establish a democratic system of government.¹⁴⁴ According to the Commission, there must be good governance in terms of transparency, accountability, a system that is free from corruption and abuse of power, efficient management of public resources, an improved system of Public financial management and the involvement of civil society organizations in management of public affairs.¹⁴⁵ Secondly,

¹⁴¹ Ibid. This process led to the Constitutional text referred to as the “Bomas Draft”. The ‘Bomas draft’ was the text that was intended to be presented to the nation in a referendum. Instead the Attorney-General presented an alternative draft that is referred to as the Wako Draft that was subjected to a referendum in 2005 and rejected. After the highly contested elections in 2007 - 2008 political parties agreed to restart and complete the constitutional review process which culminated in the adoption of the Constitution of Kenya, 2010. The Committee of Experts, the body appointed to lead the process had prepared a Harmonised Draft Constitution building on the two earlier drafts (Bomas Draft and Wako Draft). The Provision on public finance of the COK, 2010 are a copy paste of the provisions in the Bomas Draft.

¹⁴² *Joseph Kwaka & Thurania Mutunga* (n 90) 35-36.

¹⁴³ Ibid.

¹⁴⁴ Constitution of Kenya Review Commission Act 2000(now repealed) s. 3(b).

¹⁴⁵ *Constitution of Kenya Review Commission (CKRC)* (n 88)

separation of powers was necessary; the Commission stated that powers of state should be divided among its independent organs with a clear system of checks and balances.¹⁴⁶

Under concept of checks and balances, the Commission noted that the supervisory/oversight¹⁴⁷ function of the legislature had become more significant in Africa in furthering constitutionalism as it acts as a watchdog over the executive.¹⁴⁸ Further, the legislature's role of oversight was dependent on the constitutional text, the capacity and political good will.¹⁴⁹ To this end, the commission therefore recommended that the functions of parliament under the proposed constitution should include vetting and approving appointments to key constitutional offices such as that of the Auditor General and controlling and overseeing the use of state finances through the appropriate committee.¹⁵⁰ It also recommended that parliament must establish and have unlimited control over its standing orders and shall have power to investigate state organs and dismiss the Executive.¹⁵¹

In relation to public finance and revenue, the Commission's report captured the people's recommendations which include:¹⁵²

- a) Strengthening of the independence and powers of the Auditor General;
- b) Better controls over the expenditure of state revenue;

¹⁴⁶ Ibid. Constitution of Kenya Review Commission (CKRC) recommended the setting down of values and goals of the constitution which reaffirmed commitment to democracy, constitutionalism and the rule of law, limit arbitrary and/ or discriminatory exercise of power by state organs and the demand for sustainable management of the country's resources.

¹⁴⁷ Ibid. Oversight as defined by the Commission involved monitoring policy, allocation and use of resources.

¹⁴⁸ Ibid p. 191-192; See also Rick Stapenhurst and others, *Legislative Oversight and Budgeting : A World Perspective* (The World Bank 2008) <<https://ideas.repec.org/b/wbk/wbpubs/6547.html>> accessed 11 April 2021. The essential justification of parliamentary oversight is that a larger composition of the executive is unelected and therefore is not directly accountable to the people. By contrast, the legislature is democratically elected and is expected to advocate and remain attuned to the aspirations of their voters. This justifies their watchdog relationship and has resulted in the belief that oversight is and should remain the legislature's main activity

¹⁴⁹ *Constitution of Kenya Review Commission (CKRC)* (n 88).

¹⁵⁰ Ibid. Through a vote of no-confidence.

¹⁵¹ Ibid.

¹⁵² Ibid.

- c) Greater involvement of parliament and public in the budget process;
- d) Establishing of the Budget office of parliament;
- e) Separation of functions of budget control and expenditure audit,¹⁵³ and
- f) Guaranteeing parliamentary control of government borrowing.

The Commission's recommendation was therefore that the Constitution should establish a parliamentary budget committee to liaise with the National Treasury in the preparation of budget estimates. Additionally, the Constitution ought to set up a parliamentary budget office to provide technical support to the committee and further that the Office of the Controller and Auditor General should be ran by a Budget Controller and an Auditor General appointed with the National Assembly's approval.¹⁵⁴ The Budget Controller would have the function of monitoring the implementation of approved budget according to its approved purpose. On the other hand, the Auditor General would conduct an audit on all accounts of government entities and submit reports to Parliament.¹⁵⁵

The Commission also recommended that the Auditor-General should submit his/her report directly to Parliament with a copy to the Cabinet Secretary, National Treasury. Parliament should then deliberate and make resolutions on the reports.¹⁵⁶

This overview of the constitutional reform agenda provides an insight on the problems that prompted the review process and the recommendations that were geared towards curing of these problems. These recommendations also provide a basis of understanding the intentions of the

¹⁵³ Under the old Constitutional dispensation, the functions were combined under the office of the Controller and Auditor General

¹⁵⁴ *Constitution of Kenya Review Commission (CKRC)* (n 88) 193.

¹⁵⁵ *Ibid.*

¹⁵⁶ *ibid.* Noting that time was of essence in the verification and audit process, The Committee recommended that parliament debates the report within six months of receipt and should not go on recess before debating the report and if it was on recess by the time the Auditor-General's report is submitted it should be recalled immediately to discuss it.

drafters of what, in some respects, eventually became Constitution of Kenya, 2010. It should also be noted that on public finance, the provisions in the Constitution of Kenya 2010 are substantially the same as those in the Bomas Draft, which were adopted without any changes by the Committee of Experts, 2008. The principles and framework of fiscal oversight in the Constitution of Kenya, 2010 shall be discussed below.

2.2.1 Constitution of Kenya, 2010

The Constitution provides for national values and principles of governance which bind all state organs, state officers and public officers. They include rule of law, democracy, good governance, integrity, transparency and accountability.¹⁵⁷ Further, in establishing parliament, the Constitution bestows upon it legislative authority.¹⁵⁸ Additionally, the National Assembly is assigned the role of allocating funds to government entities, appropriating the funds for expenditure by the national government and other state organs and exercising oversight over national revenue expenditure.¹⁵⁹ While performing its functions, parliament and its committees are granted powers, privileges and immunities for effective discharge of its mandate such as powers to establish committees and make standing orders for the conduct of its proceedings.¹⁶⁰ The Constitution also grants parliament and its committees the power to summon any person to appear before it for purposes of giving evidence or providing information.¹⁶¹ Parliament has the powers to enforce attendance and examine witnesses and to force the production of documentary evidence.¹⁶²

¹⁵⁷ Constitution of Kenya 2010, Art 10.

¹⁵⁸ *ibid* Art 94(1)(4).

¹⁵⁹ *ibid* Art 95(4)(5).

¹⁶⁰ *ibid* Art 117(2) ;124(1). This in essence entrenches the principles of Parliamentary independence which allows both houses (national assembly and senate) to conduct its business effectively and without fear of consequences.

¹⁶¹ *ibid* Art 125(1).

¹⁶² *ibid* Art 125(2). This power is similar to that held by the High Court.

The Constitution, 2010 also lays down the principles in relation to public finance. The principles include openness and accountability. It sets out the various sources of national revenue and the integral role of the National Assembly in authorizing the imposition of taxes, incurring of public debt and the preparation and appropriation of the annual national budget.¹⁶³ In the control of public money, the Constitution mandates parliament to enact statute for the proper keeping of financial records and accounts and audit of the same and to designate accounting officers. The provision expressly makes the designated accounting officers of any national public office financially accountable to the National Assembly.¹⁶⁴

The Constitution also establishes the offices of the Controller of budget and the Auditor General who are appointed by the President with the approval of the National Assembly. The Controller of budgets is tasked to supervise budget implementation and submit quarterly reports on the same to Parliament.¹⁶⁵ The Auditor General conducts audit of all accounts of the national and county government to confirm lawful and effective utilization of public money and submits a report Parliament within six months of the end of the financial year.¹⁶⁶

An analysis of these constitutional provisions leads to a conclusion that the overarching principles of accountability and parliamentary oversight have been achieved on paper.

2.3. Legislative Framework

In order to operationalize the new public finance architecture provided by the Constitution, 2010 several enabling statutes have been enacted for the purpose of enhancing fiscal oversight. They include:

- a) Public Finance Management Act, 2012

¹⁶³ Constitution of Kenya 2010, Chapter 12.

¹⁶⁴ Ibid Art 226.

¹⁶⁵ Ibid Art 228.

¹⁶⁶ Ibid Art 229.

- b) Public Procurement & Asset Disposal Act, 2015
- c) Controller of Budget Act, 2016
- d) Public Audit Act, 2015
- e) Parliamentary (Powers & Privileges) Act, 2017
- f) National Assembly Standing Orders

2.3.1. Public Finance Management Act, 2012

The Act provides for the effective management of matters public finance, the oversight role of parliament and county assemblies and defines the responsibilities of various government entities in ensuring prudent public financial management.

The Act defines the responsibility of the National Assembly budget committee in public finance matters which includes discussing and reviewing the budget policy statement and budget estimates.¹⁶⁷ It also retains the office of the Parliamentary Budget Office¹⁶⁸ which is tasked to provide technical support to Parliamentary committees on budgeting, finance and economics.¹⁶⁹

The Act also establishes the National Treasury¹⁷⁰ which is mandated with, inter alia, the administration of the consolidated fund, equalization fund and contingency fund all approved by Parliament,¹⁷¹ the designing and prescription of an efficient financial management system which ensures transparent financial management and standard financial reporting,¹⁷² the promotion of

¹⁶⁷ Public Finance Management Act 2012, s 7.

¹⁶⁸The Parliamentary Budget Office in Kenya came into existence in the year 2007 as a unit under the Directorate of Information and Research services following a resolution of Parliament. The office later got legal backing when parliament enacted the Fiscal Management Act 2009 (FMA). The Act established the Parliamentary Budget Office in Kenya as an office in the Parliamentary Service Commission. The office then rose to become to a directorate in 2010 before the enactment of the Public Finance Management Act, 2012 which retained it as an office under Parliamentary Service with a more comprehensive role.

¹⁶⁹ Public Finance Management Act 2012, s. 9; 10.

¹⁷⁰ Ibid s 11.

¹⁷¹ Ibid s 17-22.

¹⁷² Ibid s 12(1)(e).

transparency and effective management of accountability in all levels of government¹⁷³ and ensuring the promotion of efficient and effective use of the budget through proper accounting and audit systems.¹⁷⁴ The National Treasury is also mandated to submit annual revenue estimates, prepare and submit national government's proposed budget, compile and submit national government entities' quarterly reports and financial statements,¹⁷⁵ submit quarterly reports on loans made to the National government and its entities with details on the terms and conditions of the loan and the purpose and perceived benefits of the loan to the Parliament,¹⁷⁶ submit to parliament reports and statements of any monies paid into the consolidated fund and to submit any other report as may be requested by Parliament.¹⁷⁷

The National Treasury also has the powers to restrict or suspend expenditure of any government national government entity where the Cabinet Secretary, National Treasury becomes aware of financial problems within a national government entity. These problems include where the Controller of Budget has raised material issues, the Auditor General has given a qualified opinion, issued a disclaimer, has identified serious financial impropriety, where state organs have failed to honor pending bills and outstanding financial obligations or have failed to comply with statutory timelines on submission of annual financial statements to the respective offices.¹⁷⁸ In stoppage of fund, the Cabinet Secretary is required to inform the Controller of budget on the date from when the stoppage is to be effected and the reasons for the stoppage. Additionally, the Cabinet Secretary must within seven days of the decision, seek the approval of Parliament. The Controller of Budget is then required to investigate the matter and submit a report to Parliament on this decision.

¹⁷³ Ibid s 12(2) (a).

¹⁷⁴ Ibid s 12(2) (b).

¹⁷⁵ Ibid s 12 (2) (d-f).

¹⁷⁶ Ibid s 31.

¹⁷⁷ Ibid s 34.

¹⁷⁸ Ibid s 93; 94. More specifically, this power can be exercised where an entity has delayed for more than sixty days in submitting its annual financial statements to the Auditor General.

Parliament will then either approve or renew the Cabinet Secretary's decision within thirty days of Controller's report.¹⁷⁹

The Act further outlines the national government budget process, the timelines for submission and approvals and the role of the National Assembly in the process including the powers and limits of amendment.¹⁸⁰ The Act also stipulates the amendments powers of the National Assembly with regard to the tabled estimates.¹⁸¹

The Act also sets out the responsibilities of accounting offices and the quarterly and annual financial reporting mechanisms of public entities to the National treasury, Controller of Budget and Office of the Auditor General.¹⁸² The Act has sufficiently enumerated the roles and the links between the executive and parliament in national revenue administration.

Lastly, Section 205(1) of the Public Finance Management Act, 2012 provides that the Cabinet Secretary in charge of finance is mandated to make regulations in tandem with the Act. To this end, over twenty six regulations have come into force in the exercise of this mandate including the Public Finance Management (National Government) Regulations, 2015, Public Finance Management (County Government) Regulations, 2015, Public Finance National Government Affirmative Action Fund Regulations 2016, Public Finance (Tourism Promotion Fund) Regulations, 2019 amongst others. This study will however only focus on the Public Finance

¹⁷⁹ Ibid s 97.

¹⁸⁰ Chapter VII of the Independence Constitution provided for preparation of revenue and expenditure estimates of the government by Ministry of Finance and tabling of the same together with the Appropriation Bill to parliament for approval. Unlike the current constitution, it did not provide for timelines for tabling of the estimates to parliament (practice was that the tabling would be done in mid-June before the start of the next financial year). The timelines under the Constitution of Kenya, 2010 and the Public Finance Act, 2012 seem to be too short a period for proper scrutiny of the tabled documents.

¹⁸¹ Public Finance Management Act 2012, s 39. The House can amend the budget estimates as stipulated by the Division of Revenue Act.

¹⁸² Ibid Part III.

Management (National Government) Regulations, 2015 which sets out rules and procedures governing national government budget processes and execution.

2.3.3.1. Public Finance Management (National Government) Regulations, 2015

The Public Finance Management (National Government) Regulations, 2015 has as its objective among others ensuring accountability, transparency and the effective collection and use of public resources. The regulations set out detailed provisions on budget preparation, budget execution including issues relating to release of fund for expenditure, budget variation and reallocations and monthly reporting obligations of accounting officers, management of revenue, grants and donations, accounting and reporting and asset management.

2.3.2. Public Procurement & Asset Disposal Act, 2015¹⁸³

Noting the new constitutional dispensation, Parliament enacted the Public Procurement & Asset Disposal Act, 2015 to give effect to Article 227 of the Constitution of Kenya, 2010 which provides that when public entities contract for goods and services, they shall ensure the system that is fair, equitable, transparent, competitive and cost-efficient. The Act outlines the processes of procurement, the responsibilities of the accounting officers of public entities and penalties and offences on matters procurement. The guiding principles on public procurement include the constitutional national values and principles and the principles of public finance.¹⁸⁴

It should be noted that prior to commencement¹⁸⁵ of this Act, the Public Procurement & Disposal Act, 2005(repealed) was in force. Unlike the new Act, this Act did not link procurement and disposal activities conducted by National entities to the National Assembly. For example, while it established the Public Procurement and Oversight Authority with the mandate of monitoring the

¹⁸³Public Procurement & Asset Disposal Act, 2015.

¹⁸⁴ Ibid s 3.

¹⁸⁵ The Act commenced on 7th January, 2016.

public procurement system, the Authority was only required to submit reports to the Cabinet Secretary in charge of Finance for improvement of the process.¹⁸⁶

However, the current Act outlines the functions of the National Treasury, the Public Procurement Regulatory Authority and the link with the National Assembly in procurement matters.¹⁸⁷ The Public Procurement Regulatory Authority established under the Act monitors, assesses and review the public procurement and asset disposal system to ensure that they respect the national values and provisions of the Constitution of Kenya, 2010, report on the overall functioning of the system to the Cabinet Secretary in charge of Finance.¹⁸⁸ The Authority is further mandated to inform the Cabinet Secretary for finance, Parliament, and the Auditor General on failure by public entities to comply with the Procurement laws and the Authority's directives.¹⁸⁹ The Board of the Authority is also required to prepare and furnish the Cabinet Secretary, National Treasury with reports of its activities on quarterly and annual basis. The Cabinet Secretary is then required to table the report to Parliament and the relevant county assembly in thirty days of the receipt.¹⁹⁰

2.3.3. Controller of Budget Act, 2016

The Act was enacted to give effect to the provision of Article 225, 228 and 245 of the Constitution of Kenya, 2010. The Act sets out the appointment procedure for the office of the Controller of Budget reiterating the role of parliament in approving the appointments.¹⁹¹ Prior to commencement in of this Act,¹⁹² the operationalization and appointments procedures to this office were set out in

¹⁸⁶ Public Procurement and Disposal Act, 2005.s 8;9.

¹⁸⁷ Public Procurement & Asset Disposal Act, 2015 s 7, 8, 26.

¹⁸⁸ Ibid s 8 ; 9. The Authority is also mandated to investigate procurement complaints otherwise not subjected to the Public Procurement Administrative Review Board.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid s 26. These reports also cover matters relating Article 227(2) of the Constitution of Kenya, 2010.

¹⁹¹ Controller of Budget Act 2016, s. 4.

¹⁹² The Controller of Budget Act, 2016 took effect on 21st September 2016. The Independent Officer (appointment) Act was therefore in force during the tenure of the 11th Parliament between 2013 and the most part of 2016. Kenya's first Controller of Budget serving under the Constitution of Kenya, 2010 was appointed under this Act in 2011.

the Independent Officers(Appointment)Act (repealed).¹⁹³ While the repealed Act also guaranteed the independence of the said offices,¹⁹⁴ it did not set out the procedures for the conduct of the operations of the office of the Controller of Budget which was a major short coming.

Under the Controller of Budget Act, 2016, the functions of the office include approving withdrawals from the various funds, monitoring implementation of budget and recommending improvement areas and enforcing budget ceilings set by Parliament.¹⁹⁵

The Act mandates the Controller to furnish quarterly reports on the implementation of the budget by the government entities to Parliament. The reports include information on the approved budget, total funds released, absorption capacity of funds by projects, approved expenditures, authorized withdrawals, actual releases and expenditure and receipts into the consolidated fund.¹⁹⁶ The Controller has the duty to also submit special reports to Parliament on funds withheld by the National Treasury detailing reasons for withholding and recommendations or on any issue requested by the National Assembly.¹⁹⁷

2.3.4. Public Audit Act, 2015

The Act was enacted to provide for the function of the office of the Auditor General in accordance with the Constitution of Kenya, 2010. It establishes the office of the Auditor General with the function of auditing government entities to confirm compliance with the law, intent and efficiency.¹⁹⁸ Similarly, the set up and functions of this office were governed by the Public Audit

¹⁹³ Independent Officers (Appointment) Act, 2011(repealed).

¹⁹⁴The Independent Officer (Appointment) Act prescribed the appointment process and qualifications for the Controller of budget and the Auditor General reinforcing the National Assembly's role in appointment as provided in the Constitution.

¹⁹⁵ Controller of Budget Act, 2016 s. 5.

¹⁹⁶ Ibid s 9.

¹⁹⁷ Ibid s 10.

¹⁹⁸ Public Audit Act 2015, s 6.

Act, 2003(repealed)¹⁹⁹ and the Independent Officers(Appointment) Act, (repealed).²⁰⁰ Public Audit Act, 2003 (repealed) provided the legal framework for the conduct of the audit function of the Auditor General for the years 2013 to 2015 under the tenure of the 11th Parliament. It prescribed the functions of the audit office particularly in relation to auditing of submitted accounts from government entities and the submission of reports to the National Treasury who then submitted the same to the National assembly seven days after its first session. This Act tasked the Auditor General to submit the copy of the report to the speaker of the National Assembly should the Cabinet Secretary fail to do so. Some of these provisions were not aligned to the Constitution, 2010 hence the enactment of the Public Audit Act, 2015.

Under the new Act, the office is guided by the constitutional values and principles of public finance. The office has the power to conduct investigations on its own initiative or on the basis of complaint made by a third party, to issue witness summons during investigations, to access all books, record returns, reports of public entities, examine bank accounts and to determine the scope and extent of audit.²⁰¹ The Act further guarantees the independence of the office and restates the appointment procedures of the holder of the office.

The Act prescribes the various audit conducted by the office. Aside from the annual audit of accounts, the office is empowered to carry out performance audits to investigate the economic impact of a particular project, forensic audit upon the request of parliament to establish fraud, corruption or other financial improprieties and procurement audit to examine whether the procurements conducted by public entities were lawful and effective.²⁰² All these reports in relation

¹⁹⁹ Public Audit Act, 2003(repealed). This Act was in force from 2003 with amendments until 7th January, 2016 when it was repealed by the Public Audit Act, 2015.

²⁰⁰ Independent Officers (Appointment) Act, 2011(repealed). The appointment process of the Auditor General under this Act was similar to that of the Controller of budgets. This office was equally independent. Kenya's first Auditor General under the Constitution of Kenya, 2010 was appointed according to this Act in September, 2011.

²⁰¹ Public Audit Act 2015, s 9.

²⁰² Ibid s 35;39.

to national government entities are submitted directly to the National assembly and publicized within fourteen days of submission to parliament.

The Act further stipulates statutory timelines for the Auditor General's report.²⁰³ It also gives the Auditor General the leeway to submit special reports in cases which he or she believes warrants the immediate action of parliament.²⁰⁴ Subsequently, Parliament is expected to deliberate the final audit report within three months of receipt. Accounting officer of the respective state organs are required to take relevant steps to implement the recommendations of parliament or explain failure to action the recommendations.²⁰⁵ The Act gives parliament the power to hold the Accounting officers in contempt should they fail to comply with their recommendations.²⁰⁶ In cases of serious material breaches, the Auditor General has been granted the power to recommend withholding of funds to the public entity for Parliaments approval²⁰⁷ and report any fraud or corrupt practices to the police, the Ethics and Anti-corruption Commission and the Public Procurement Oversight Authority for their further action.²⁰⁸

2.3.5. Parliamentary Powers & Privileges Act, 2017²⁰⁹

As discussed, the Constitution of Kenya, 2010 in guaranteeing parliamentary independence obligates parliament to provide for powers, privileges and immunities for its members and its Committee for effective discharge of its business.²¹⁰ To this end, the Parliamentary Powers & Privileges Act fulfils this provision of the Constitution. Prior to enactment of this act, the powers, privileges and immunities of the members of parliament were set out under the National Assembly

²⁰³ Ibid s 47.

²⁰⁴ Ibid s 49.

²⁰⁵ Ibid s 53.

²⁰⁶ Ibid.

²⁰⁷ Ibid. s 54.

²⁰⁸ Ibid s 64.

²⁰⁹ The Act came into force on 16th August, 2017.

²¹⁰ Constitution of Kenya 2010, Art. 117.

(Powers & Privileges) Act, Cap 6(repealed).²¹¹ It was in force during the tenure of the 11th parliament until it's repeal in 2017.

The Powers and Privileges Act grants parliament and its committees the power to summon any person to appear before it and to give evidence or produce any documentation. Parliament and its committees may also examine witnesses on oath.²¹² The Act further provided for objections to answer questions or produce any documentation and privileges of witnesses before the Parliament or any of its committees.²¹³ It should be noted that, under this Act, public officers are duty bound to produce documents and give evidence to parliament failure to which the House may pass a resolution constituting the grounds for removal from office of the public officer.²¹⁴ This provision is unlike the old regime where public officers required the consent of President prior to attending the National Assembly to give evidence or produce requested documents.²¹⁵ The Act further creates offences in relation to false evidence, disobedience of orders to attend or produce evidence, refusal to be examined before Parliament or its committees, offering of bribes, fee, gifts or rewards in order to influence any member or officer of Parliament or its committee.²¹⁶

2.3.6. National Assembly Standing Orders²¹⁷

It is acknowledged that the foundational concepts of parliamentary oversight such as a democratically elected parliament, supremacy of the law and checks and balances are usually laid

²¹¹ National Assembly (Powers & Privileges) Act, 2012(repealed).

²¹² Parliamentary Powers & Privileges Act 2017, s16 ;18.

²¹³ Ibid s 20.

²¹⁴ Ibid s 23.

²¹⁵ National Assembly (Powers & Privileges) Act, 2012(repealed) s 18.

²¹⁶ Parliamentary Powers & Privileges Act, 2017 s 27; 28.

²¹⁷ National Assembly Standing Orders (4th Edition 2013) was adopted by the National Assembly on 9th January, 2013 (in the 4th Session of the 10th Parliament). It was amended on 15th June, 2017(in the 5th Session of the 11th Parliament). Subsequent amendments were made on 7th December, 2017 (in the 1st Session of the 12th Parliament) and 23rd August, 2018 (in the 2nd Session of the 12th Parliament).

down in the constitutional texts. However, it is the parliamentary rules of procedure that most commonly provide a more detailed framework for oversight activities.

The National Assembly standing orders provide for the procedures of the conduct of the business of the house, presentation of motions and questions, debates, the establishment of the standing committees of the house, appointment and removal of chairpersons and the members of the standing committees.

The Standing orders establish the National Assembly's Public Accounts Committee with the responsibility of examining the accounts of utilization of the sum voted by the House to meet the public expenditure and other accounts laid before the House and referred to the Committee from time to time.²¹⁸ The Standing orders provide that the membership of the committee includes a Chairperson and twenty-six other members. The Committee serves three calendar years after the general election where after it is reconstituted for the remaining term of parliament.²¹⁹

In relation to removal from the committee, a member, the Chairperson and the Vice-Chairperson may be removed from the committee through discharge by a political party to which a member belongs,²²⁰ by replacement by the Committee on selection upon failure to attend at least four meetings consecutively without written permission,²²¹ or by a vote of no-confidence on the Chairperson or vice-chairperson by a majority of members.²²²

The Standing orders also establish the National Assembly's Budgets and Appropriation Committee whose membership consists of a Chairperson and twenty-six other members. The

²¹⁸ Ibid Order No. 205.

²¹⁹ Ibid. This provision was amended in the current parliament. It currently provides that the membership of the committee should include a Chairperson and 18 other members with the majority of the membership drawn from opposition parties. The PAC tenure currently runs throughout the full term of the Parliament (5 years).

²²⁰ Ibid No. 176. This practice is commonly referred to as de-whipping and has been more often than not used to enforce party interests. Member is usually supposed to be given an opportunity to be heard through a notice to the Speaker before removal is done.

²²¹ Ibid No. 187.

²²² Ibid No. 193.

Committee is expected to conduct inquiry into national budget matters, deliberate and recommend budget estimates to the whole House and scrutinize policy statements on the budget and the respective bills.²²³

The committee serves for three calendar years following the general elections where after it is reconstituted.²²⁴ Additionally, the standing orders set out the procedures and timelines for tabling and debates of the policy statements on the budget, strategy for management of national debt²²⁵ and the presentation of the Appropriation Bill.²²⁶ The Standing Orders also prescribe the procedure for presentation and deliberations on the supplementary budgets and the Finance Bill.

In addition to these two important committees, the Standing Orders establish departmental committees assigned to the various government ministries and departments. These committees investigate, inquire and reports in matters concerning the mandate, management, activities, administration and operations of the assigned ministries and departments.²²⁷ This role should be viewed as complementary to that of the Budget & Appropriations Committee and Public Accounts Committee.

2.4. International Instruments

Article 2 (6) of The Constitution of Kenya, 2010 stipulates that any treaty or convention ratified by Kenya forms part of the laws of Kenya. It therefore becomes necessary to establish some international instruments that enumerate the principle and exercise of parliamentary fiscal oversight. It should be noted that there are no international laws on parliamentary fiscal oversight.

²²³ Ibid Order No. 207.

²²⁴ Ibid Order No. 207. The Reconstituted committee serves for the remaining term of parliament.

²²⁵ Ibid Order No. 232.

²²⁶ Ibid Order No. 240B. The National Assembly while considering the bill is restricted to the recommendations of the Budget and Appropriations Committee in respect of any amendment to the bill.

²²⁷ Ibid Order No. 216.

However, there are international associations that recognize this role of parliament and some which prescribe guidelines for exercise of the same.

A major international instrument that speaks as to the role of parliamentary fiscal oversight is the Commonwealth (Latimer) House Principles on the Three Branches of Government adopted in 2003.²²⁸ The objectives of the Latimer principles were to mandate parliament to develop parliamentary procedure that provide for sufficient mechanisms to hold the executive to account and to prescribe the steps for encouraging accountability within the public sector. These steps entail the setting up of oversight institutions and mechanism such as the PAC and the Auditors-General.²²⁹

The Latimer principles state that Parliamentary procedures should provide sufficient means of upholding and enforcing executive accountability to parliament.²³⁰ These should include:

- a) Adoption of committee structure proportionate to parliament, well-resourced and with the ability to call witnesses. The executive should also be expected to publish their responses to committee reports and recommendations within a definite period;
- b) Provision of sufficient time to parliamentarians to question ministers and deliberate statutory proposals through the standing orders;
- c) Independent audit of Public accounts by the Auditor General who has a direct reporting line to parliament; and
- d) Chairmanship of the PAC should be drawn from the opposition party.

²²⁸Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003. Kenya was part of the development process and eventual adoption on 1st December, 2003

²²⁹ Ibid.

²³⁰ Ibid. Principle VI.

Regionally, the Africa Union Convention on Preventing and Combating Corruption²³¹ was implemented due to raising concerns on effects of corruption on the stability of African States.²³² The convention requires signatory states to implement a statutory framework that sets up and reinforces accounting, auditing and follow up in relation to public finance and procurement.²³³ These instruments are more of a guiding framework on best practices rather than law. A cursory glance at the Kenya's constitutional and legal framework reveals that the provisions of these instruments have been put in place in as far as it relates to provision of adequate mechanism of enforcing executive accountability to parliament.

2.5. Judicial Jurisprudence

The Constitution of Kenya, 2010 mandates the Judiciary to interpret the provisions of the Constitution in line with the its purposes and principles.²³⁴ Additionally, judicial precedents being a common law principle form part of the Kenyan legal framework.²³⁵ This section therefore discusses some judicial decisions during the period under review which restated the importance, purpose and practice of parliamentary fiscal oversight under the Constitution of Kenya, 2010.

2.5.1. Judicial Service Commission -vs- Speaker of the National Assembly & 8 Others²³⁶

Although the matter was in essence a deliberation on the independence of constitutional commissions, the issue of meaning and scope of parliamentary oversight was determined. The Petitioner (Judicial Service Commission) had taken disciplinary action against the then Chief Registrar of the Judiciary. During its deliberations, the Petitioner resolved to send the Chief

²³¹ African Union Convention on Preventing and Combating Corruption 2003. The convention was adopted on 11th July, 2003 in Mozambique and was ratified in Kenya in 2007.

²³² Ibid. Preamble.

²³³ Ibid. Article 5.

²³⁴ Constitution of Kenya 2010, Art. 159 ;165(3).

²³⁵ Judicature Act ,1967, s 3.

²³⁶ Judicial Service Commission -vs- Speaker of the National Assembly & 8 others [2014] eKLR (High Court Constitutional & Human Rights Division).

Registrar on compulsory leave as it conducted further investigations. Following this decision, the Committee on Justice and Legal Affairs of the National Assembly summoned the Petitioner for a meeting to discuss the circumstance of the resolution and the overall state of the Judiciary. Subsequently the Committee requested for the Judiciary's Annual Financial Reports and Statements for the Financial Year 2011/12. The Clerk of the National Assembly forwarded a Petition submitted to the House seeking removal of six JSC Commissioners(the Petitioner). These resulted to the filing of this Petition.

When deliberating the scope of parliamentary oversight, the Court stated that Constitution assigned the oversight role over budget and the expenditure thereof of public entities to Parliament. The Court stated that the extent to which Parliament can ensure that the government is accountable to the people was the true test of democracy.

In making its determination, the Court relied on a South African Report on Parliamentary Oversight and Accountability²³⁷ in distinguishing between accountability and oversight. The report defined accountability to mean 'to give an account' of actions or policies, or 'to account for' spending and so forth. The Court concluded that oversight function runs parallel with the responsibility to account. The Court also stated that the Constitution demanded accountability from those in charge of managing public affairs.

Further, the report underscores the importance of oversight as a constitutional principle stating that;

Oversight is the function of the legislature which flows from the separation of powers and the concept of responsible government, like law-making, which entails certain powers.

²³⁷ Hugh Corder, Saras Jagwanth and Fred Soltau, 'Report on Parliamentary Oversight and Accountability' (University of Capetown, Faculty of Law 1999) <<https://gsdrc.org/document-library/report-on-parliamentary-oversight-and-accountability/>> accessed 8 July 2020.

Foremost among these is the power to hold the executive accountable. Monitoring the implementation of laws goes to the heart of the oversight tool....the legislature is in this way able to keep control over the law it passes and to promote constitutional values of accountability and good governance. Thus oversight must be seen as one of the central tenets of democracy...accountability is also designed to encourage open government. It serves the function of enhancing public confidence in government.

It was the court's analysis that legislative oversight is integral for the realization of the rule of law and must therefore be exercised within set legal limits. Usually, Parliament exercises the mandate through its standing committees. Further, under the Public Financial Management Act, 2012, Parliament through the Budget & Appropriation Committee is mandated to check adherence by the government to the principles of public finance. The duties of Budget and Appropriation Committee include to investigate, inquire into and report on matters related to coordination, control and monitoring of implementation of the national budget.

Further, independent commissions such as the Judicial Service Commission (JSC) are constitutionally obligated to submit annual reports and financial statement to Parliament. The Court therefore concluded that the JSC is subject to Parliamentary oversight. The Court emphasized that while the JSC enjoys autonomy (financially and administratively), it still accounts to Parliament.

2.5.2. Okiya Omtatah Okiiti & 2 others -vs- Attorney General & 3 Others²³⁸

In this case, the Petitioners filed a Petition on the legality of the construction of the Standard Gauge Railway (SGR). The 2nd Petitioners' case was that the 2nd Respondent, by single-sourcing the 4th

²³⁸Okiya Omtatah Okiiti & 2 others -vs- Attorney General & 3 others [2014] eKLR (High Court Constitutional & Human Rights Division).

Respondent and violated procurement laws which obligated the Government to use open tender method in majority of procurement of goods and services.

Further, the Petitioners submitted that the Respondents failed to seek approval from Parliament on the project during the budget process contrary to the Public Finance Management Act, 2012. Additionally, the Petitioners argued that the Respondents further failed to seek approval of Parliament before borrowing funds for the project. The 3rd Petitioner also contested the procurement process alleging violations of the procurement laws and further that the Respondents failed to ensure that there was value for money in the process.

The Court ruled that Parliament authorized the project through approval of the Finance Bill, 2013 which introduced a railway development levy as the source of funding for the project. This therefore meant that Parliament was fully involved in the approval process of the relevant budget used to fund the project as required by law. The Court dismissed the Petition.

2.5.3. Commission for the Implementation of the Constitution -vs- Speaker of the National Assembly²³⁹

The Commission for the Implementation of the Constitution filed a constitutional petition challenging the constitutionality of the National Assembly's Standing Order No 66. The Petitioner asserted that the Standing Order offended the Constitution with regard to fair trial rights of a Cabinet Secretary who faces an impeachment motion in the National Assembly. The particular standing order set out the procedure for removal or impeachment of cabinet secretary and was as a result of the National Assembly's Constitutional power to recommend to the President the

²³⁹ Commission for the Implementation of the Constitution -vs- Speaker of the National Assembly [2016] eKLR (High Court Constitutional & Human Rights Division).

removal of a Cabinet Secretary on account of serious violation of the Constitution or statute, commission of serious national or international crime or gross misconduct.²⁴⁰

The Court opined that under Article 153 of the Constitution, Cabinet Secretaries are individually and collectively accountable to the democratically elected Parliament as they are expected to appear before the National Assembly and its committees to answer questions relevant to their respective dockets. Additionally, Cabinet Secretaries are required to provide Parliament with full and regular reports concerning matters under their respective dockets.

The Court also stated that accountability is not limited to financial reporting or the duty to explain how public money has been spent. It also involves a general duty on cabinet secretaries in a constitutional democracy to explain their actions and policies to Parliament. Such latter medium of accountability, in the Court's view, was relevant and necessary to ensure that Parliament's oversight role is actually successfully achieved.

Taking cognizance of the provision in Article 95,²⁴¹ The Court held that the National Assembly not only holds the Cabinet Secretaries, together with the Executive, politically accountable but also supervises and exercises internal control over them. According to the Court, the National Assembly acts as a "check" but without governing or taking over the Executives role and functions. The Court reiterated therefore that there was no doubt that the function of the National Assembly is to call the executive organs to account.

The Court, in dismissing the petition stated that the challenged Standing Order was a replica of Article 152 (6) to (10) of the Constitution in that the National Assembly added nothing new save for the requirement that the motion be made formally in writing and be first delivered to the Clerk

²⁴⁰ Constitution of Kenya 2010, Art 152 (6); (7)

²⁴¹ The National Assembly reviews the conduct of the President, Deputy President, and other State Officers and initiates the process of removing them from office and it further exercises oversight over state organs.

of the National assembly with the endorsement of both the mover and the members of parliament in support. Consequently, the provisions envisaged the core ingredients of fair hearing. The Constitution also has inbuilt mechanisms to ensure impartiality and independence in decision making by requiring majority vote in a resolution to remove a Cabinet Secretary. The same remains true even when a standing committee proposes the removal.

In closing, the Court pointed out that the constitutional spirit elevates the importance of public service accountability.

2.5.4 Council of Governors & 6 Others -vs- Senate²⁴²

This Petition challenged the constitutionality of summons issued by the Public Accounts and Investment Committee of the Senate to County Governors to provide information as regards issues highlighted in the Report of the Auditor General for the financial year 2012/2013. The matter arose when the Senate passed a resolution barring the Controller of Budget from authorizing withdrawal of funds by the Governors of the concerned counties pending sufficient response to the audit queries raised after failure by the concerned Governors to honor the summons. This power was exercised under Article 228(4) and (5) of the Constitution of Kenya.

The Petitioners therefore questioned the constitutionality of the Senate summons and the constitutional power and authority of the Senate to pass a resolution directing the Controller of Budget to withhold public funds until satisfactory answers are provided by the Petitioners to the audit queries. According to the Petitioners, the summons contravened Article 226(2) of the Constitution which provides that in terms of management of their finances, counties are accountable to the County Assembly. The Petitioners claimed that in summoning the County

²⁴² Council of Governors & 6 others -vs- Senate [2015] eKLR (High Court Constitutional & Human Rights Division).

Governors, the Senate usurped the roles of County Assemblies and in any event that County Governors are not the Accounting Officers of the County and cannot answer any audit queries.

The Respondent submitted that **Article 125** of the **Constitution** clothes Parliament with the Constitutional power and authority to call any person to appear before it and provide information or give evidence and further that a Governor by disregarding summons would be committing a criminal offence under **Section 13(a)** of the **Privileges Act**. The Respondent also argued that Parliament has powers to enforce the attendance and examination of witnesses on oath and to compel production of documents and that the power to summon any person for the above purpose is not restricted, qualified or conditioned similar to that of the High Court.

The Court identified the issues arising *inter alia* as whether the Senate (read parliament) has the power to issue summons to Governors to respond to queries arising from the Auditor General's reports in regard to the 2012/2013 financial year and whether the resolution by the Senate directing the withholding of funds by National Treasury and the Controller of Budget of the respective Counties was/is constitutional.

The Court then deliberated on the meaning of oversight powers of the Senate over national revenue in relation to counties. The Court adopted the English meaning of the word "oversight" as "the action of overseeing". "Oversee" is then defined as, "supervise" or "look at from above". Therefore, in the context of Article 96(3) of the Constitution, the Court concluded that oversight was a function of the Senate.

According to the Court, the Senate performs procedural oversight through participating in the deliberation and approval of division and sharing of national revenue. The Senate then conducts substantive oversight through calling for explanations on expenditure allocated to the respective counties and ensuring that the same is utilized according to the law through receiving and deliberating the reports of the Auditor General. The Court also concluded that there are other

constitutional organs such as the Controller of Budget and Auditor General which oversee the fiscal and financial management of revenue by the Counties.

From the foregoing, the Constitution has established firm and strong structures to realize the public finance principles as stipulated. The oversight mechanisms put together ensure that there is a proper checks and balances system which ensures accountability and transparency in fiscal matters in County Governments and other public organs.

Relatedly, the Court in determining that the Senate summon of governors was lawful and constitutional relied on the case of *International Legal Consultancy Group vs The Senate and the Clerk of the Senate*.²⁴³ The Judge in this case ruled that the Constitution stipulated transparency and accountability as its core values. Therefore, public officers are obligated to adhere to any mechanism set up to achieve these values. The Judge went on to state that the Court under Article 159 is called upon to interpret the Constitution in a way that adheres to principles of good governance through transparency and accountability. The Court restated the law in terms of the oversight role of parliament and declined to grant injunctive orders against the Senate from summoning the County Governors.

From the foregoing review of judicial cases, it is evident that the concept of parliamentary oversight is directly connected to the principles of transparency, accountability and good governance as envisioned by the Constitution of Kenya, 2010.²⁴⁴ Further the Court, in exercising their mandate to interpret the Constitution of Kenya, 2010, must give credence and interpret it in a manner that upholds its principles.

²⁴³ *International Legal Consultancy Group vs The Senate and the Clerk of the Senate* [2014] eKLR (High Court).

²⁴⁴ *Judicial Service Commission -vs- Speaker of the National Assembly & 8 others* [2014] eKLR (High Court Constitutional & Human Rights Division).

In furthering its Constitutional role of oversight, Parliament exercises both procedural and substantive oversight over revenue expenditure. It does so through approval of budgets to be utilized (procedural) and thereafter monitoring whether the allocated funds have been disbursed as authorized in collaboration with the Office of the Controller of Budgets and evaluating whether said funds have been utilized efficiently through the Office of the Auditor General(substantive).²⁴⁵ Additionally, Parliament has numerous powers bestowed upon it to effectively conduct oversight, including the approval of budgets,²⁴⁶ the independence to determine its own procedures, summon accounting officers to give evidence or clarification in case of audit queries and to make appropriate recommendations including impeachment or removal of the relevant public officer.²⁴⁷ However, it goes without saying that the oversight function should be conducted within the legal confines of the Constitution such as adherence to the principles of natural justice and procedural fairness.²⁴⁸

Nevertheless, it can be conclusively said that the oversight mechanisms and powers of parliament in collaboration with external constitutional independent offices provide a sufficient system of checks and balances to ensure that public entities are held accountable in relation to fiscal matters.

2.6. Conclusion

In this chapter, we have mapped out the constitutional foundations and the legal framework of parliamentary oversight in relation to national revenue expenditure. We have also discussed applicable international and regional treaties that have been adopted by Kenya and reinforce the concept of parliamentary fiscal oversight. Lastly, we have assessed judicial decisions that restate

²⁴⁵ Council of Governors & 6 others -vs- Senate [2015] eKLR (High Court Constitutional & Human Rights Division).

²⁴⁶ Okiya Omtatah Okoiti & 2 others -vs- Attorney General & 3 others [2014] eKLR (High Court Constitutional & Human Rights Division).

²⁴⁷ Commission for the Implementation of the Constitution -vs- Speaker of the National Assembly [2016] eKLR (High Court Constitutional & Human Rights Division).

²⁴⁸ *ibid.*

the parliamentary role of oversight. We note that while the provisions of the Constitution of Kenya, 2010 had reflected the intentions of the reform agenda and put in place a full-bodied framework for parliamentary fiscal oversight, the enabling legislations were not enacted immediately after its promulgation. This in essence means that for the most part of its term, the 11th Parliament and the supporting institutions of oversight were operating under a legal framework that was not aligned to the constitutional provisions.

CHAPTER THREE: THE NATIONAL ASSEMBLY PUBLIC ACCOUNTS COMMITTEE OF THE 11TH PARLIAMENT

3.1. Introduction

In the preceding chapter, we have acknowledged the entrenchment of principle of parliamentary oversight within the Constitution of Kenya, 2010 and the enabling statute. In this chapter, we discuss the actual exercise of oversight by the PAC of the 11th Parliament. This analysis demonstrates the disconnect between the constitutional texts and the implementation thereof. We argue that the committee was largely unsuccessful in the exercise of oversight due to the shortcomings in its constitution and operations and by extension that of the office of the Auditor General as a major supporting institution. We also argue that delay in enactment of enabling statutes that are realigned to the constitutional foundations of oversight greatly affected the exercise of oversight more so in relation to the Public Audit Act, 2015 and Controller of Budget Act, 2016.

3.2. Framework for Analysis of the Public Accounts Committee

A review of existing literature reveals that the successes of the PAC has been examined in two broad frameworks. The first is proposed by Stapenhurst, Pelizzo and Obrien and is broken down into three categories: the level of activity, the level of output and the extent of outcomes.²⁴⁹ The level of activity analyzes the extent to which the committee keeps abreast with the Auditor General's reports and the timelines of delivering outputs. The level of output considers the committee's recommendations and the implementation thereof. Lastly the extent of outcomes studies the impact of the recommendations on operations and policies of government.²⁵⁰

²⁴⁹ David G QC McGee, *The Budget Process: A Parliamentary Imperative* (Pluto Press 2008)164.

²⁵⁰ Ibid.

The second is proposed by Mezey and Olson who argue that there are many attributes defining a committee's ability to impact the policy-making process.²⁵¹ These include:

- a) Whether the committee is permanent or adhoc;
- b) Whether its work cross-cuts the administrative structure or is parallel to it;
- c) Whether the committee has distinct and autonomous jurisdictions;
- d) Whether the Committee is well resourced in term of staff, funds, research facilities, offices and other infrastructure;
- e) Whether the committee has the power to set its own agenda, change legislation and whether it is vested to take evidence and summon witnesses;
- f) Whether its members are independent and are able to make independent choices; and
- g) The Composition of its membership.

While it is acknowledged that these authors discuss parliamentary committees in general and their ability to impact policy, they offer an important device for analyzing the effectiveness of the PAC in relation to the realization of fiscal oversight. We will rely on both frameworks in studying the structure, workings and shortcomings of the PAC of the 11th Parliament.

3.3. Public Accounts Committee of the 11th Parliament

The 11th Parliament took office on 28th March, 2013 after the general elections of 4th March, 2013.²⁵² Thereafter, the National Assembly constituted the PAC during the first session of the 11th Parliament in May, 2013 which was chaired by a member of the then opposition party.²⁵³ A

²⁵¹ David M Olson and Michael L Mezey (eds), '*Legislatures in the Policy Process: The Dilemmas of Economic Policy*' (Cambridge University Press 1991) <<https://www.cambridge.org/core/books/legislatures-in-the-policy-process/19ED3C15048131BA0FE1950717CA4EA6>> accessed 5 May 2021.

²⁵² The 11th Parliament's tenure ran from March 2013 to August, 2017.

²⁵³ The membership of the committee is nominated by the National Assembly's Committee on Selection and approved by the House. The members thereafter elect the Chairperson and the Vice-Chairperson from amongst themselves. Mr. Ababu Namwamba, the Chairperson was a member of the Orange Democratic Movement Part, the main opposition party.

majority of the members including the Vice Chairperson of the committee were drawn from the party forming the government.²⁵⁴ The Committee was later reconstituted in the third session of the National Assembly in April, 2015 replacing five members as had been recommended by the Committee on Powers and Privilege.²⁵⁵ Further, the Committee in its operations stated that it was assisted by a secretariat which consisted of two clerks, a financial analyst, a legal counsel, a research officer, a serjeant at arms and an audio officer.²⁵⁶

In the performance of its mandate, the Committee ought to have been guided²⁵⁷ by the constitutional principles of public finance,²⁵⁸ the direct personal liability of holders of public officers in case of loss of public funds²⁵⁹ and the obligation of accounting officers.²⁶⁰ To this end, it summoned witness, took evidence and interrogated Accounting Officers in relation to the audit issues highlighted by the Auditor General.²⁶¹

A review of the committee's reports reveals that it considered the Auditor General's annual reports of the 2010/2011, 2011/2012, 2012/2013 and 2013/2014 reports. Additionally, the Committee tabled reports of its predecessors in relation to 2008/2009 and 2009/2010. Aside from the annual reports, the National Assembly and the Committee called for special audits during this period including Audit on the Procurement of Electronic Voting Devices for 2013 General Elections,

²⁵⁴ National Assembly Public Accounts Committee, 'Public Accounts Committee Legacy Report for the Eleventh Parliament' (National Assembly 2017). Jubilee Party was the ruling party in the 2013-2017 Government.

²⁵⁵ National Assembly, 'National Assembly Hansard' (22nd April, 2015).

²⁵⁶ National Assembly Public Accounts Committee, 'Report of the Public Accounts Committee on the Government of Kenya Accounts for the Financial Year 2013/2014' (National Assembly 2016).

²⁵⁷ The guiding principles of the Committee is contained in the executive summary of all its report tabled before the house.

²⁵⁸ Constitution of Kenya 2010, Art 201.

²⁵⁹ Ibid Art 226(5).

²⁶⁰ Public Finance Management Act 2012, s 68(1) provides that an accounting officer for a national government entity shall be accountable to the National Assembly for ensuring that resources of the respective entity is used in a lawful and authorized, effective, efficient, economic and transparent way.

²⁶¹ National Assembly Standing Orders (4th Edition 2015) Order No. 205.

Audit on the Accounts of the National Youth Service and Audit on the Hiring of An Aircraft for the Deputy President.²⁶²

During its tenure, the Committee reports entailed numerous recommendations for adoption to the house. These recommendations included conduct of a forensic audit, institution of internal disciplinary proceedings against public officers, surcharging and/or prosecution of public officers it found culpable, further investigations by the anti-corruption agencies, bar from holding future public office in case of a cabinet secretary, lifestyle audits on public officers. For instance, in the special audit on the 2013 General Election, the committee interviewed witnesses and received evidences on the same concluding that several officers were responsible for procurement of substandard voting devices. It also concluded that the irregular procurement process was as a result of internal vested interests amongst the commissioners and staff of the Independent Electoral & Boundaries Commission. The committee therefore recommended lifestyle audits of the commissioners and members of the respective tender committees, recovery of irregularly paid monies from the Chief Executive Officer in office at the time of audit and investigation and eventual prosecution of tender committee members.²⁶³

In the special audit on the accounts of the National Youth Service under the Ministry of Devolution and Planning, the committee concluded that over Kshs. 23 Billion was irregularly paid in respect of illegal procurement of goods and service at the institution. It therefore recommended initiation of investigations by the Ethics and Anti-corruption Commission and Directorate of Criminal Investigation into the irregular payments and the role of the Central Bank of Kenya, the barring of the Cabinet Secretary, Ministry of Devolution & Planning from occupying a public office if found

²⁶² This power is provided for under the National Assembly Standing Order (4th Edition 2015) Order No. 205.

²⁶³ National Assembly Public Accounts Committee, 'Special Report of the Public Accounts Committee on the Procurement of Electronic Voting Devices For 2013 General Elections' (National Assembly 2016).

guilty, lifestyle audit of top officials of the Ministry of Devolution and Planning and the National Youth Service, conduct of a thorough forensic audit on the development budgets of the Ministry and all its agencies for the period 2013-2016 and report the same by 31st December, 2017.²⁶⁴ The Committee also recommended revamping of internal audit functions to make it pro-active and effective.²⁶⁵

The committee claimed that its major challenges included the human resource and financial incapacity of Auditor General, the lack of implementation of its recommendations, the incapacity of its support staff particularly in compilation and preparation of its reports and a majority composition drawn from the ruling party.²⁶⁶ The Committee further cited the National treasury for having weak supervisory controls over accounting officers.²⁶⁷ According to the Committee, this was as a result of:

- a) Unwillingness or failure to convene entry and exit meetings with the Auditor General to facilitate the audit process and ventilate on the provision of information and relevant documentation;
- b) Failure to respond to Management letters issued by the Auditor General in a timely manner;
- c) The tendency of accounting officers to find frivolous excuses to delay and frustrate convening of exit meetings;
- d) Poor and inadequate or unsatisfactory responses to audit queries as raised by the Auditor General;
- e) Unconvincing excuses to avoid appearance before the Committee; and

²⁶⁴ National Assembly Public Accounts Committee, 'Report of the Public Accounts Committee on the Special Audit Report of May, 2016 on the Accounts of the National Youth Service' (National Assembly 2016).

²⁶⁵ *Ibid.*

²⁶⁶ National Assembly Public Accounts Committee, 'Public Accounts Legacy Report' (n 254).

²⁶⁷ National Assembly Public Accounts Committee, 'Report of the Public Accounts Committee on the Government of Kenya Accounts 2013/2014' (n 256).

- f) Failure to act on the recommendations of the committee.

The Committee also alleged attempts to interfere or discredit the workings of the Auditor General. This allegation arose from paid up advertisement ran by the National Treasury and the Ministry of Health in both tv and print media condemning the Auditor General's report as malicious.²⁶⁸ Additionally, the Committee accused accounting officers of deliberately providing incomplete or unsatisfactory and misleading response to audit queries and incessantly requesting for rescheduling of appearance before the committee.²⁶⁹

The Committee also cited delay in tabling of its reports as a major challenge.²⁷⁰ Lastly, the committee also expressed its concerns regarding the persistent lack of implementation of its recommendations by the executive.²⁷¹ In a bid to resolve this challenge, the Committee in collaboration with the Public Investment Committee held a round table discussion with the 'Big 9' comprising of the Speaker of the National Assembly, Chairs of the Public Accounts Committee, Pubic Investment Committee and Budget and Appropriations Committee, the Chief Justice, the Cabinet Secretary National Treasury, the Director of Public Prosecution, the Auditor General, the Controller of Budget, the Attorney General and the Head of Public Service.²⁷² According to its report, the main purpose of the meeting was to discuss the overall challenges encountered by the oversight committees in the exercise of their mandate. The meeting resolved the following:

- a) All agencies implementing resolutions of Parliament including the Director of Public Prosecution, Ethics and Anti-corruption Commission and the Attorney General should report to Parliament every six months on the status of implementation;

²⁶⁸ Ibid. Subsequent investigations by the committee into the matter revealed improper use of funds amounting to Kshs. 4 Billion at the Ministry of Health.

²⁶⁹ *National Assembly Public Accounts Committee*, 'Public Accounts Legacy Report' (n 254).

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² *National Assembly Public Accounts Committee*, 'Report of the Public Accounts Committee on the Government of Kenya Accounts 2013/2014' (n 256).

- b) There will be regular meetings between the Controller of Budgets and Departmental Committees of the National Assembly on the Controller of Budget reports on budget implementation status;
- c) The National Treasury will give an annual memorandum on implementation of the recommendations of Public Accounts Committee and Public Investment Committee;
- d) Accounting officers should strictly adhere to audit timelines including issuance of timely responses to management letters of the Auditor General. Consequently, responses issued after management letters shall not be considered by the oversight committees; and
- e) The Directorate of Criminal Investigations and the Director of Public Prosecutions will second officers to the oversight committees to facilitate timely investigations and subsequent prosecutions where culpability is apparent on the Accounting Officers or witnesses.²⁷³

3.4. Analysis of the Committee

Following, the above highlight on its set up, workings and challenges, the efficiency of the committee will be discussed in terms of its composition, tenure, powers, resources and recommendations.

3.4.1. Constitution & tenure of the Public Accounts Committee

The influence of political parties on the business and activities of parliament in Kenya is indubitable.²⁷⁴ Political parties impact the constitution of the committee in three ways. The first being the chairmanship, the second being the majority composition and lastly the nomination and removal of members of the committee.

²⁷³ Ibid.

²⁷⁴ The National Assembly, *'The Role of Political Parties and Key Parliamentary Offices'* (National Assembly 2017) 33 <http://www.parliament.go.ke/sites/default/files/2018-04/33_The_Role_of_Political_Parties_and_Key_Parliamentary_Offices.pdf> accessed 5 May 2021.1-2.

In relation to chairmanship, the Public Accounts Committee has traditionally been chaired by a senior member of the opposition under most commonwealth countries including Kenya as reported above.²⁷⁵ Joachim Weiner recommends this as best practice to portray the non-partisan and watchdog nature of the committee.²⁷⁶ The justification of an opposition chair can be identified from its mandate to oversight/audit government and more specifically executive expenditure. The chair should therefore be drawn from the opposition in order to ensure the performance of audit effectively and impartially. To this end the committee adhered to best practices.

Parliaments by nature have highly partisan climate arising from political party-based representation as is the case in Kenya. Therefore, strong disagreements between and within political parties are bound to occur and spill over to the operations of the Public Accounts Committees²⁷⁷ seeing as members of the committee are nominated by their respective parties with the expectation of party allegiance. The partisan climate may translate to ineffective oversight. To this end, Stapenhurst et al recommend that the committee should have a majority of its members if not all drawn from the opposition in order to minimize the influence of the ruling party(the government) on its operations.²⁷⁸ As discussed above, the Public Accounts Committee of the 11th Parliament had a majority of its composition drawn from the ruling party contrary to best practice.²⁷⁹ According the Committee, this posed a major impediment to the independence of the committee as the ruling party members may have been inclined to protect party interest as opposed to exercising oversight.²⁸⁰ Additionally, the possibility of de-whipping²⁸¹ by a member's party

²⁷⁵ Section 3.3. para 1.

²⁷⁶ Joachim Weiner, '*Best Practices of Public Accounts Committee*' (Institute for democracy in South Africa 2002) <internationalbudget.org/wp-content/uploads/Best-Practices-of-Public-Accounts-Committees.pdf> accessed 21 August 2020.

²⁷⁷ *Stapenhurst et al* (n 109) 20.

²⁷⁸ *Ibid.* p. 31.

²⁷⁹ Section 3.3. para 1.

²⁸⁰ *National Assembly Public Accounts Committee*, 'Public Accounts Legacy Report' (n 254).

²⁸¹ Section 2.3.6 para 4.

further enforced the need to protect the interest of the member's party to the detriment of the Committee's mandate. While there might not be direct evidence of party politics from analysis of the work of the committee, the challenge alleged by the committee²⁸² and the eventual amendment of the standing orders suggests its existence.²⁸³

Nevertheless, Mcgee states that the Chairperson's capacity to effectively carry out the duties of the office has been proposed as a cure for managing party influence in the Committee.²⁸⁴ He adds that the Chair of the Committee should ideally offer strategic direction and guide the workings of the Committee. He or she also plays the principal role as the representative of the Committee to the House and to the public. Therefore, he or she should act more independently of party pressures.²⁸⁵ Noting the mix of parties in the Committee, the Chairperson should also work towards maintaining harmony within the committee.²⁸⁶ The Chairperson of the PAC formed immediately after the 2013 elections was removed from the Committee and the Committee was reconstituted before expiration of its term.²⁸⁷ This happened after the members of the Committee including the Chairperson traded allegations in public fora of bribery by government officials under its investigations in order to alter recommendations of its reports.²⁸⁸ The National Assembly's Committee on Powers and Privileges was therefore tasked to investigate the allegations and it reported that some members including the Chairperson had breached privilege and the code of conduct as no evidence was tabled to substantiate said allegations against each

²⁸² *National Assembly Public Accounts Committee*, 'Public Accounts Legacy Report' (n 254).

²⁸³ The amended Standing orders under the 12th Parliament now provides, in relation to the Public Accounts Committee, that a majority of the Members should be drawn from parties other than parliamentary parties forming the national government. This is to cure the threat of interference.

²⁸⁴ David G QC McGee, *The Overseers: Public Accounts Committees and Public Spending* (Pluto Press 2002). 66-67.

²⁸⁵ *Ibid* p. 67.

²⁸⁶ *Ibid*.

²⁸⁷ *National Assembly Public Accounts Committee*, 'Public Accounts Legacy Report' (n 254). The National Assembly standing orders required the PAC to serve for a period of three years from its first appointment and thereafter reconstituted for the remaining term (s 2.3.6 para 4)

²⁸⁸ National Assembly, 'National Assembly Hansard' (14th April, 2015)

other. The Powers and Privileges Committee recommended removal of the Chairperson and the reconstitution of the PAC on this ground and the realization that there was bad blood amongst the members leading to the committee's inability to perform.²⁸⁹ Seemingly, the Committee therefore lacked the appropriate leadership necessary to steer the committee in the performance of its mandate. The events also allude to internal wrangles within the committee which may have affected its exercise of oversight.

On the question of tenure of the Public Accounts Committee, McGee argues that effectiveness of the Committee is promoted by continuity of membership during the term of Parliament hence longevity of the same will strengthen the Committee.²⁹⁰ He adds that a high turnover in membership of the public accounts committee is undesirable.²⁹¹ He therefore recommends that the lifespan of the committee ought to last the full term of parliament.²⁹² The Public Accounts Committee of the 11th Parliament served for three years as per the standing orders.²⁹³ Further, according to the Committee, another member of the Committee was de-whipped by his party during the period under review.²⁹⁴ This means that the Committee and its membership lacked the permanency and security of tenure recommended as best practice for its effective operation.

Lastly, underpinning the success of the PAC is the backing of a solid technical and research staff.²⁹⁵ McGee argues that the Committee requires support staff with adequate research skills and report writing/editorial skill²⁹⁶ proportionate to its workload. From the discussion above, the Public Accounts Committee of the 11th Parliament purportedly had just one researcher and one financial

²⁸⁹ Ibid.

²⁹⁰ McGee, *The Overseers* (n 284) 62.

²⁹¹ Ibid.

²⁹² *Stapenhurst et al* (n 109).

²⁹³ See s 2.3.6 para 3.

²⁹⁴ *National Assembly Public Accounts Committee*, 'Public Accounts Legacy Report' (n 254). See also s 2.3.6. para 4.

²⁹⁵ McGee, *The Budget Process* (n 249)150.

²⁹⁶ Ibid.

analyst.²⁹⁷ Should this be the case and considering the Committee's workload, then the Committee was inadequately resourced in terms of its support staff.

In view of the foregoing, the Committee only met one aspect of best practice in relation to drawing its chairmanship from the opposition. It however lacked in terms of security of tenure as the legal framework provided a three-year term and a reconstitution thereafter contrary to best practice of serving for the full term of the house. Additionally, the membership was susceptible to de-whipping which also threatened the Committee's independence and security of tenure. It also had a challenge to its operational independence, as it had a majority of its members drawn from the ruling party contrary to recommended practice of an opposition majority which again compounded the risk of party interests. Finally, the Committee lacked an adequate support staff proportionate to its workload.

3.4.2 Workings of the Committee

Stapenhurst et al posit that a major problem highlighted in the working of Public Accounts Committees is that they end up dealing with old issues caused by delay in tabling of accounts and audit reports and heavy workload.²⁹⁸ From analysis of the reports of the PAC of the 11th Parliament, the committee suffered a similar problem.²⁹⁹ The Committee was behind schedule in deliberating the relevant reports³⁰⁰ affecting its level of activity. It inherited three years' worth of backlog of accounts from the 10th parliament.³⁰¹ Successful oversight in relation to some of the reports (2008/09,2009/10) is doubtful. Some of the entities whose audit reports were presented for

²⁹⁷ s 3.3. para 1.

²⁹⁸ *Stapenhurst et al* (n 109) 20

²⁹⁹ s 3.3. para 3 & 8.

³⁰⁰ The Committee ought to have handled the 2012/13, 2013/14, 2014/15, 2015/16 Financial Reports.

³⁰¹ s 3.3. para 3.

deliberation had been terminated³⁰² or had undergone restructuring by virtue of the Constitution of Kenya, 2010. It would be difficult if not impossible to call to account the officers who were in those offices at the time of audit. Therefore, the recommendations of the Committee in relation to these reports would not have served the intended purpose of oversight.

Further, acknowledging that the Public Accounts Committee relies heavily on the Office of the Auditor General, the success and shortcomings of the office of the Auditor General directly impacts the work of the Committee. Mcgee states that the Public Accounts Committee requires a strong support from the office of the Auditor General. He states that a weak, incapacitated, and ineffective Auditor General will inevitably result in a weak and ineffective Public Accounts Committee.³⁰³ Therefore, there is need to briefly discuss the effectiveness or lack thereof of the office of the Auditor General during the term of the 11th Parliament. In analyzing the effectiveness of the office of the Auditor general, Rick Stapenhurst and Jack Tistworth argue that there are several features that are crucial to the success of Supreme Audit Institutions(SAI) and the resultant success of the Committee.³⁰⁴ These include good and supportive working environment, well-outlined mandates, functional and operational independence, sufficient funding, adequate staffing levels, knowledge sharing and experience and compliance to international auditing standards.³⁰⁵ Supreme Audit Institutions can only be effective if their operative and administrative independence is guaranteed.³⁰⁶ Where there are flagrant violations identified by audit, SAI will be considered ineffective if said violations are not prosecuted. The audit institutions also require

³⁰² For example, the reports of 2008/09,2009/10, 2011/12 and 2012/13 contains reports in relation to the Office of the Prime Minister which was abolished by the Constitution of Kenya, 2010 and whose term ended in 2013 after the 2013 General Elections. Any recommendation to hold the officers in the office to account would be futile.

³⁰³ McGee, *The Overseers* (n 284) 84.

³⁰⁴ Rick Stapenhurst and Jack Tistworth, '*Features and Functions of Supreme Audit Institutions*' (World Bank 2002) 59 <<http://hdl.handle.net/10986/11363>> accessed 5 May 2021.

³⁰⁵ *Ibid.*

³⁰⁶ *Mbogo AG Ochilo* (n 13).

adequate funding and qualified and adequately remunerated staff in order to achieve its mandates and ensure timely, accurate and quality reports.³⁰⁷

In relation to the backlog and delays discussed above, a contributing factor to this problem may have been the financial and human resource constraints at the office of the Auditor General as alleged by the Public Accounts Committee reported above.³⁰⁸ This allegation by the Committee may be evidenced by the fact that conclusion of special audits commissioned by the Committee took an extraordinarily long time. For instance, the special audit on the 2013 general elections was tabled before the House on March, 2016, two years after it was commissioned.³⁰⁹

The Auditor General's mandate requires the office to audit all national government and forty-seven county government accounts and submit reports on the same within six months after the end of the financial year. To put this into perspective, it should be explained that each government entity prepares and submits its annual reports and financial statements before the end of August to the Auditor General.³¹⁰ This in essence means that the Auditor General has approximately three months to conduct audit and report the same. Therefore, should the allegation by the Committee be true, then the Auditor General's ability to produce timely reports may have been hindered.

Additionally, the claims of incapacity of accounting officers and their lack of cooperation³¹¹ may have resulted in unnecessary audit queries presented for consideration by the Committee resulting in wasted time. Further, alleged attacks on the office of the Auditor General³¹² provided unfavorable environment for performance of its functions which in turn results to its

³⁰⁷ Ibid.

³⁰⁸ s 3.3. para 6.

³⁰⁹ *National Assembly Public Account Committee 'Special Report of the Public Accounts Committee on the Procurement of Electronic Voting Devices For 2013 General Elections.'* (n 263).

³¹⁰ Public Finance Management Act 2012, s 81(4).

³¹¹ s 3.3. para 6.

³¹² Ibid para 7.

ineffectiveness. Therefore, the challenges of the Auditor General's office may have hampered the overall performance of the Public Accounts Committee of the 11th Parliament.

3.4.3. Recommendations of the Committee & the Problem of Implementation

Committees recognize and cherish the importance of making recommendations and report publicly. Mcgee states that the power to make recommendations and its effectiveness is determined by the implementation thereof as they are of little use if not implemented.³¹³ It is accepted that the Committee made numerous commendable recommendations, their implementation thereof was however uncertain.

As stated above, the Committee is required to table its report for adoption by the House for the implementation process to begin. Mcgee identifies that lack of time for debate of Public Accounts Committee reports by Parliament as a perennial problem impacting the performance of the Committee.³¹⁴ Mcgee notes that the Committee's work is an essential part of the accountability demanded of governments and it is not unreasonable to demand some parliamentary time to debate its reports.³¹⁵ He recommends that annual debate of the committees work would be critical and would be at the very least an acknowledgement by Parliament that it considers the need to ensure effective oversight a serious obligation .³¹⁶ With regards to the Committee of the 11th Parliament , the tabling of its reports was dependent on the House Business Committee.³¹⁷ The PAC alleged that there were delays in scheduling for debates of its reports by the House Business Committee particularly on reports of special audit.³¹⁸ The Committee's report on special audit of hire of

³¹³ *McGee, The Budget Process* (n 249) 150

³¹⁴ *McGee, The Overseers* (n 284) 81

³¹⁵ *Ibid* 81.

³¹⁶ *Ibid* 81.

³¹⁷ The House Business Committee is chaired by the Speaker of the National Assembly. It prepares and, if necessary, from time to time adjust the Parliamentary Calendar with the approval of the House and determines the order in which the reports of Committees shall be debated in the House.

³¹⁸ *National Assembly Public Accounts Committee, 'Public Accounts Legacy Report'* (n 254).

aircraft for the Deputy President for example was tabled in April 2014 and only received the House's deliberation on 30th July, 2015³¹⁹ diluting the impact of its eventual implementation.

Additionally, the possibility of rejection of the Committee's reports affects the eventual effectiveness of the committee. Rejection may be substantive or as a result of the interplay of party politics discussed above. For instance, the aforementioned report was rejected by the house in totality despite the fact that the Committee noted irregular procurement practice and probability of fraud in relation to public funds.³²⁰ This was a result of a majority vote in the House which is majorly comprised of members of Parliament from the ruling party. Worse still, some of the Committee members were not present in the house to support the report.³²¹ The influence of party interests may have been at play in the failure to protect the report by members.³²²

Another major impediment was the implementation of resolutions of the National Assembly. The Public Accounts Committee, once its reports are adopted by the National Assembly, has two major ways of following up on its recommendation. One of the ways is through monitoring of resolution of previous audit queries that had been carried forward to the next audit period. These queries go through the usual motions of audit conducted by the Committee. Ultimately its recommendations thereafter will still require adoption by the National Assembly and implementation through the second approach.

This second approach is through the National Assembly's Committee on Implementation established under the standing orders. The Committee monitors the implementation of National

³¹⁹ National Assembly 'National Assembly Hansard' (30th July, 2015). It should be pointed out that the Deputy President is drawn from the Ruling Party.

³²⁰ Ibid.

³²¹ Moses Njagih, 'Break for Deputy President Ruto as MPs Reject PAC Report on "Hustler Jet"' *The Standard* (5 August 2015) <<https://www.standardmedia.co.ke/kenya/article/2000171659/break-for-dp-ruto-as-mps-reject-pac-report-on-hustler-jet>> accessed 5 May 2021. A member of the Committee was quoted saying that 'It is a shame that a report that was adopted by a majority at the committee can be rejected yet most of the 27 members of that committee are either not here or those that are don't do anything to protect the report'.

³²² As stated above, majority of the members of the committee were from the ruling party

Assembly's resolutions and whether such resolutions have been implemented within the shortest time possible.³²³ The Committee has powers to recommend sanctions against any Cabinet Secretary for their failure to report on the status of implementation. This then seems to be the main means of follow up and implementation.

However, this follow up process and implementation of the reports of the committee adopted by the National Assembly has been largely non-existent. The Committee on Implementation had been accused severally of not adequately carrying out its mandate. The Committee, in its defence, stated that the officers in the Executive were frustrating the process by ignoring calls to appear before it or finding excuses to postpone set dates.³²⁴ Curiously, there is no evidence that the Committee on Implementation exercised its power of proposing sanctions for the 'rogue' members of the executive.

Otiende Amollo, a member of parliament highlighted this challenge in respect to the general implementation of resolutions which equally applies to the reports and recommendations of the committee. He stated that tracking of the implementation status of recommendations by Parliamentary Committees and especially those by the Public Accounts Committee and Public Investments Committee Reports have not been forthcoming.³²⁵ Additionally, after every general election there is a change of guard in the National Assembly. The Chairperson of the Committee noted that this high turnover rate hampers the follow-up of recommendations from the previous committee and the House in general.³²⁶ The consequence of this is that recommendations of the Public Accounts Committee may not have been effectively implemented if at all.

³²³ National Assembly Standing Orders (4th Edition 2013) No. 209.

³²⁴ National Assembly, 'National Assembly Hansard' (20th April, 2016)

³²⁵ *Amollo* (n 83).

³²⁶ National Assembly Public Accounts Committee, 'Public Accounts Legacy Report' (n 254).

Consequently, recognizing that the Committee's resolutions largely remained unimplemented, as a measure of the extent of outcomes, the impact of the Committee as the legislature's tool of oversight over public expenditure also remain questionable.

3.5. Legislative Impediments

As discussed in the previous chapter, the Constitution of Kenya, 2010 required enactment of various legislation in relation to public finance. It had further prescribed timelines for enactment of the same.³²⁷ It required the enactment of legislation on financial control within two years after promulgation of the Constitution of Kenya, 2010. Similarly, it also required enactment of legislation on audit of accounts of public entities and procurement of public goods and services within four years of the Constitution of Kenya, 2010.³²⁸

An analysis of the legal framework reveals that most of the aforementioned legislation were enacted out of the set timelines and after the 11th Parliament begun its term. This is more particularly in reference to the Controller of Budget Act, 2016, Public Audit Act, 2015 and Public Procurement & Asset Disposal Act, 2015. A semblance of challenges faced in the exercise of oversight can be elucidated by an analysis of the Public Audit Act, 2015 and the Controller of Budget Act, 2016.

3.5.1. Public Audit Act, 2015

During the deliberations before the House on the proposed Public Audit Bill, the bill was hailed for entrenching the autonomy of Auditor General and creating sanctions for officers under the Auditor General which would address the raising concern on the integrity of said officials.³²⁹ However, the passage of the bill brought about concerns as to the Act's attempt to define and restrict the independence of the Auditor General.

³²⁷ Constitution of Kenya 2010, Art 261(1).

³²⁸ Constitution of Kenya 2010, 5th Schedule.

³²⁹ National Assembly, 'National Assembly Hansard' (17th February, 2016)

This was highlighted in the case of **Transparency International (TI Kenya) -vs- Attorney General & 2 others**.³³⁰ TI Kenya filed the case on grounds that the Act attempted to limit the Auditor General's independence guaranteed by the Constitution of Kenya, 2010. The Petitioner's argument was based on the following sections:³³¹

- a) Section 4(2) subjected the recruitment of staff of the Office of the Auditor General to delegation of the Public Service Commission. Accordingly, this section was in contravention with Article 252(1)(c) of the Constitution which empowered each Commission and Independent Office to recruit their own staff. The Petitioner argued that the section gave the executive some measure of control over an independent office holder by forcing the Auditor General to appoint staff as may be delegated in accordance with Article 234(5) of the Constitution;
- b) The Act subjected the Auditor General to Article 234 and 234(5) of the Constitution by requiring the Auditor General to develop an organizational structure and staffing establishment subject to Article 234(5) of the Constitution; to recruit and promote qualified staff to perform office functions, exercise disciplinary control, develop human resource office, and subject to Articles 230(4)(b) and 234, determine remuneration and benefit of members of staff; develop and maintain a code of ethics in consultation with the Public Service Commission and the National Treasury. Therefore, the Petitioner argued that these Sections undermined and compromised the institutional independence of the Auditor General by subjecting the control of its staff and personnel to Public Service Commission;

³³⁰ Transparency International (TI Kenya) -vs- Attorney General & 2 others [2018] eKLR (High Court Constitutional & Human Rights Division).

³³¹ Ibid.

- c) Section 12 mandated the President to select an Acting Auditor General from senior staff of the Auditor General's office where a vacancy arose;
- d) Section 14 required the Auditor General to submit an organizational structure for approval to an Audit Advisory Board. According to the Petitioner the Section assigned roles of the office to a constitutionally unknown organ which had potential of interfering with its independence;
- e) The Act under section 15 also set up a Senior Deputy Auditor General's office which was to be filled competitively by the **Audit Advisory Board** and appointed by the Auditor General. The Petitioner stated that the officer is also to be recruited by an unconstitutional organ. The Petitioner averred that the person would not be independently recruited by the Auditor General thus compromising the independence of the Auditor General. The Petitioner also challenged the creation of the position of Senior Deputy Auditor General through an ordinary legislation;
- f) Section 17(1) of the Act obligated the Auditor General to recruit officers necessary for proper functioning under the Constitution, the Act and other written laws on terms and conditions to be determined in consultation with the Salaries and Remuneration commission and subject to *Articles 230 and 234(5)* of the Constitution. Again, this interfered with the institutional independence of the office of the Auditor General;
- g) Section 18(3) obligated the Auditor General to designate an officer to a government entity and the officer so seconded would during the period he is on secondment be under the ***direction and control*** of the State Organ or public body. The Section further stated that such officer would not audit the State Organ or Public Entity for a period of 24 months after expiry of the secondment. The Petitioner contended that such an arrangement was unconstitutional since the Auditor General had no constitutional mandate to provide

technical support to State Organs and or public bodies and that such an arrangement compromised the independence of staff of the Auditor General;

- h) Section 25 created an Audit Advisory Board to oversee the activities of the Auditor General. The Board drew membership from the office of the Attorney General and Public Service Commission. The Petitioner averred that this provision was unconstitutional since State Organs and public bodies to be audited were given a role to oversee the performance of the Auditor General's functions which compromises his constitutional independence. The Petitioner also argued that Section 26 which made provisions for meetings and Section 27 which gave the Audit Advisory Board power to advise the Auditor General on the performance of his duties were constitutionally invalid. The Petitioner contended that these Sections in so far as they relate to creation of an Advisory body to advise the Auditor General on the performance of his duties, were unconstitutional;
- i) Section 40 of the Act forced the Auditor General to hold meetings with the national security organs being audited to agree on areas that may touch on national security and determine the appropriate audit approach to ensure confidentiality of the information. The Section further made national security organs audit reports confidential. It also required the vetting of officers from the Auditor General's office auditing these accounts by authorized government vetting agency. The Petitioner challenged the constitutionality of this Section as it had the resultant effect of clipping the Auditor General's powers and ability to discharge his mandate independently.
- j) Section 42 of the Act restricted the Auditor General powers to only accounts and expenditure and not the merit of a policy objective of either the national or country governments or any public entity. The Petitioner submitted that the section imputed limitation on the ability of the Auditor General to discharge his constitutional mandate to

question policy objectives of the government. The Petitioner referred to Article 229(6) of the Constitution which required the Auditor General to confirm efficient use of public money in arguing that the Auditor General could only determine efficiency if he reviewed the policy's purpose and compliance with the law;

- k) Section 68 of the Act assigned the role of making regulations under the Act to the Cabinet Secretary, National Treasury. The Petitioner argued that the Section contravened the Constitutional spirit of independence of the office.
- l) Lastly, section 72 limited the access by the public to certain Auditor General's reports on account of national security. The Petitioner averred that section imputed a restriction that was not envisioned by the Constitution and that the same could not be done through an ordinary statute.

The Petition was partially successful as the Court declared that certain sections of the Act contravened the Constitution of Kenya, 2010 and were therefore invalid.³³² It should be noted however that this decision was issued in February, 2018 after the term of the 11th Parliament.³³³ This means that the Public Accounts Committee and Office of the Auditor General during the period under review exercised their mandate according to this Act and the Public Audit Act, 2003 which was not aligned to the principles under the new constitution.

McGee argues that it is the responsibility of the Public Accounts Committee to ensure that the independence of the Auditor General is protected to bolster the effectiveness of the committee.³³⁴

The Committee being part of the Parliament that passed the Act failed to protect the office of the Auditor General.

³³² Specifically, the Court annulled Sections 4(2), 8, 12, 17(1), 18, 27, 40, 42, and 70 of the Act. It should be noted that the Act has remained unamended by Parliament to date.

³³³ *Ibid.*

³³⁴ *McGee, The Overseers* (n 284) 81

3.5.2. Controller of Budget Act, 2016

In the readings of the Controller of Budget Bill, 2016, the deliberation in the House envisioned that the bill would solve oversight issues previously faced by the National Assembly's committee such as the Budget and Appropriations Committee and the Public Accounts Committee. More so because it required the Controller of Budget to furnish the National Assembly with reports on budget implementation on a quarterly basis. Their arguments were that through the provisions of the bill, the House was now sufficiently equipped to interrogate Cabinet Secretaries in relation to delay in release of funds from the exchequer and fraud and utilization levels of the allocated budgets.³³⁵ For instance, in 2013/2014 audit, the Committee observed that most projects and programs implementation lagged behind due to inadequate or delayed exchequer releases which exposed the government to litigation and interest costs. The Public Accounts Committee recommended that all project and program funds should be ring-fenced with the entities' budgets and timely releases be prioritized by the National Treasury.³³⁶ This issue ought not to have arisen had this particular legislation been in place to actualize the reports from the Controller of Budget to the National Assembly. In essence, despite the Constitutional provision of the Controller of Budget, the operations thereof were lacking hence the missing link of budget utilization monitoring between the stages of budget approval and audit until enactment of this Act in September, 2016.

3.6. Conclusion

This Chapter set out to examine the exercise of oversight by the National Assembly Public Accounts Committee of the 11th Parliament. It has discussed the constitution, the mandate and the

³³⁵ National Assembly, 'National Assembly Hansard' (17th February, 2016). Members of the House stated that if the Office of the Controller of Budget was working efficiently, the country would have avoided the Eurobond scandal where about Kshs. 215 billion went unaccounted for.

³³⁶ *National Assembly Public Accounts Committee*, 'Report of the Public Accounts Committee on the Government of Kenya Accounts 2013/2014' (n 256).

term of the Committee. It has also highlighted the methodology of the Committee in the exercise of the mandate and the adoption of its recommendations by the National Assembly. Referring to the framework by Mezey and Olson, the Committee set its own agenda and did direct special audits where it deemed necessary. The Committee also exercised its mandate by summoning accounting officers, witness and receiving evidence with respect to matters before it. The Committee also inspired the setting up of the Special Funds Accounts Committee operationalized under the current parliament to handle queries relating to the various special funds established by the Constitution. However, the chapter has established that that while the Committee was established as a permanent committee, it was limited to a three-year term and was subject to party whipping and other removal procedures. This denied the Committee stability and made them susceptible to extraneous pressure from the party whips and leaders.

The Committee was further plagued with other numerous challenges in the exercise of its mandate. These include the incapacity and general indifference of accounting officers, intimidation on the office of the Auditor General, insufficient human resource and financial capacity of the office of the Auditor General compared to the heavy workload and strict Constitutional timelines, the corresponding heavy workload on the Committee, the technical incapacity of the parliamentary staff attached to the Committee, the delay in tabling and debating of its reports by the House, lack of implementation of its recommendations by the executive, the lack of an adequate system of follow-up of implementation and enforcement of the Committee's recommendations, threat of partisan approach to the workings of the Committee as it was majorly comprised of members from the ruling party and the allegations of bribery and undue influence traded amongst Committee members which brought to light the possibility of compromised reports. Further a review of the reports of the Committee reveal that similar audit issues have persisted in most if not all of the Committee's reports. It therefore can be conclusively said that the Committee was unsuccessful in

its exercise of oversight as its recommendations did not yield or inspire improvement in the prudent utilization of resources. The Committee equally failed to protect the independence of the office of the Auditor General critical for oversight and accountability.

We will now make recommendations towards strengthening of the Public Accounts Committee to fully realize its mandate.

CHAPTER FOUR: STRENGTHENING THE PUBLIC ACCOUNTS COMMITTEE

4.1. Introduction

World over, legislatures are faced with the ever increasing need to conduct audit of expenditure of national revenue towards ensuring oversight that is effective.³³⁷ They do so in various models each with their own respective challenges. It is therefore almost impossible to identify one specific system that has achieved effective oversight successfully. However, from a broad framework of analyzing best practices of public accounts committee, studies have identified the key features of an ideal committee.³³⁸ These include:

- a) Chairmanship that is drawn from the opposition and is a senior parliamentarian;
- b) The Committee serves for the whole term of parliament;
- c) The Committee has adequate support staff;
- d) The Committee's role and responsibilities are clear;
- e) There are frequent committee meetings;
- f) The Committee receives the Auditor General's Report automatically and the Auditor General attends the Committee meetings and gives a highlight of the report especially on the focus areas;
- g) In addition to issues raised by the Auditor, the Committee has the power of deciding to conduct inquiries on other matters;
- h) The Committee aspires for unanimity in their recommendations and reports;
- i) The Committee submits substantive reports to parliament at least once every year;
- j) The Committee has mechanism of monitoring implementation of its recommendations;
- k) The Committee engages the Auditor General as an expert advisor in its deliberations; and

³³⁷ *Weiner* (n 276).

³³⁸ *Stapenhurst et al* (n 88).

- 1) The Committee's reports are debated on floor annually.

Having identified the major challenges that affected the Public Accounts Committee of the 11th Parliament, this chapter will therefore borrow from the aforementioned features of an ideal committee and propose institutional and legislative reforms through which the effectiveness of the Public Accounts Committee in national revenue expenditure can be strengthened.

4.2. Composition & Tenure of the Public Accounts Committee

As discussed, the Committee has the responsibility of overseeing and performing a post audit on expenditure of national revenue. In order to do this effectively, the Committee is required to operate in a largely non-partisan environment and the ruling party is seen to endorse transparency through an independent audit.³³⁹ It is therefore necessary to maintain the long-standing commonwealth structure where the Chairperson of the Committee is a senior parliamentarian and is drawn from the opposition and further that a majority of its members are drawn from the parties other than the ruling party.

Additionally, as recommended by McGee, the Committee, appointed after every general election should operate for five years being the tenure of Parliament.³⁴⁰ This fosters continuity and maintenance of institutional memory in the performance of the Committee's functions particularly in the monitoring of implementation of its recommendations.

4.3. Independence of the Public Accounts Committee

The Public Accounts Committee is a standing committee of the National Assembly and therefore enjoys the same independence enjoyed by the House in the exercise of its mandate. However, as discussed, the Committee's independence was threatened by members' respective party

³³⁹ McGee, *The Overseers* (n 284) 81

³⁴⁰ Ibid 62. See also *Mbogo Ag Ochillo* (n 13)

interests³⁴¹ which were enforced through de-whipping by the party whip. To solve this challenge, the Committee should be allowed sufficient political space to carry out its mandate. This includes amendment of the National Assembly Standing Orders to delink parliamentary party whipping procedures from the committee. The Committee should have its own internal disciplinary processes where removal of members is limited to frequent non-attendance of meetings, ethical violations and where criminal proceedings are initiated against a member.

Further, the Committee should strive for unanimity in their recommendations irrespective of the party. This gives strength to the eventual recommendations of the Committee and mandates the Committee members to support the same when tabled before the house for adoption.³⁴²

Lastly, the Committee should adopt a performance-based model of oversight such as that adopted by the Victorian Public Accounts & Estimates Committee (Australia). The Committee publishes an annual report which tracks the committee's activities and the impact thereof.³⁴³ The model demands that the members of the committee are knowledgeable and are skilled. It also incorporates views from the public and entities involved in the committee's operations on their expectations as regards the operations of Government. The model then ends with outputs which entail advices and recommendations of the Committee. The Committee analyzes in detail, the intermediate results which include improved efficiency of government services and eventually the increased confidence of the public and strengthened power of Parliament in exercising oversight. It usually publicizes its targets annually which highlights the level of government acceptance of its recommendation and annual workplans including the shortcomings or successes of its previous activities. The Committee further monitors the time it takes to analyze the reports tabled before it

³⁴¹ *National Assembly Public Accounts Committee*, 'Public Accounts Legacy Report' (n 254).

³⁴² *McGee, The Overseers* (n 284) 71. For example, very few instances of dissent have been recorded in Australia and the UK.

³⁴³ *Stapenhurst et al* (n 88) 29.

and reports where it has failed to meet the set target.³⁴⁴ This model allows the Committee to measure its effectiveness, identify gaps in the performance of its mandate and at the set time set a good example for the government agencies in terms of accountability and transparency. It also ensures continuity of the accountability process by the Committee established after expiry of its tenure which can follow up on outstanding queries and recommendations.

4.4. Capacity Building of PAC & Secretariat

Mcgee states that the mandate of the PAC requires knowledge, skills and experience concerning finance and audit that most members of parliament do not possess.³⁴⁵ The end result is that the most members of the committee are forced to learn on the job and may be overwhelmed by the volumes of Audit reports tabled for deliberation. Similarly, this may also affect the quality of hearings conducted by the committee. Further, it is necessary that the Committee is backed by a secretariat that is well versed in the areas of public finance, audit, research and report writing. A solid research support would guide the Committee in terms of selecting important issues in the audit reports and pursuing them to conclusion.³⁴⁶

We recommend that the Committee and secretariat should be allocated sufficient budget for capacity building which includes an annual training program on public finance audit and induction program where new Committee members are taken through the mandate and the deliverables. The training program would be better conducted by the office of the Auditor General.

Noting that the office of the Auditor general has been identified as the chief support of the committee and is staffed with technical staff, it will be prudent that some of its staff are attached to the Committee to boost the secretariat/support staff of the Committee especially during

³⁴⁴ Ibid.

³⁴⁵ Ibid 20.

³⁴⁶ Ibid

preparations for hearing in audit queries. In fact, the Auditor General ought to be allowed to question witnesses and advise the committee on the important areas of concern. This is the case in India wherein the Comptroller & Auditor General sits in the meetings of the Committees as a 'friend philosopher and guide' of its members and questions representatives from the ministries and departments as they appear before the Committee.³⁴⁷

4.5. Securing Independence of the Auditor General

There is no doubt that the independence of the Auditor General is crucial for the effectiveness of the Public Accounts Committee (PAC). The PAC is highly dependent on the accuracy of the information supplied by the Auditor General. It is especially necessary for Auditors General to be protected from interference that hinder their impartiality in the course of their duties.³⁴⁸ However, it has been established that the legislative framework setting up the office in Kenya has not secured this independence³⁴⁹ which has worked against the gains of the committee.

The Mexico Declaration on Supreme Audit Institution (SAI) Independence identifies eight core principles as necessary criteria for proper auditing of the public sector.³⁵⁰ They include:

1. An adequate and efficient structure within the legal framework and support of the same in practice;
2. Independent head and staff of the SAI, including protection of tenure and legal immunity, in the regular performance of their responsibilities;
3. In the discharge of SAI functions, a reasonably broad mandate and absolute discretion;
4. Unlimited information access;

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ See s. 3.5.1 above

³⁵⁰ Mexico Declaration on Supreme Audit Institution(SAI) Independence, 2007

5. The privilege and responsibility of reporting on their jobs;
6. Ability to make decisions, publish and disseminate its reports without external influence;
7. The presence of an appropriate follow-up mechanisms; and
8. The autonomy in terms of finance and management/administration and the provision of sufficient resources in terms of employees, finances and implements.

The Constitutional framework guarantees independence in the aforementioned terms. The Constitution of Kenya, 2010 recognizes the office of the Auditor General as an independent office. It further states that independent offices are subject only to the Constitution and the law, are not subject to the direction or control of any person or authority and are to be funded from a separate vote allocated by Parliament.³⁵¹ It further states that an officer of an independent office is immune from legal liability for any action done in good faith and in the course of duty.³⁵² Lastly, the Constitution also provides the office with the power to conduct self-initiated investigations or out of any complaint submitted to it, to recruit its own staff, to summon any witness to assist in its investigation and to public and publicize its reports.³⁵³ However, the enabling statute enacted by parliament attempted to restrict this independence.³⁵⁴

We recommend that the Court's decision in Transparency International case³⁵⁵ be implemented and the Public Audit Act, 2015 be further amended to ensure that the Auditor General's recruitment process is independent and partial. The Act currently provides that in case of a vacancy, applications for the position are submitted to the Public Service Commission and the names of the applicants are thereafter gazette. The President then constitutes a panel to conduct interviews and

³⁵¹ Constitution of Kenya 2010, Art 249(2).

³⁵² Ibid Art 250(9).

³⁵³ Ibid Art 252 (1) (a), (c)& (3); 254(3).

³⁵⁴ See 3.5.1. para 2-3.

³⁵⁵ See s 3.5.1.

make recommendations.³⁵⁶ A majority of the representative are drawn from the executive hence the possibility of executive interference. We recommend that this selection panel be chaired by the Chairperson of the Public Accounts Committee and the other members of the selection panel are endorsed by the National Assembly. Additionally, the Committee should have the statutory mandate under the Act to commission an audit on the performance of the Auditor General.³⁵⁷ This gives the Committee the powers to guarantee and protect the independence and integrity required for the office of the Auditor General.

The Act should bestow upon the office of the Auditor General, recruitment powers and administrative powers which include promotions, disciplinary and remuneration that are not subject to the control of the Public Service Commission and the Salaries Remuneration Commission.

The Act should also be amended to allow the Auditor General's office unrestricted and unconditional access while auditing accounts of National Security Organs as is the case in South Africa where such reports are tabled before Parliament and the relevant committee conducts hearings of this nature under closed sessions.³⁵⁸

Further, it is necessary to amend the Act to guarantee the fiscal autonomy of the Office of the Auditor general. Currently, the Office of the Auditor General submits its budget estimates to the National treasury which has the discretion of reviewing it before submission to the National assembly.³⁵⁹ This is in contrast with the Tanzanian framework where the Controller and Auditor

³⁵⁶ Public Audit Act 2015, s 11(5). The panel consists of a representative from the National Treasury, Auditor General's office, Public Service Commission, Institute of Certified Public Accountants of Kenya, Association of Professional Societies of East Africa and the Law Society of Kenya.

³⁵⁷ This is the case in the Victorian Public Accounts & Estimate Committee which commissions the audit after every three years.

³⁵⁸ Oliver Cover and Sazan Meran, *'Watchdogs? The Quality of Legislative Oversight of Defence in 82 Countries'* (Transparency International 2013) 47 <<https://securitysectorintegrity.com/publication/watchdogs-quality-legislative-oversight-defence-82-countries/>> accessed 14 May 2021.

³⁵⁹ Public Audit Act 2015, s 20(2).

General prepares estimates of the revenues and expenditures and presents them to a consultative meeting of the Minister and the Public Accounts Committee where after the Minister responsible for Finance submits the estimates to the National assembly for approval.³⁶⁰ This is a more secure model where the PAC is able to ensure that the office is sufficiently financed.

4.6. Workings & PAC Recommendation

The Committee had complained of delay in submission of reports by the office of the Auditor General which resulted in handling of stale audit issues before getting to the most current reports. To resolve this concern, it has been recommended that the committee adopts a ‘last in first out’ policy where the latest report of the Auditor General is given priority. Further, the Committee should prioritize areas of the report that need their attention rather than scrutinizing each and every aspect of the Auditor’s reports this would best be done with the guidance of the Auditor general as proposed above.³⁶¹ Fidelma White et al proposed a hierarchical analysis of these reports.³⁶² They proposed that committee should subject reports with grave irregularities or misappropriation to full-scale hearings and the rest to written explanations either to the committee or to the Auditor for resolution.³⁶³

Another concern was the perennial problem of lack of sufficient time on the floor of the House for debate of the Committee’s reports.³⁶⁴ We recommend that the National Assembly Standing Orders be amended to allocate a minimum of one sitting annually to debate the reports of the Committee

³⁶⁰ Public Audit Act 2008, s 44.

³⁶¹ See s 4.4. para 3.

³⁶² Fidelma White and Kathryn Hollingsworth, *Audit, Accountability and Government* (Oxford University Press 1999) 131-132.

³⁶³ Ibid.

³⁶⁴ See s. 3.4.3 para 2.

as in the United Kingdom where the house debates up to six of the Public Accounts Committee's reports annually.³⁶⁵

Another major challenge for the Committee was the lack of a sufficient mechanism for the follow up and implementation of its recommendations.³⁶⁶ As discussed above³⁶⁷, in a bid to resolve this challenge, the Public Accounts Committee in collaboration with the Public Investment Committee held a round table discussion with the 'Big 9' comprising of the Speaker of the National Assembly, Chairs of the Public Accounts Committee, Public Investment Committee and Budget and Appropriations Committee, the Chief Justice, the Cabinet Secretary National Treasury, the Director of Public Prosecution, the Auditor General, the Controller of Budget, the Attorney General and the Head of Public Service.³⁶⁸ The resolutions thereof³⁶⁹ if implemented will introduce a more organized framework of follow up and oversight as there will be a budget utilization monitoring step where the departmental Committees deliberate the tabled reports of the Controller of Budget. Additionally, the National Treasury and enforcement agencies will be obligated to issue reports to the PAC on the status of implementation of its recommendations. Lastly, accounting officers will ensure timely submission of their responses to the Auditor General thereby avoiding the delays in preparation of audit reports or focus on audit queries which would have otherwise been resolved prior to tabling of the reports before the Committee.

Additionally, it will be necessary to tie up the audit outcomes and parliamentary recommendations with the budgeting process. This recommendation is based on the recognition that Parliament approves the budget estimates of all State Organs. The Budget Appropriations Committee can

³⁶⁵ *McGee, The Overseers* (n 284) 80.

³⁶⁶ See s. 3.4.3 para 4.

³⁶⁷ See s. 3.3 para 8

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

therefore withhold budget consideration and approval until the recommendations of the Committee are implemented and proof of the same is tabled.

Further, Parliament acting on the recommendation of the Auditor general³⁷⁰ or the Cabinet Secretary in charge of Finance,³⁷¹ has the power to authorize withholding of any fund appropriated to a government entity. This power can be used to ensure implementation of the Committee's recommendations.

4.7. Lessons Learnt in the 12th Parliament

We acknowledge that the Public Accounts Committee of the 12th Parliament has implemented three recommendations made in this study. First, the Committee as constituted in the 12th Parliament consists of the Chair and eighteen members. Additionally, majority of the members are drawn from parties other than the ruling party³⁷². Secondly, the Public Accounts Committee constituted after the 2017 elections now serves for the full term of Parliament.³⁷³

Lastly, the 12th Parliament's Public Accounts Committee is currently supported by Secretariat which comprises of a Principal Clerk Assistant, third Clerk Assistant, a senior financial analyst, a senior Legal Counsel, a Research Officer III, a senior serjeant at Arms and an audio officer.³⁷⁴

This is an improvement from the previous Committee as the current Committee is now supported by senior and more experienced staff.

Nevertheless, a majority of the recommendations are yet to be implemented and remain necessary for the strengthening of the PAC.

³⁷⁰ Public Audit Act 2015, s 54.

³⁷¹ Public Finance Management Act 2012, s 93;94;97.

³⁷² National Assembly Standing Orders (5th Edition 2020) Order No. 205(4).

³⁷³ Ibid No. 205(5); Standing Order No. 174(1)(d) also provides that majority of the Members of the Public Accounts Committee, Public Investments Committee, Committee on Implementation and the Special Fund Accounts Committee are drawn from parties other than parliamentary parties forming the national government.

³⁷⁴ National Assembly 'Public Accounts Committee' (Kenyan Parliament Website)

<<http://www.parliament.go.ke/the-national-assembly/committees/12/public-accounts-committee>> accessed 14 May 2021.

4.8. Conclusion

The chapter has proposed ways in which the Public Accounts Committee can be strengthened. To this end, the chapter has recommended amendment of the National Assembly Standing orders to secure the independence of the Committee in terms of delinking it from party whipping procedures and establishing internal disciplinary procedures specific to the Committee. The Public Accounts Committee should also adopt a unanimous approach to deliberations to ensure eventual ownership and support of the reports by every member of the Committee. It has also been recommended that the Committee adopts a performance-based approach to its mandate in order to monitor its own effectiveness. Noting that the mandate of the Committee is highly technical, it has been recommended that the capacity of the Committee be strengthened through allocation of sufficient budget for induction programs and regular training of Committee members and its secretariat, secondment of representatives of the office of the Auditor general to the Committee to provide support to the secretariat and the presence of a senior representative from the office of the Auditor General to guide the committee during hearings and identification of crucial areas of concern.

As regards the independence of the Office of the Auditor general, the chapter acknowledges its correlation with the effectiveness of the Committee. The chapter has recommended review of the Public Audit Act in following terms; allowing participation of the Public Accounts Committee in the appointment process, the commissioning of audit of its accounts and lastly in the consideration and approval of its budget estimates; allowing the office of the Auditor general to recruit its own staff, determine their remuneration, promotions and disciplinary. The chapter has recommended the unconditional access to all government accounts including national security organs in order for effective oversight by the Public Accounts Committee.

The chapter has also recommended review of Audit reports from the office of the Auditor general on a 'last in first out' basis to allow the committee to deal with the most recent of queries. It has

further recommended the prioritization of audit queries by the Committee with the guidance of the Auditor general in order to direct its focus on the conducting hearings for queries with most weighty issues only and dispense other through other summary means. In relation to scheduling time for debate of the Committee's reports the chapter has recommended amendment of the National Assembly Standing Orders to make it mandatory for the House to allocate at least one sitting annually for debates of the Committee's reports.

Additionally, the chapter has recommended implementation of a collaborative framework of follow up where the National Treasury, the office of the Auditor general, the Director of Public Prosecution, the Office of the Attorney General and the Ethics and Anti-corruption Commission follow up on implementation of Committee's recommendations and report back. We have also recommended that the budget process be linked with the implementation of resolutions of the Public Account Committee such that the Budget Appropriations Committee be granted the power to withhold approval of budgets for any government entity that has failed to implement resolutions of the Public Accounts Committee and the House. Lastly, the chapter has recommended exercise of Parliament's power of stoppage of release of funds to any government entity on recommendation from the Cabinet Secretary, National Treasury and the Auditor general.

We note that these proposals will go a long way towards realizing the effectiveness of the committee. However, as argued by Professor Yash Pal Ghai,³⁷⁵ we also disclaim that absent political good will from the Executive and the Legislature, an amended statutory framework can only do so much.

³⁷⁵ Yash Pal Ghai, 'Constitutions and Constitutionalism: the Fate of the 2010 Constitution' (n 39)-

BIBLIOGRAPHY

Books

Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18 *Indiana Journal of Global Legal Studies* 55

Akech M, *Privatization & Democracy in East Africa: The Promise of Administrative Law* (East African Educational Publishers 2009)

Barnett HA, *Constitutional and Administrative Law* (3rd edition, Cavendish 2000)

Chen A. HY, 'Constitutionalism in Asia in the Early Twenty-First Century ' (2014) Cambridge University Press.

Delreux T and Adriaensen J, (eds), *The principal agent model and the European Union* (Palgrave Macmillan, Cham 2017) <https://link.springer.com/content/pdf/10.1007%2F978-3-319-55137-1_1.pdf> accessed on 22nd March, 2020

Fombad CM, 'The Constitution as a Source of Accountability: The Role of Constitutionalism' (University of Cape town 2009) <<https://repository.up.ac.za/handle/2263/17022>> accessed 12 June 2020

Friedberg C and Hazan RY, 'Legislative Oversight' (Centre for International Development 2012)

Greenberg D, Kartz SN, Oliviero B and Wheatley SC (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York OUP: 1993) Chap 4

Hatchard J, 'The Role, Independence and Accountability of the Auditor General: A Comparative Constitutional Analysis' (2018) 30 *The Denning Law Journal* 51

Hoque Z (ed), *Making Governments Accountable: The Role of Public Accounts Committees and National Audit Offices* (1st edition, Routledge 2015)

Hyden G, Olowu D and Okoth-Ogendo HWO (eds), *African Perspectives on Governance* (Africa World Press 1999)

Journal Articles

Kameri-Mbote P and Odote C (eds), 'Essays in Honour of HWO Okoth-Ogendo' (University of Nairobi School of Law 2017) <<http://www.ielrc.org/books/b1702.htm>> accessed 2 April 2021

Lyons W and Thomas LW, 'Oversight in State Legislatures: Structural-Attitudinal Interaction' (1982) 10 American Politics Quarterly 117

Mbondenyi MK and Ambani JO, The New Constitutional Law of Kenya: Principles, Government and Human Rights (LawAfrica Publishing Ltd 2012) <<https://www.lawafrica.com/?product=the-new-constitutional-law-of-kenya-principles-government-and-human-rights>> accessed 2 April 2021

Mbondenyi MK and others, 'Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal' [2015] Pretoria University Law Press <<https://www.pulp.up.ac.za/component/edocman/human-rights-and-democratic-governance-in-kenya-a-post-2007-appraisal>> accessed 16 February 2021

McGee DG, The Budget Process: A Parliamentary Imperative (Pluto Press 2008)

McGee DG, The Overseers: Public Accounts Committees and Public Spending (Pluto Press 2002)

Mckie K and Van de Walle N, 'Toward an Accountable Budget Process in Sub-Saharan Africa: Problems and Prospects' (New School for Social Research 2010) Vol 77 Iss 4 <<https://go.gale.com/ps/anonymous?id=GALE%7CA253056457&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=0037783X&p=AONE&sw=w>> accessed 2 April 2021

Mihyo PB, Musahara H and Mukuna TE, 'Horizontal Accountability of the Executive to the Legislature in Africa: A Case Study of Kenya' (Organization for Social Science Research in Eastern and Southern Africa (OSSREA) 2016) <<http://www.ossrea.net/images/ossrea-report.pdf>> accessed 16 June 2020

Murunga G, Okello D and Sjogren A (eds), Kenya: The Struggle for a New Constitutional Order (Zed Books London 2014) <[https://www.diva-](https://www.diva-portal.org/smash/get/diva2:775818/FULLTEXT01.pdf)

[portal.org/smash/get/diva2:775818/FULLTEXT01.pdf](https://www.diva-portal.org/smash/get/diva2:775818/FULLTEXT01.pdf)> accessed 17 June 2020

Njuguna SN and Makau P, 'The Parliamentary Budget Oversight in Kenya: Analysis of the Framework and Practices since to Date' (Institute of Economic Affairs 2009)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwimm87Wz9_vAhWcTRUIHQLwAxQQFjAAegQIAxAD&url=https%3A%2F%2Fwww.ieakenya.or.ke%2Fdownloads.php%3Fpage%3DThe-Parliamentary-Budget-Oversight-in-Kenya.pdf&usg=AOvVaw1KMIaHri6iN3r6Wddq2p_> accessed 2 April 2021

Odhiambo M (ed), The Annual State of Constitutionalism in East Africa 2010 (Fountain Publishers 2012)

<https://www.kituoachakatiba.org/sites/default/files/publications/Annual%20State%20of%20Constitutionalism%20in%20the%20East%20African%202010_0.pdf>

Odhiambo-Mbai C, 'Public Service Accountability and Governance in Kenya Since Independence' (2003) 8 Africa Journal of Political Science 113

Ojwang JB, 'Constitutional Development in Kenya: Institutional Adaptation and Social Change' (1991) 35 Journal of African Law 213

Okoth-Okombo D et al (eds), Challenging the Rulers: A Leadership Model for Good Governance (East African Publishers Rwanda Ltd 2011)

<<http://erepository.uonbi.ac.ke/handle/11295/51520>> accessed 2 April 2021

Olson DM and Mezey ML (eds), Legislatures in the Policy Process: The Dilemmas of Economic Policy (Cambridge University Press 1991) <[https://www.cambridge.org/core/books/legislatures-](https://www.cambridge.org/core/books/legislatures-in-the-policy-process/19ED3C15048131BA0FE1950717CA4EA6)

[in-the-policy-process/19ED3C15048131BA0FE1950717CA4EA6](https://www.cambridge.org/core/books/legislatures-in-the-policy-process/19ED3C15048131BA0FE1950717CA4EA6)> accessed 5 May 2021

Pelizzo R and Stapenhurst F, *Parliamentary Oversight Tools, A Comparative Analysis* (Routledge 2013) <<http://books.google.co.ke>> accessed on 10th March, 2020

Rockman BA, 'Legislative-Executive Relations and Legislative Oversight' (1984) 9 *Legislative Studies Quarterly* 387

Schick A, 'Congress and the Details of Administration' (1976) 36 *Public Administration Review* 516

Tusasirwe B (ed), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003* (Fountain Publishers 2005) <<http://www.kituoachakatiba.org/publications/annual-state-constitutionalism-papers/constitutionalism-east-africa-progress-challeng-3>> accessed 2 April 2021

Unger RM, 'The Critical Legal Studies Movement: Another Times, A Greater Task' (1983) Harvard University Press

White F and Hollingsworth K, *Audit, Accountability and Government* (Oxford University Press 1999)

Yamamoto H, *Tools for Parliamentary Oversight: A Comparative Study of 88 National Parliaments* (Inter-Parliamentary Union 2007)

REPORTS

Constitution of Kenya Review Commission (CKRC), 'The Final Report of the Constitution of Kenya Review Commission' (Constitution of Kenya Review Commission 2005) <<http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf>> accessed 2 April 2021

Corder H, Jagwanth S and Soltau F, 'Report on Parliamentary Oversight and Accountability' (University of Capetown, Faculty of Law 1999) <<https://gsdrc.org/document-library/report-on-parliamentary-oversight-and-accountability/>> accessed 8 July 2020

Cover O and Meran S, 'Watchdogs? The Quality of Legislative Oversight of Defence in 82 Countries' (Transparency International 2013)

<<https://securitysectorintegrity.com/publication/watchdogs-quality-legislative-oversight-defence-82-countries/>> accessed 14 May 2021

Economic Commission for Africa Governance and Public Administration Division(GPAD), *The Role of Parliament in Promoting Good Governance* (UN. ECA 2013)

<<https://repository.uneca.org/handle/10855/22131>> accessed 2 April 2021Economi

National Assembly Public Accounts Committee, 'Public Accounts Committee Legacy Report for the Eleventh Parliament' (National Assembly 2017)

National Assembly Public Accounts Committee, 'Report of the Public Accounts Committee on the Government of Kenya Accounts for the Financial Year 2013/2014' (National Assembly 2016)

National Assembly Public Accounts Committee, 'Report of the Public Accounts Committee on the Special Audit Report of May, 2016 on the Accounts of the National Youth Service' (National Assembly 2016)

National Assembly Public Accounts Committee, 'Report on the Examination of the Reports of the Auditor General on the Financial Statements for the National Government for the FY Ending 30th June, 2015' (National Assembly 2018)

National Assembly Public Accounts Committee, 'Special Report of the Public Accounts Committee on the Procurement of Electronic Voting Devices For 2013 General Elections, .' (National Assembly 2016)

Parliament of Kenya 'The National Assembly and Budget Making'(National Assembly Fact Sheet 29, 2017) <http://www.parliament.go.ke/sites/default/files/2018-04/29_The_National_Assembly_and_Budget_Making.pdf> accessed 1 May 2021

Pelizzo R and Stapenhurst F, 'Tools for Legislative Oversight: An Empirical Investigation' (World Bank Institute 2004) 3388 <<http://hdl.handle.net/10986/14143>> accessed 6 April 2021

Pelizzo R, Stapenhurst R and Olson D (ed) 'Parliamentary Oversight for Government Accountability' (World Bank Institute 2006) <https://ink.library.smu.edu.sg/sooss_research?utm_source=ink.library.smu.edu.sg%2Fsooss_research%2F137&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 6 April 2021

Stapenhurst R and others, 'Legislative Oversight and Budgeting: A World Perspective' (The World Bank 2008) <<https://ideas.repec.org/b/wbk/wbpubs/6547.html>> accessed 11 April 2021

Stapenhurst R and others, 'Scrutinizing Public Expenditures Assessing the Performance of Public Accounts Committees' (2005) SSRN Electronic Journal <<http://www.ssrn.com/abstract=754229>> accessed 11 April 2021

Stapenhurst R and Titsworth J, 'Features and Functions of Supreme Audit Institutions' (World Bank 2002) 59 <<http://hdl.handle.net/10986/11363>> accessed 5 May 2021

The National Assembly, 'The Role of Political Parties and Key Parliamentary Offices' (National Assembly 2017) 33 <http://www.parliament.go.ke/sites/default/files/2018-04/33_The_Role_of_Political_Parties_and_Key_Parliamentary_Offices.pdf> accessed 5 May 2021

Union I-P and United Nations Development Program, 'Global Parliamentary Report 2017 Parliamentary Oversight: Parliament's Power to Hold Government to Account' Global Parliamentary Report 2017 <www.undp.org/content/undp/en/home/library/> accessed 6 April 2021

Weiner J, 'Best Practices of Public Accounts Committee' (Institute for democracy in South Africa 2002) <internationalbudget.org/wp-content/uploads/Best-Practices-of-Public-Accounts-Committees.pdf> accessed 21 August 2020

Dissertations

Githu M, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997) a Study in the Politics of the Constitution' (Thesis, University of Nairobi 2001) <<http://erepository.uonbi.ac.ke/handle/11295/15784>> accessed 2 April 2021

Ochilo MAG, 'The Effectiveness of the Oversight Role of the Kenyan Parliament: A Case Study of the Public Accounts & Investment Committees in the Ninth Parliament' (Thesis, University of Nairobi 2010) <<http://erepository.uonbi.ac.ke/handle/11295/16148>> accessed 2 April 2021

Oyaya CO, 'Towards Constitutional Legitimacy a Study of the Principles and Processes of Constitutional Development and Constitution Making in Kenya from Colonial Times to 2010' (Thesis, University of Nairobi 2013) <<http://erepository.uonbi.ac.ke/handle/11295/59185>> accessed 12 June 2020

Siew MYC, 'Power of the Purse in Singapore: Who Controls the Controllers?' (Ph.D, Harvard Law School 2019) 24 <https://scholar.harvard.edu/files/briefingpapers/files/71_-_siew_cheryl_-_power_of_the_purse_in_singapore.pdf> accessed 27 March 2020.

Case Law

Commission for the Implementation of the Constitution vs Speaker of the National Assembly [2016] eKLR (High Court Constitutional & Human Rights Division)

Council of Governors & 6 others vs Senate [2015] eKLR (High Court Constitutional & Human Rights Division)

International Legal Consultancy vs the Senate & the Clerk of the Senate [2014] eKLR (High Court)

Judicial Service Commission vs Speaker of the National Assembly & 8 Others [2014] eKLR (High Court Constitutional & Human Rights Division)

Okiya Omtatah Okoiti & 2 others vs Attorney General & 3 others [2014] eKLR (High Court Constitutional & Human Rights Division)

Transparency International(TI Kenya) vs Attorney General & 2 Others [2018] eKLR (High Court Constitutional & Human Rights Division)

International Conventions

African Union Convention on Preventing and Combating Corruption 2003

Commonwealth (Latimer House) Principles on the Three Branches of Government 2003

Mexico Declaration on SAI Independence 2007

Presentations

Amollo O, ‘Accountability & Oversight’ (International Governance Summit, Leisure Lodge & Golf Resort, 7 November 2018) <https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Oversight_and_Accountability_-_Hon._Otiende_Amollo_60.pdf> accessed 26 March 2020

Newspaper Articles

Njagih M, ‘Break for Deputy President Ruto as MPs Reject PAC Report on “Hustler Jet”’ *The Standard* (5 August 2015) <<https://www.standardmedia.co.ke/kenya/article/2000171659/break-for-dp-ruto-as-mps-reject-pac-report-on-hustler-jet>> accessed 5 May 2021

Otieno D, ‘Before You Vote: The Truth about Money Lost in the NYS Scandal’ *Daily Nation* (24 June 2017) <<https://nation.africa/kenya/newsplex/before-you-vote-the-truth-about-money-lost-in-the-nys-scandal-415390>> accessed 2 April 2021

Websites

National Assembly ‘Public Accounts Committee’ (Kenyan Parliament Website) <<http://www.parliament.go.ke/the-national-assembly/committees/12/public-accounts-committee>> accessed 14 May 2021.