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THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

FIRST QUARTERLY REPORT ON THE IMPLEMENTATION OF THE CONSTITUTION

March, 2011

FOREWORD

The Commission for the Implementation of the Constitution (CIC) is the single most important institution that will ensure that the will and aspirations of the Kenyan people, as expressed in The Constitution of Kenya, 2010 become a reality. The Chair and Commissioners therefore bear a heavy responsibility, on behalf and for the Kenya people to ensure that decades long struggle for a new constitutional dispensation results into prosperity, security, political stability and peace.

The rigorous process for selecting and vetting the Commissioners ensured that their expertise and experience is upto the task. Indeed, the CIC hit the ground running immediately the Chair and the Commissioners were sworn on 4th January 2011. Since that day, despite outstanding issues, such as settling the terms of service of the Chair and the Commissioners and recruitment of the full staff compliment, the Commission has made significant progress in discharging its mandate and ensuring the adhering the deadlines set out in the Constitution.

In its short life (three months), the CIC has already demonstrated its potential. The Commission is, however, acutely aware that Kenyans expect even more in terms of technical work and leadership from the Commission. Despite the achievements so far and the demonstrated potential, the CIC will therefore not rest on its laurels but will continue to strive to deliver the best to Kenya. Nevertheless, the task of implementing the new Constitution depends on all citizens and stakeholders and each has to play their part if the efforts of the CIC are to bear fruit. The support and engagement of all citizens and stakeholders will therefore be critical going forward.

Inevitably, the discharge of the CIC's mandate will face challenges some of which have already started to crystallise. Being alive to these challenges and finding innovative ways to address them will an important aspect of the Commission's work. Already, the CIC's independence has been tested and questioned in controversies such the nominations saga. Other broader institutional, political and technical challenges have also started to manifest themselves.

This report is the first in a series of quarterly reports by the CIC to Parliament and the people of Kenya to inform them about the progress being made in the implementation of the new Constitution. The reports will also play the role of highlighting the challenges that could impede implementation and offer ideas on how various stakeholders can work together to overcome such challenges. By providing these public reports the CIC will not only keep the public apprised on how the Constitution is turning into reality but will also ensure that the Commission is accountable to the people of Kenya in line with the national principles and values set out in the Constitution.

Charles Nyachae
Chairperson

EXECUTIVE SUMMARY

The Commission for the Implementation of the Constitution (CIC) is established under section 5 of the Sixth Schedule to the Constitution and the Commission for the Implementation of the Commission Act, 2010 which was legislated by the National Assembly in 2010.

The mandate of CIC is provided for in section 5 (6) and 15 (2) d of the Sixth Schedule to and, in Article 249 (1) of the Constitution. Section 6 provides for the functions of the Commission which are:

- (a) To monitor, facilitate and oversee the development of legislation and administrative procedures required to implement t this constitution;
- (b) To coordinate with the Attorney General and the Kenya Law Reform Commission in preparing for tabling in parliament , the Legislation required to implement this constitution;
- (c) Report regularly to the Constitutional Implementation Oversight Committee on –
 - (i) progress in the implementation of this constitution; and
 - (ii) any impediments to its implementation; and
- (d) Work with each constitutional commission to ensure that the letter and spirit of this constitution is respected

The CIC is the focal institution charged with facilitating, monitoring and overseeing the implementation of the new Constitution. This quarterly report concerns itself with the mandate and functions, performance and activities of the Commission in the implementation process during the period between January and March 2011.

In the first three months of its work, the CIC has made significant progress in setting up strategies, mechanisms and the partnerships necessary to discharge its mandate. To begin with, the Commissioners have elaborated a common understanding and view of their mandate which has helped the Commission to start its work without any major delay. The CIC has also elaborated a number of strategies to fulfil its mandate. As part of the strategy, the Commission has, in consultation with experts and stakeholders developed a framework to enable it to effectively deliver as expected.

The Commission has elected to work with the results based planning and has defined key result areas at the outcome level. These result areas will assist in guiding the Commission's work and providing the basis for accountability to other institutions and the public at large. The result areas include:

- Laws that are compliant with the letter and the spirit of the Constitution;
- Policies that are compliant with the letter and spirit of the constitution; and
- Institutional frameworks and administrative procedures that are operating in accordance with the values and principles of the constitution.

The CIC has also developed a sectoral strategy for various key constitutional issues including devolution, representation and legislation, executive and the security sector, the Bill of Rights, public finance, public service and leadership, land and environment and the judiciary and constitutional commissions.

At the implementation level significant progress was recorded in the January – March 2011 quarter. A number of legislations, including the Vetting of Judges and Magistrates Act were put in place. Work also began the review of administrative procedures such as on the Police Recruitment Guidelines. The CIC also spent time on key Constitutional interpretation issues, including with respect to the controversy regarding the nominations of the Chief Justice (CJ), Director of Public Prosecution (DPP), Controller of Budget and the Attorney General. A range of public and stakeholder consultations were also undertaken during the period ensuring that the principle of public participation is observed in the Constitution implementation process.

Important administrative and programme matters were also address by the CIC during its first three months of work. Setting up the Commission began immediately the Commissioners were sworn in on 4th January 2011. With nothing in place other than an office, the Commissioners spent time discussing where and how to begin. The internal consultations were of two kinds. The first addressed administrative issues, especially those relating to establishment of the Commission complete with a secretariat. Included in these consultations were issues to do with staffing, finance, procurement, information technology and outreach activities, among others. The second category of the initial internal discussions related to technical and programmatic issues. The discussions here focussed on the mandate of the Commission and related matters.

The Commission did not anticipate significant impediments to its work when it took office. It nevertheless recognized that like any other life endeavour, challenges would inevitable arise in the course of its work. These challenges were initially not specific and only began to crystallize as the work unfolded and progressed. These challenges, which not necessarily impediments, and can broadly be classified as administrative and organizational challenges, political challenges, technical challenges.

A number of steps and actions can be taken to reduce the risks posed by these emerging challenges. Consequently, the report discusses each group of challenges and makes a number of legal, administrative, policy and financial recommendations which the CIC hopes the government and other stakeholders will take forward in support of the implementation of the Constitution.

1. BACKGROUND

The Constitution of Kenya, 2010 which was promulgated on 27th August 2011, was an auspicious and historic moment for Kenya. It marked the end of a long journey for the country in search of a constitutional dispensation which truly reflected the will and the aspirations of the people of Kenya. To fully understand the role and the progress that has been made in implementing the new constitution

it is important to appreciate the historical background and political context in which the implementation is taking place.

1.1 The History of Constitution-Making in Kenya

The 1963 Constitution which came into force at independence on 12 December 1963 guided Kenya's political and socio-economic development for 47 years. During this period it was subjected to 38 amendments. One of the most significant constitutional amendments took place in 1982 making Kenya a *de jure* one-party state. This state of affairs subsisted for a period of seven years. In 1991, following sustained political pressure to return the country into a multi-party state, section 2A was repealed.

The constitutional re-establishment of the multi-party system in 1991 marked the beginning of heightened pressure for constitutional reforms, characterised by intense advocacy and political activities for a period of another seven years. These demands for change culminated in the enactment of the Constitution of Kenya Review Act of 1998. The 1998 Act provided the legal framework for a participatory constitutional-making process, which resulted in the 2005 Draft Constitution that was rejected at a popular referendum held in the same year. However, the outcome of the 2005 referendum was by no means the end of the collective desire for comprehensive constitutional reforms.

Following the disputed presidential election in December 2007 and the ensuing post-election violence, two pieces of legislation were enacted to lead Kenyans to a new Constitution. One was the Constitution of Kenya (Amendment) Act 2008. It was enacted on 22 December 2008 and provided a new roadmap for constitutional reforms and established the organs and mechanisms for constitutional review. The second was the Constitution of Kenya Review Act 2008, which was enacted on 29 December 2008. This Act sought to facilitate the completion of the review process. It therefore provided a legal framework for the review mechanisms and established organs charged with the responsibility for facilitating the review process.

The 2008 Review Act established a Committee of Experts (COE) which was mandated to finalize its work on a new (harmonised) draft Constitution within twelve months from the date of appointment. On 17 November 2009, the COE published a harmonised draft Constitution. The draft Constitution was approved by the National Assembly and subjected to a referendum conducted by the Interim Independent Electoral Commission (IIEC).

The results of the referendum conducted on 4th August 2010 were that the draft constitution received 67% support of the electorate and, in accordance with the enabling law, came into force on 27th August 2010, the date on which it was promulgated by the President.

1.2 The Political Context

The promulgation of the Constitution of Kenya 2010 is regarded as the most significant achievement in governance in Kenya since independence in 1963. The difficulties experienced in previous attempts to pass a new Constitution serve to reinforce this view. The promulgation of the Constitution on 27th August 2010 therefore marked the beginning of an era of good governance and political administration. It rekindled the hope for a new social order and economic prosperity guided by national values and principles of governance set out in Article 10 of the Constitution.

The Implementation of the Constitution of Kenya 2010 is also key to ensuring political stability in the country. The Constitution, it is hoped, marks the end of era for a country which had experienced large-scale election-related violence including the violence in 2007 triggered off by poorly-managed presidential elections. It should be remembered, however, that the 2007 violence was a climax of many underlying political currents which were enhanced by the referendum of 2005.

The promulgation ceremony provided the occasion for the President and the Prime Minister to reiterate the promises made during the referendum campaigns to the effect that the new constitution would stimulate major improvements in the daily lives of ordinary Kenyans. The people of Kenya await the full implementation of the Constitution, 2010, they overwhelmingly voted for. Accordingly, the effective and timely implementation of the new Constitution may be viewed as a debt to the people who trusted the government and supported the enactment of the new Constitution in the referendum.

2. THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

The establishment of the Commission for the Implementation of the Constitution (CIC) was mandated by Section 5 of the Sixth Schedule to the Constitution. This mandate has been implemented through the enactment of the Commission for the Implementation of the Constitution Act, 2010. The Act confers CIC with legal status, including the right to sue and to be sued and it also provides for the functions, powers, qualifications of, and appointment procedure for the chairperson and members of CIC. CIC, which is made up of a chairperson, 8 members supported by a secretariat, formally came into being on 4th January 2011 when the Chairperson and the Commissioners were sworn in.

2.1 The Mandate and Role of the CIC

The mandate of CIC is provided for in section 5 (6) and 15 (2) d of the Sixth Schedule and, in Article 249 (1) of the Constitution. Section 5 (6) provides for the functions of the Commission which are to:

- Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the constitution; Coordinate with the Attorney General and the Kenya Law Reform Commission in preparing for tabling in parliament, the legislation required to implement the constitution;
 - Report regularly to the Constitutional Implementation Oversight Committee on progress in the implementation of the constitution; and
 - any impediments to its implementation; and
- Work with each constitutional commission to ensure that the letter and spirit of the constitution is respected

Section 15 (2) (d) empowered of Parliament, by legislation, to provide mechanisms that ensure that the CIC can perform its role in monitoring the implementation of the system of devolved government effectively.

The CIC is obliged to carry out the above functions with the ultimate aim of achieving the objects of the constitutional commissions and the independent offices stated in Article 249 (1) namely to:-

- (a) Protect the sovereignty of the people;
- (b) Secure the observance by all State organs of the democratic values and principles; and
- (c) Promote constitutionalism.

Article 249 also provides that the CIC is to be subject only to the Constitution and the law and, is independent and not subject to direction or control by any person or authority.

The functions and objects of the CIC are made specific by the CIC Act 2010. The Act provides greater specificity to the constitutional requirement of regular reporting, requiring that the commission shall report at least once every three months to the Parliamentary Select Committee for the Implementation of the Constitution (CIOC) on the progress in and any impediments to the implementation of the constitution. Further, the Act confers on CIC, as a general matter, the power to exercise such other functions as are provided for by the constitution or any other written law.

In this context, the CIC understands its role as that of supervising, on behalf of the people of Kenya, all the implementing government ministries and institutions and any other entities tasked with the responsibility of ensuring the Constitution is implemented at both the national and county levels. As a result, CIC envisages its role as that of ensuring that policies, laws, structures, systems and administrative procedures are developed and applied at all levels of government. These should be consistent with and according to the letter and spirit of the constitution of Kenya. The aim is to work towards achieving a state of a united, peaceful and prosperous Kenya in which all citizens, including leaders, respect the rule of law, uphold national values and live by the Constitution.

Key to CIC ensuring that the constitution is implemented effectively is the active participation of the people of Kenya, in a meaningful way, in the processes that will lead to the Constitution's implementation. In this regard, CIC will strive to be the guarantor to the general public, that its right to actively participate will be upheld by the concerned implementing government ministries, institutions and other entities. To

fruitfully achieve this, CIC considers effective civic education a necessity. CIC will therefore facilitate and monitor civic education carried out by various actors. This may call for CIC assessing the content and provision of civic education provided for by the various civic education providers countrywide.

Additionally, to effectively protect the sovereignty of the people, the public would be required to be aware of their rights and responsibilities under the Constitution. Therefore, at the very least, CIC plans to facilitate and/or conduct public awareness or civic education on the role of CIC and the process of implementation, along with the duties and responsibilities of the people of Kenya. Public awareness is necessary for people to ensure State organs and, implementing ministries and institutions observe democratic values and principles and, to promote constitutionalism.

To achieve the above, CIC plans and is already overseeing, facilitating and monitoring both the review, design, development and application of policies, laws and administrative procedures by different government ministries and institutions, at both the county and national levels.

The attitudes and behaviour of employees of government ministries and institutions as they deliver the services to the people on a daily basis; and the people of Kenya as they receive the services, will be influenced by the new/revised policies, laws and administrative procedures. It is therefore during the phase of application that the observance and realisation of new dispensation will be tested practically.

For example, CIC, implementing government ministries and institutions, parliament, the Judiciary and the people should be vigilant as policies, laws and administrative procedures are applied on a daily basis so as to ensure they are not violated. For instance, citizens need to ensure and inform CIC if any appointing authority fails to follow the procedures laid down in the constitution and any law for the appointment of public officers or election of office holders. Or, the national government usurps the roles and responsibilities of the county governments.

In this regard it is necessary to point out that the violations may also involve failure to take into account national values and principles of the constitution as well as provisions of chapter six on leadership and integrity. Violations can also occur when, in carrying out their responsibilities, those in delivering services act in contravention of the provisions of the constitution. This can occur for example when a public officer takes action that is not in line with the new/reviewed laws and/or administrative procedures policy or that contradicts a provision in the Constitution including the democratic values and principles. Consequently, CIC must ensure that any state organ or persons employed to serve the people do not undermine the rights and privileges of the people enshrined in the Constitution. When this happens CIC has a duty to intervene by, for example, pointing out any violations of people's rights and where necessary, instituting legal proceedings against those that violate the rights.

Overall, the fulfilment of the CIC's mandate will be guided by the national values of Article 10 and the values (Box 1 below)

Box 1

National Principles and Values

1. Kenyans first - the Constitution of Kenya shall be our guide
2. Servant, humble, selfless and reliable officers and leadership
3. High integrity and ethical
4. Respect self, each other, and owners of the constitution - Respect people's rights and freedoms and facilitate their fulfilment
5. Do unto others as you would like them do unto you
6. Honest and consistent in all aspects of one's life (official and private)
7. Inclusivity and participation of the people
8. Objectivity and impartiality - corruption, nepotism, favouritism and impunity free
9. Equity, fairness and justice
10. Equality before the law and uphold human dignity
11. Transparent and accountable, disciplined, creative and committed to excellence
12. Be living examples of the new dispensation/constitution

Because CIC is mandated to oversee the implementation of the constitution, it is imperative that it plays a coordinating role and has access to information on all initiatives, activities and actors involved in the implementation of the constitution. This is the information CIC will use to monitor the activities and initiatives with the view to ensuring that they contribute to the effective implementation of the constitution, including the requirement that these initiatives are consistent with the letter and spirit of the constitution.

In sum, the CIC views its mandate as facilitating actions and processes required to translate the provisions of the Constitution of Kenya, 2010 into reality.

2.2 Strategy for Achieving the Mandate of the CIC

To enable CIC to facilitate, monitor and oversee the design, development and application of policies, laws and administrative procedures for the implementation of Constitution can be implemented, CIC has proposed a process to apply to all players.

In this regard, the CIC requires each government ministry and institution to:

- (a) Understand the constitution, what implementing the constitution demands of the ministry and institution, and the minimum standards/benchmarks developed to guide the process of implementing the constitution consistently and in a coordinated manner;
- (b) Establish the status of, and then review existing and/or develop, where necessary, policies, sessional papers, laws and administrative procedures relating to the ministry or institution's functions and to the sector in which they operate. The aim is to ensure that they are in line with the letter and spirit of the Constitution. In the course of this, every ministry and institution should ensure the active participation of the people of Kenya, transparency of the exercise and the application of the national values and principles in the constitution. In the case of policies and administrative procedures – each institution attends to them as per their needs while forwarding the common issues to relevant ministries/institutions for attention. With respect to laws that need amendment or development, including those listed in the fifth Schedule of the Constitution – forward the same to the AG's office. In each case, The CIC shall require copies of the same.
- (c) Develop and applies a change management strategy and plan. Change management is a structured and systematic approach to transforming individuals, groups of people or institutions, usually after a situational analysis. In the Kenyan case the change anticipated was triggered off by the coming in place of a new constitution. The goal of change management should therefore entrench the culture of constitutionalism within the institution and in its delivery of services to the people of Kenya. Specifically, each Ministry/institution needs to understand (i) where it is, (ii) where it wishes to be with respect to the demands of the Constitution, (iii) when, why, and what needs to be done to get there. To successfully manage the change into the new dispensation, each Ministry/institution will need to integrate implementation of the Constitution into its Performance contracts. Each Ministry/institution is also to share its strategy and plan with CIC.
- (d) Apply the policies, laws and administrative procedures, in the course of their daily activities. While CIC recognises that the people of Kenya will be receiving services as the above reviews/developments take place, CIC anticipates the exclusive provision of services under the new dispensation, once the development of the policies, laws and administrative procedures is completed. CIC will continuously monitor their application in order to ensure that the attitudes and behaviours of the employees of the ministries and institutions during the delivery of services to the people of Kenya are according to the requirements of the Constitution. Any deviation by any arm of government will require CIC to draw the attention of the concerned ministry/institution to the anomaly and where the deviation persists, CIC will inform the public and if the ministry/institution doesn't rectify, CIC may seek court interventions.

In determining whether any legislation forwarded to CIC for review is consistent with the letter and spirit of the Constitution, CIC will take the following into account: -The extent to which the public participated effectively in generating the policy or legislation;

- The consistency of any sessional papers; laws, by-laws and regulations; policies and administrative procedures with the letter and spirit of the constitution;
- The adequacy and sufficiency of the sessional papers; laws, by-laws and regulations; policies and administrative procedures in enabling the implementation of the constitution
- The impact of the sessional papers; laws, by-laws and regulations; policies and administrative procedures on other laws, institutions and at the two levels of government.

CIC, in pursuance of its mandate to facilitate, monitor and oversee the implementation of the constitution, in order to protect the sovereignty of the people; secure the observance by all state organs of the democratic values and principles; and to promote constitutionalism, will from time to time undertake an audit of the different sectoral policies, laws, and administrative processes and structures and their day to day application. The aim will be to determine their compliance with the letter and spirit of the Constitution.

2.3 Sectoral Implementation Strategy

To achieve its mandate in a holistic manner, the CIC has developed a process guideline to facilitate effective, monitoring and overseeing of implementation of the Constitution by all government Ministries and Institutions and in all sectors. This process has been discussed by the head of Public Service and the office of the Prime Minister and will be finalised after consultations with all Permanent Secretaries in a meeting organised to take place on 4th April 2011 at the Kenya Institute of Administration.

Each commissioner has been assigned a number of government Ministries and institutions to work with in overseeing their implementation of the letter and spirit in the Constitution. The Commission will schedule consultative meetings and forums with each institution and sector to agree on sectoral implementation roadmaps for ensuring full compliance with the Constitution. The institutions will then be encouraged to develop reporting mechanism to ensure they also provide information to CIC and the public at large on the progress and impediments in their implementation of the constitution.

The Commission has elected to work with the results based planning and has defined key expected result at the outcome level (Box 2 below). These result areas will assist in guiding the Commission's work and providing the basis for accountability to other institution and the public at large.

Box 2

Expected Results from CIC's Work

1. Laws that are compliant with the letter and the spirit of the Constitution.
2. Policies that are compliant with the letter and spirit of the constitution.
3. Institutional frameworks and administrative procedures that are operating in accordance with the values and principles of the constitution.

The rights enshrined in the constitution are crosscutting and are expected to be taken into account in implementation activities relating to the three outcome result areas. Taking cognizance of the fact that the commissioners are executive, the CIC has also demarcated its work into 8 technical thematic areas all working towards the three outcomes result areas. Accordingly the Commission's activity plan and interim organizational structure are designed to support this structure. The thematic areas are drawn from the different chapters and interest themes in the Constitution. Each thematic area is convened by one commissioner who works with one or more other commissioners. The thematic teams report to the whole CIC for the adoption of their decisions.

Below is a brief description of the thematic areas and the teams for each.

Devolved Government:

Conveners -Prof. Peter Wanyande; Member -Kamotho Waiganjo

The devolution thematic area deals with all matters relating to the operationalisation of the constitutional provisions on devolved government as provided for in Chapter 11 of the constitution. This includes the development of new policies legislation and administrative procedures and, in some cases, the review of existing policies, legislation and administrative procedures required to implement the devolved system of government. The thematic area monitors the status and progress made in the development of legislation, policies and administrative procedures required to implement devolution. A list of legislation required for implementing devolution and the timeframes within which the legislation must be passed is given in the Fifth Schedule to the Constitution. The CIC has however identified additional legislation required for the effective implementation of the Constitution. These were not listed in the Fifth Schedule. CIC has also revised the timeframe for the enactment of these pieces of legislation. In this regard the convener of the devolution thematic area works with the Ministry of Local government which is responsible for the initiation and development of policies, legislation and administrative procedures required to implement devolution including the establishment of county governments.

However, it should be noted that in a devolved system of government virtually every function of government including those functions that are assigned to the national government, all ministries are required to address those areas of their mandate that will be affected by devolution. In this regard, ministries have to determine the nature of the relationship between national level functions and how the performance of such functions will affect and be affected by devolution. Ministries also have to determine how the two levels of government will work together for effective implementation of devolution.

The devolution thematic team also works with non- state actors including civil society organizations to facilitate the implementation of devolution. In view of the fact that devolution is new it is necessary to establish new structures especially at the county government level. The convener of this thematic area is responsible for developing work plans for the thematic area and for advising the Commission on all matters relating to the timely and efficient implementation of devolution.

Representation and Legislation:

Conveners -Dr Florence Omosa; Member -Catherine Mumma)

The objective of the theme is to ensure that the policies, laws, systems, structures and administrative procedures that are developed/reviewed and applied at the national and County levels for elections, within political parties, for national Assembly, Senate and County Assembly affairs, are consistent with and according to the letter and spirit of the Constitution of Kenya, 2010. The eventual aim is to have all Kenyan citizens, including leaders, respect the rule of law, uphold national values and live by the Constitution with the ultimate aim of all Kenyans living in the new dispensation and in united, peaceful and prosperous Kenya.

To achieve CIC's role in monitoring, facilitating, oversight, and coordinating of implementation in this thematic area the Representation and Legislature theme will work with the relevant sectoral stakeholders to ensure that the electoral system and process, the Independent Electoral and Boundaries Commission (IEBC), Political Parties, the national Assembly, Senate and County Assemblies play their roles and responsibilities as per the letter and spirit of the constitution.

Executive and Security:

Conveners-Philemon Mwaisaka; Members -Dr. Elizabeth Muli, Dr. Florence Omosa)

The thematic area covers Chapter Nine on the Executive and Chapter 14 on the Security Sector.

-The Executive

Chapter nine on the Executive provides for the functions and powers of the offices of the President, the Deputy President, the cabinet and

other offices such as the Attorney General, Director of public prosecutions and their removal. The Executive formulates government policies and priorities. The legislation that requires enactment under this thematic area includes:

- Power of Mercy- Article 133
- Elections of the President - Articles 136-142
- Domestication of International law -Article 2(5)

Issues relating to presidential elections shall be considered under the thematic area on Representation of the People to ensure consistency and uniformity in the development of electoral laws.

Key tasks with respect to executive include:

- Development of legislation in the fifth schedule and other relevant legislation including amendment of existing law where necessary;
- Monitoring administrative procedures giving effect to the Constitution and other legislation;
- Review of existing administrative procedures and development of new procedures where necessary to ensure that they comply with the letter and spirit of the Constitution and reflect the principle that Executive authority in Kenya derives from the people and must be exercised for their benefit;
- Facilitate development of a change strategy for the Executive and cabinet with regard to decision making; and
- Monitoring progress of implementation

-Security Sector

Under Chapter 14, provision is made for the development of instruments and the establishment of institutions in the security sector. The institutions include the national security organs which include the Kenya Defence Forces (KDF), the National intelligence Service (NIS) and the National Police Service (NPS).

Key tasks with respect to the security sector include;

- The development of legislation in the Fifth Schedule and amendment of relevant existing laws;
- Review of and development of administrative procedures to ensure compliance with the Constitution;
- Facilitate the development of the National Security Policy; and
- Monitoring to ensure that service delivery reflects compliance with the letter and spirit of the Constitution.

Bill of Rights:

Conveners -Catherine Mumma; Member =Prof. Peter Wanyande, Dr. Elizabeth Muli

The Constitution of Kenya 2010 is anchored on the fundamental human rights principles which are reinforced in nearly all the chapters. It has a whole chapter dedicated to the protection of specific civil, political, economic and social rights.

In defining human rights as one of the thematic areas, the CIC recognizes that 'human rights' is a crosscutting theme that is applicable to all sectors. It is therefore imperative for ALL implementers in all sectors to appreciate their role in integrating human rights in their legal and policy frameworks. The implementation of human rights will be at two levels. First, there is the obligation by ALL implementers in all the arms of government to integrate the constitutional principles which draw heavily from human rights. These are stipulated in Articles 10, 27, 68,100 and Chapter 13 and many other parts of the Constitution. Second, there is also the need for different sectoral implementers as to implement specific rights that are relevant to their sector. Among these are the rights in chapter 4 of the Constitution, rights expressed in other Articles of the Constitution and Rights stipulated in ratified international human rights treaties and conventions.

To ensure effective implementation of human rights the CIC has planned the following broad road map:

1. To undertake a Stakeholders analysis to properly locate the different responsibilities relating to different rights. In this regard a participatory methodology will be employed to determine roles for the different players.
2. To work with relevant Constitutional Stakeholders to identify any priority legislation and notify the relevant stakeholder to

originate the required Bill(s) for processing in the agreed manner (eg. The Citizenship law and the KNHRE Bill).

- To develop a clear guidance within the process circular to guide sectoral implementers in undertaking the necessary sectoral review of laws and policies in order to, among others integrate the human rights approach in their policies and administrative/operational practices and integrate provisions of the chapter on the Bill of rights and international human rights instruments into relevant sectoral laws and policies.
3. To organise capacity building forums on the human rights and the rights approach for CIC commissioners and staff and different implementing stakeholders. This will include capacity on the following principles
- Affirmative action for equality and equity (gender, for youth, people with disabilities (PWDs) minorities and marginalised groups);
 - Equitable sharing of national and local resources throughout Kenya;
 - Equality before the law;
 - Participation of the people in governance;
 - Right of communities to manage their own affairs and to further their development;
 - Transparency and accountability, including public participation in financial matters;
 - involvement of the people in the process of policy making;
 - accountability for administrative acts; and
 - Right to information.

There will also be need for capacity building on the following key human right concepts (among others) that will need to be understood including.

- The concept of progressive realisation of socio-economic rights in Article 43;
- The concept of social protection;
- The concept of inclusivity particularly with respect to the rights of persons with disability;
- The definition of minorities; and
- The principle of derogation from human rights (particularly by the executive and security agents).

Public Finance:

Conveners -Kamotho Waiganjo; Members -Dr. Florence Omosa and Catherine Mumma)

The Constitution fundamentally transforms the fiscal architecture under which Kenya will be governed in the new constitutional order. The thematic area on public finance is about guiding and coordinating the constitutional implementation activities relating to matters of Public Finance.

The Public Finance Chapter deals with issues of public finance management both at the national level and the county level making the process of public finance management more participatory, and equitable than under the previous legal framework. In particular the public finance regime provided under the Constitution:

- Requires the setting of standards to achieve the progressive realization of economic and social rights.
- Establishes the principles that will determine the sharing of resources between the two levels of government, including openness and accountability, including public participation in financial matters; equity and fairness; the need to make special arrangements for marginalized groups; and prudent management of national resources. Makes the process of

the borrowing by the national governments more transparent.

- Separates the offices of Controller of Budget from that of the Auditor General so as to imbue effectiveness and accountability.
- Provides for the manner in which the national government must support the county governments whilst providing mechanisms for efficient utilization of resources at the devolved level.

There is need to enact legislation that covers the above issues and to review current policy, legislation and processes so that they respect and are consistent with the values of the constitution and the principles of public finance management outlined in the constitution.

It is also important that cognizance is taken of the need to progressively attain socio economic rights under Article 43. This will include the mapping of the current status with respect to the distribution of development resources and the setting of standards and guidelines to facilitate the state to demonstrate progression and accountability in the delivery of these rights.

National and county governments must also establish compliant administrative systems and processes that respect and enforce the new fiscal management environment. These should be in place long before the general elections considering that they will apply to the devolved governments from the day they are operational. Without this, there could be disruptions in the public finance sector and possible losses or mismanagement of public funds. Notwithstanding that the constitution in Schedule 5 requires legislation under this Chapter to be concluded within more than one year, it is nevertheless essential that all legislation on this Chapter and any legislation dealing with fiscal management in other related chapters (e.g. on devolution) be fast tracked and completed within the next six months and at any rate before the next general elections.

The role of CIC in this process is to oversee the development of legislation and administrative procedures that reflect the letter and spirit of the constitution. It is also to ensure that in the development of such legislation and administrative procedures, a participatory approach is undertaken. To this end CIC will be liaising with the ministry of finance, as the key driver in public finance management reforms to ensure broad stakeholder involvement in the development of the legislation and the required procedures.

Public Service and Leadership:

Conveners -Dr. Elizabeth Muli; Members -Philemon Mwaisaka)

The thematic area covers Chapters Six and 13 of the Constitution and matters related thereto. The public service cuts across the entire government at both national and county levels. An efficient and effective public service is vital to the development of the country's economy. Transparent operations that are free of corruption contribute to the good delivery of public services. Implementation of Chapters Six on leadership and thirteen on the public service will ensure transparency, accountability, effectiveness and efficiency in the delivery of quality public services.

CIC will be working with players in the public service to ensure that the guiding principles of leadership and integrity as set out in Chapter Six of the Constitution and the values and principles of public service are guiding the conduct of business in the public sector. The CIC notes that the success in the implementation of the Constitution will be demonstrated by the commitment of the public service to the adoption of the culture of constitutionalism. Laws relating to the following will be developed or reviewed where they already exist.

- Ethics and Anti-Corruption Commission -Article 79
- Legislation on leadership and integrity -Article 80
- Legislation on the Values and Principles of the Public service -Article 232
- Staffing of county governments -Article 235
- Public service Commission Bill -Article 234
- Teacher Service Commission Bill -Article 237

Land and Environment:

Conveners -Ibrahim Ali; Members -Imana Laibuta)

The Land and Environment thematic area is wide and covers the Ministry of Land, Ministry of Environment and Mineral Resources, Ministry of Forestry and Wildlife, Ministry of Water and Irrigation,

Ministry of Tourism, Ministry of Northern and Arid Lands, Ministry of Regional Development and the Ministry of Livestock Development. The latter Ministries are by and large focused on the rangelands of Kenya and therefore have great impact on the ecology of the area.

The CIC has written to many of these ministries to advise them on their plans and programmes that respond to the Constitution. The CIC has set in place tentative plans to engage with them and we await a response from them to date. This is not in any way a delay because legislation in this thematic area are not among the priority legislation and therefore have time to continue pursuing engagement with these ministries.

The CIC has also engaged with the Network of Environment CSOs and some low level consultations done already. Following these consultations a training workshop for selected Environment CSOs with support from WWF is now scheduled for April 2011.

**Judiciary and Constitutional Commissions:
Conveners -Imana Laibuta; Member -Ibrahim Ali**

This thematic area, the Judiciary and Constitutional Commissions, is concerned with the constitutional establishment and/or institutional reform of the judiciary and constitutional commissions as respectively provided in chapters 10 and 15 of the Constitution of Kenya 2010. It addresses such matters as the enactment and/or amendment of legislation, policy development or review, and formulation of administrative processes required to ensure effective and timely implementation of the Constitution in that regard.

Reforms of the legal and institutional frameworks of the judiciary and constitutional commissions invariably involve the process of appointment to various constitutional and other public offices, which in turn require adherence to (a) the national values and principles set out in Article 10; (b) the principles of justice set out in Article 159; and (c) in accordance with the guiding principles of leadership and integrity set out in Article 73(2) of the Constitution.

The thematic team works with sectoral stakeholders, including State and non-state organs, with the support of the Secretariat and technical advisors to effectively deliver on the CIC's mandate. The team convener is responsible for timely delivery of advice and reports to the Commission in respect of the responsibilities set out in periodic work plans prepared and approved by the Commission. The convener is also responsible for building and sustaining consensus among respective sectoral stakeholders.

3. PROGRESS IN THE IMPLEMENTATION OF THE CONSTITUTION

The CIC was to have been established 90 days after the promulgation of the Constitution, meaning by 27th November 2010. However, as already noted the Commissioners were only sworn in on 4th January 2011. Despite the delay, the Commission is making good progress in delivering on its mandate. This section reports on the progress made on implementation during the quarter of January to March, 2011. It also highlights the key activities the Commission has planned to work on and achieve during the April – June 2011 quarter. In assessing progress, the following should be borne in mind:

- Full implementation of the Constitution goes beyond the enactment of legislation and involves the effective development and application of policies and administrative procedures which ensure that the people of Kenya get the services they are entitled to and in a manner provided for under the Constitution. This means that even after a bill is enacted, CIC shall continue to monitor, facilitate and oversee implementation thereafter, in compliance with Article 249 of the Constitution.
- The progress and effectiveness of the work of CIC is inevitably impacted on by the capacity, progress and effectiveness of its constitutional partners, the office of the Attorney General and the KLRC as well as that of implementing agencies such as line ministries and commissions plus other arms of government.

In the January - March 2011 quarter, a number of achievements were recorded in relation to legislation, review of administrative procedures, Chapter 15 Commissions, staffing at the CIC, among others. A number of legislation were enacted during the period. This included the Judicial Service Act and the Vetting of Judges and Magistrates Act.

With respect to review of administrative procedures Police Recruitment Guidelines were finalised. With regard to Chapter 15 Commissions and related matters, a number of activities were undertaken including the development of the Rapid Action Plan and the work related to the nominations to constitutional offices. During this period, the CIC also developed a staff recruitment policy and recruited key personnel through a competitive process. The budget and work plans for the CIC were also finalised during this period.

Other achievements during this period include:

- Review and publishing of the bills as per schedule.
- Constitutional Implementation Conference and County Implementation Forums to be held by June 2011.
- County Inputs on Electoral, police and legislative laws by June 2011.
- Competitive recruitment of key staff by June 2011.
- Establish the financial systems necessary to support good management of Commission funds.
- Engage with Parliamentary Committees on published Bills.

The full details of the specific achievement are set out in **Annex I** to this report.

As already noted, the progress of implementation may be impacted by the fact that CIC does not solely bear responsibility of full implementation of the Constitution. To the extent that other actors are involved in the implementation process, it is difficult to be specific and certain of actual time bound deliverables. Through the use of a case study on one of the bills with which the CIC has been involved in (the Vetting of Judges and Magistrates Bill) the dynamics of the relationship between the CIC and other actors and how this impacts on implementation can be demonstrated (Box 3).

**Box 3
Case Study on CIC's Engagement on Constitutional
Implementation Legislation
Vetting of Judges and Magistrates**

The Vetting of Judges and Magistrates Bill was initially published on 14th September 2010 and was then tabled before the National Assembly on 30th November 2010. The CIC did not have opportunity to review the Bill before it was published. At the request of the CIC the Minister for Justice withdrew the Bill to allow the CIC to review it. Thereafter the Commission discussed the Bill internally and with the Attorney General, the Minister for Justice National Cohesion and Constitutional Affairs and the KLRC. It also undertook a series of consultations on the content of the Bill. The Commission had formed the impression that the views held by stakeholders regarding this particular bill were very strong and that in particular there was concern in the judiciary that the vetting process should be managed in a manner that did not lead to the witch-hunting of members of the judiciary. Following these consultations, a number of amendments were agreed on. The CIC agreed with the Attorney General that these would be incorporated in a new Bill to be prepared by his office.

However, when the Bill was re-published the CIC observed that not all the amendments agreed to during the stakeholders' forums had been incorporated in the re-published version of the Bill. First, a clause whose exclusion had been requested by the CIC was retained. The clause reads as follows:

"Nothing in this section shall be construed as preventing the President, in consultation with the Prime Minister, from nominating and forwarding names, other than those submitted by the Public Service Commission to the National Assembly for consideration and approval."

The CIC wrote to the Committee on the Administration of Justice and Legal Affairs, through which it took up this matter and reiterating its recognition of the need to involve the Executive in the process of nominating and appointing members to institutions, including under the Vetting Board. The CIC noted that the Selection Committee, also provided for under the Bill, was largely comprised of representatives of the Executive to allow the Executive to play its role in recommending persons to serve in the Board, whilst at the same time facilitating a process that respects the national values in Article 10 and the principles of leadership enumerated in Article 73(2)(a) of the constitution including

participation of the people and selection on the basis of competence and suitability. Secondly, the CIC took issue with clause 12 (5) and (6) of the Bill which had omitted the requirement for consultation with the Prime Minister during the process of filling a vacancy in the Vetting Board. Consultation was required by the constitution in section 29 of the Sixth Schedule.

Eventually, the CIC's position on these matters was upheld. The Bill went through the second reading on 8th February 2011 and was assented to by the President on 22 March 2011.

The CIC has recognised the need to prioritize the activities for the implementation of the Constitution to meet various national needs. This need was reflected by the drafters of the Constitution who provided a time bound guide on the urgently required implementation laws in the Fifth Schedule to the Constitution. The timelines in the Fifth schedule have not been strictly adhered to for various reasons and as a result there has been a delay in moving on some of the activities including: the establishment of the CIC itself, the formation of the Commission on Revenue allocation (CRA) the appointment of the Chief Justice and the finalisation of the boundaries report.

The delays can be mitigated if all stakeholders prioritize the identified urgent tasks and work in a collaborative manner to ensure that further delays are not occasioned. It is also important that all the arms of government invest in ensuring that the urgent laws and systems are put in place.

In the view of the CIC the current priorities are as follows:

- Laws, policies, institutional systems and operational regulations and procedures required for conducting the next general elections.
- Laws and regulations relating to institutions that are supportive of the electoral process e.g. those relating to the security sector, registration of persons and citizenship.
- Laws and policies that related to the organisation of governance structures and systems at the county levels.
- Laws relating to the management of Public finance.
- Laws, regulations and systems relating to the establishment of a fully functional Judiciary.

The conduct of elections in 2012 presumes a reformed judiciary in which the country will have the confidence to entrust electoral disputes. Secondly, since the country must, in addition to parliamentary elections, also hold elections in relation to county assemblies, the wards for those assemblies must be determined. The determination of the wards involves the provisions on devolution. Also the security sector will have a big role to play in the elections. Reforms in this sector are a priority if the country is to have the confidence that free and fair elections are possible.

Though the delays have occasioned the adjustment of timelines, it has, however, not resulted in the extension of time beyond that which has been provided in the schedule. If anything, the review has only resulted in the re-organisation of time, most of which has been shortened. Further, in the view of the CIC, whereas the Fifth Schedule contains a good list of legislation that need to be enacted to give effect to the new Constitution, this list is not complete.

Consequently, in addition to the legislation identified in the in the Fifth Schedule, there are other laws which would need to be enacted as soon as possible. The CIC has therefore established a more comprehensive list of the laws that should be in place by the end of August 2011. The list is contained in **Annex II** to this report.

3.1 Public Participation and Stakeholder Engagement

A key part of the role of the CIC is to ensure public participation in the constitutional implementation process. The initial discussions at the CIC clarified the constitutional standard regarding public participation in public processes. In this regard, the CIC recognises that public participation has been elevated to a national principle under Article 10 of the Constitution and in several other places in the constitution. There is also a duty, direct or implied, that public participation be incorporated in the public processes. The implementation process is such a public process and the CIC made the decision from the

beginning that it would have to put in place mechanisms for giving effect to this principle in its processes.

The CIC has therefore elaborated a policy on public participation. It has therefore become standard practice to invite submissions by the public on matters to do with policies, legislation and administrative procedures, in any language using postal and electronic means. The public can also participate by expressing their views through the electronic and print media, attending and participating in workshops organized by government ministries and other relevant institutions involved in initiating and developing the relevant policies, legislation and administrative procedures required for the implementation of the constitution.

In order to ensure such public participation, the CIC has also advised the public on the steps to be followed to make their participation in the implementation of the Constitution effective. The steps include the following:

- Members of the public, in their individual or collective capacities, should familiarize themselves with the entire Constitution.
- Members of the public, in their individual or collective capacities, are encouraged to identify aspects of any existing policies, legislation and administrative procedures which are not in line with the letter and spirit of the Constitution and submit their views on any of these aspects to the relevant line ministry or institution to facilitate the necessary reviews and development by the ministry or institution. The recommendations may be copied to CIC for information purposes.
- Every member of the public should be vigilant and ensure that government ministries and institutions comply with the Constitution and with the new/revised policies, laws and administrative procedures.

In making any recommendations for the review/development of policy, administrative procedures and legislation, the public should take into account the fact that the constitution requires government ministries and institutions to involve all relevant actors including the public in the process. In making proposals for the review of existing sectoral /issue policies, administrative procedures and legislation, and in determining the necessity of new laws, institutional policies and structures, and, administrative procedures, the public should take into account, among others:

- The provisions relating to human rights in the Constitution and, in particular, the need to incorporate the requirement for progressive implementation of the socio-economic rights under Article 43.
- The values and principles articulated in Articles 10 and 232 and Chapter 6 (Leadership and integrity) of the Constitution.
- The principles of fairness, prudence, clarity, and the need for fiscal responsibility in the management of public resources articulated in Chapter 12 of the Constitution

As part of its engagement with the public and stakeholders, the CIC also held a three day consultation retreat at Naivasha from at which the Commissioners were inducted on the operational relationship between the Commission, the Ministry of Justice National Cohesion and Constitutional Affairs and other stakeholders. The purpose of these consultations was manifold. First, it was to enable the CIC share its opinion on its mandate with stakeholders. Second, it was to enable the stakeholders and the CIC to agree on the modalities of working together in the process of implementing the Constitution. Third, the consultations were intended to get the stakeholders own the process. Fourth, consultations were an important vehicle for building trust between the stakeholders and the CIC. The meeting with civil society aimed at urging civil society to serve as a bridge for reaching out to the larger public and to incorporate the expectations of this sector of society in its preliminary planning.

A second tier of meetings that deserve specific mention is those that the CIC has held with the top political leadership of the country. The CIC met with His Excellency the President, Mwai Kibaki and the Right Honourable the Prime Minister, Raila Odinga, on 7th January 2010. At one level, the meeting was a courtesy call. However, the CIC also used the meeting to seek the support of the President and the Prime Minister for the work of the Commission. Both in private and through a statement that they allowed to be released to the press later, the President and the Prime Minister expressed support for the work of

the CIC and pledged that resources necessary for the discharge of its mandate would be provided. Subsequent to this meeting the two principals have availed the CIC opportunities to consult with them on various issues relating to the implementation of the Constitution.

There have also been a series of meetings with development partners. The purpose of the consultation with development partners was mainly to brief the partners on the approach that the CIC intended to take in the discharge of its mandate and to explore ways through which the two would collaborate in the implementation of the Constitution.

The full list of the various consultations and meeting that the CIC has held with different stakeholders can be found in **Annex III** to this report. The Commission will continue to hold consultations with stakeholders as need arise.

3.2 CIC's Administrative Set-up and Functioning

Ensuring the efficient and orderly functioning of the CIC is a key part of ensuring that effective implementation of the Constitution. Consequently, it is important to highlight the progress that has been made in setting up administrative systems, policies and regulations as well as other matters such as on staffing to facilitate the work of the CIC.

The CIC Commissioners, as already noted, were sworn in on 4th January 2011. They moved into their allocated offices at Delta House in Westlands and began work immediately. Initial discussion by the Commissioners identified a number of issues relating to the setting up and functioning of the Commission that need to be addressed on a priority basis. The work of the Commission began, first, with addressing administrative issues, including issues to do with staffing, financial arrangements, procurement plans, communication strategy and outreach activities.

The second category of the initial internal discussions related to technical or programmatic issues. Here the discussions mainly focused on the mandate of the Commission. The Commissioners interpreted their mandate with a view to having a shared understanding of their mandate. As part of this discussion, the CIC assembled relevant literature and background documents that will be used in the course of what will be a continuous interpretation of the mandate of the Commission.

The CIC also spent a considerable amount of time identifying relevant stakeholders whose contribution to the work of the Commission would be invaluable and consulting with them. The classification of stakeholders and the discussions between them and the Commission is reported in some detail in section 3.1 above and in Annex III to this report. The specific activities relating to the establishment of a functioning secretariat outlined above are described in greater detail below.

3.2.1 Office Space

The Commission was lucky because it did not have to struggle for office space. This is because the COE appointed under the Constitution of Kenya Review Act, and whose work led to the enactment of the new Constitution, was disbanded at the end of its successful mandate. The Committee left behind a fully furnished and operational office, which CIC inherited. The CIC was therefore saved the trouble, which can be considerable, of finding and equipping an office from scratch.

The Commission is grateful to the Ministry of Justice, National Cohesion and Constitutional Affairs for facilitating the smooth acquisition, by the Commission, of office space. This has enabled CIC to make a relatively easy start, allowing it to concentrate on its core mandate from the start.

3.2.2 Financial Arrangements

The CIC spent significant time, at the start, discussing financial matters that would affect the operations of the Commission. The discussions were informed by the fact that the Commission was established in January 2011, long after the presentation to the National Assembly of the financial estimates for the year 2010/2011. The CIC had understandably missed out on the financial estimates because of the unfavourable time of its establishment. To facilitate the work of the Commission under the circumstances, Treasury authorised the

Ministry of Justice, National Cohesion and Constitutional Affairs to spend up to Ksh 156 million on account of the Commission. Treasury later revised this figure to Ksh 292 million as the budget for the Commission between January and June 2011. It is expected that financial or budgetary provision will be made for the CIC in the estimates for the year 2011/2012.

In practice, the arrangements authorised by Treasury have worked reasonably well for the Commission so far, and the Ministry of Justice, National Cohesion and Constitutional Affairs has discharged its financial obligations to the Commission efficiently. However, there can be no substitute for complete financial autonomy, which the Commission hopes to have by June/July 2011.

3.2.3 Staffing

The CIC also devoted time, from the start, on its staffing needs and ways in which these might be addressed. In particular, the Commission sought to put in place a basic staff complement to form part of its initial team. The Commission was happy that the Ministry of Justice, National Cohesion and Constitutional Affairs authorised it to hire temporary staff that would supply the immediate needs of the Commission. The Ministry has also deployed staff to assist the Commission and support the process of its establishment. These staff complement includes an acting Chief Executive Officer, deployed from the Public Service Commission (PSC).

The CIC also hired consultants to assist with the discharge of specified tasks. For example, a media consultant was hired under this arrangement. The Commission is grateful for assistance that it has received from the DFID and SUNNY KENYA which has enabled it to hire the two consultants.

The CIC, however, decided that there would need to be greater consultations to determine the rest of the staffing needs. This would allow most of the staff posts to be filled on a competitive basis. This means that the Commission will advertise these positions. To make a determination of its actual staffing needs, the Commission has been discussing its establishment plan. A draft of this has been developed and approved by the Commission. Seeking the approval of Treasury for the plan will be the next level of engagement. Thereafter, and subject to funding, the Commission will commence the process of filling the positions.

3.2.4 Procurement Plan

Under the direction of the Commissioners, a procurement plan for the CIC has been developed and discussed. The plan encompasses both the administrative procurement, and programmatic procurement. The plan has been approved by the Commission and now awaits funding.

3.2.5 Communications Strategy

Analyses of what it would take to give effect to the principle of public participation indicated that the public can only participate if it is provided with information to understand what is going on. With a view to doing so, the CIC made a decision at the onset that it would create a capacity to generate relevant information concerning its work and that it would have to disseminate this information to the public in an organized manner. Also the Commission would need to place itself in a position where it would receive, analyze and respond to information coming from the public and which was deemed to be important for its work.

The upshot of this was that the CIC decided to establish a communications function within its set up, as one of the core capacities without which its work would be ineffective. With help from the DFID, the CIC hired, on an interim basis, a media relations consultant to oversee the development of communication strategy and to manage the communication function on its behalf in the interim.

To manage the public communication function the CIC discussed and agreed on a code of practice as to how this function would be managed. The Chair of the Commission was designated the official spokesperson of the CIC although other members of the Commission may, with the concurrence of the Commission, or on the delegation of the Chair, also exercise this function on behalf of the Commission.

During the period covered by this report, the Commission has from time to time communicated with the public. This has been done through media briefings, press conferences, and the participation by the Chairman in talk shows on television and radio.

The CIC also held early consultations with members of the media, through their representative organizations, such as the Kenya Editors' Guild, the Media Owners Association and the Parliamentary Reports Association. The objectives of the consultations were to establish a positive relationship with the media, in the hope that this would enable the CIC to discharge its functions more effectively; to provide media practitioners with opportunity to state the expectations that they had towards the Commission; and to provide a briefing to the media on the work of the Commission thus far.

4. EFFECTIVE IMPLEMENTATION OF THE CONSTITUTION: KEY CHALLENGES AND POTENTIAL IMPEDIMENTS

The Commissioners did not anticipate significant impediments to their work when they took office. The availability of Office space immediately after being sworn in allowed the Commissioners to immediately settle down for business. The Ministry of Justice, National Cohesion and Constitutional Affairs officials, led by the Minister and the Permanent Secretary welcomed the Commissioners to the Offices at Delta House and assured the Commission of their full and total support. Such support and encouragement was further received from the President and the Prime Minister when the CIC met them at the Office of President in the same week.

Though the CIC did not anticipate impediments to the implementation of the constitution, it nevertheless recognized that like any other life endeavour, challenges would arise in the course of its work. These challenges were initially not specific and only began to crystallise as work unfolded and progressed. A number of challenges, which are not necessarily impediments, have been encountered by the CIC. The challenges can broadly be classified into the following three categories.

- Institutional and organizational challenges.
- Political challenges.
- Technical challenges.

4.1 Institutional and Organizational Challenges

Despite the immediate provision of office space, building the Commission into an institution and an organization is still on-going. The CIC has just developed its organizational structure and is soon to begin building its Human Resource capacity needed to support its administrative and technical work. The expectations of the public from the Commission are high and this in itself is a challenge. The Commission will therefore have to assemble high calibre staff if the public's expectations are to be realistically addressed.

The CIC recognizes that funding to sufficiently cover for its programmes and activities will be a challenge. Government funding can be stretched and despite the good will and intentions, this will many a times, not meet the Commission's needs fully. The Commission will therefore need to work closely with the Government to fundraise with the development partners to augment government funding.

There are a number of transitional challenges inherent in the implementation of the new constitution. Laws exist which had their validity in the old constitution, and which have yet to be replaced, even if they are now in contravention of the new constitution. For example, the CIC has been informed that it cannot communicate with the press because it is barred by existing government regulations which prohibit public officials from speaking with the media without authorisation. There is uncertainty whether the CIC is subject to the control of the Public Service Commission (PSC).

Although the Commissioners were appointed in January 2011 and have been in office for a period of three months, their terms of service have not been clarified or dealt with. It remains unclear when and how these will be dealt with.

4.2 Political Challenges

The political situation in the country has not been ideal for the implementation of the new constitution. The existence of the Grand Coalition Government has been a challenge of itself, as it delays

consultations that the CIC has to make with the government. The large number of ministries, itself a consequence of the coalition government, increases the sites of engagement with which the CIC must deal, and could slow the pace of implementation.

Further, there have been some disharmony within the government and this has had an effect on perceptions towards the CIC. At different times, the actions of the Commission, however well meaning, are regarded as aimed at, or having the effect of, supporting a given political preference. In these circumstances, the CIC has been called upon to pledge its independence and non-partisanship in ways that it would not have had to do if the political situation was a little more trusting. The Commission would urge both the President and the Prime Minister to ensure that, in the way in which they exercise leadership in this country, the kind of difficulties witnessed in the country recently are not repeated as this has direct implications for the implementation of the constitution.

The CIC enjoys much the same position in relation to the central government, as that occupied by other independent commissions, which are not subject to the control of any person or authority. The CIC is also in the same position as regards autonomy, as the Judiciary, for example. In much the same way as public officials, however high, cannot dictate to the judiciary what to do in the discharge of its functions, it is not possible for any public official to dictate to the Commission on what to do with its mandate. The CIC has a duty to work with other public agencies, and cannot discharge its mandate without doing so. However, in its engagements with those agencies, the Commission has to ensure that it maintains its independence.

A chain exists in the relationships between the CIC and other public offices, mainly the office of the Attorney General and the KLRC. There is yet to emerge a coordinated approach between these offices in the discharge of their mandates as they relate to the implementation of the Constitution. For example, the Attorney General appears to hold the view that all Bills to the Commission come from his office, and that Bills received from other sources are not properly before the Commission. Given the slow turnaround between the Attorney General and the KLRC, the CIC has, in certain cases, taken upon bills that were handed over outside the formal chain, so as to save on public time. Ways of improving these relationships will save public time, and must be developed in the coming days.

The CIC feels that there is a common but erroneous perception that the implementation of the Constitution is only about drafting of laws. Whereas there is a large amount of drafting involved in the implementation of the Constitution, this also involves compliance with aspects of the Constitution not requiring addition legislation to come into force. Also, the Constitution requires the assumption on the part of public officials and the Kenyan public, of new attitudes that will lead to a national culture that is supportive of the values of the Constitution. These are matters about which there can be no legislation and which the Commission has to mobilize Kenyans on how to collectively address this challenge.

The CIC foresees that the implementation of the Constitution will lead to changes in the way in which the public service is organised, and also the manner in which public service is delivered. The fear of change is expected to lead to turf wars in the political arena and this could impede the implementation of the Constitution.

4.3 Technical Challenges

A key mandate of the CIC is to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution. It fortunately continues to undertake this mandate by heavily drawing on the expertise and experience of the Commissioners and investing heavily on needed time and the extra energy from them.

No Bill is anchored in a vacuum and by necessity has social, economic and even political implications. Any Bill has therefore been shaped by history and the evolution of society. A complete understanding and consequently examination of a bill requires extensive background reading and research. Handling two or three Bills at a time has been exhausting and terribly demanding on the part of the Commissioners. The CIC is now nearing the recruitment of staff and hopefully technical staff to support the Commission in this regard will soon be realized.

The office of the Attorney General and the KLRC are both important counterparts of the CIC, as both are involved in the generation of draft

legislation. Their capacities also require to be strengthened to cope with the increased demand for drafting and legislative work.

Annex I

Summary of Key Achievements in the January – March 2011 Quarter

Outcome Status	Start Date	Planned Date of Completion	Actual Date of Completion	Status or Comments
Legislation				
Judicial Service Act	January 2011	August 2011	March 22, 2011	Shall oversee the application of the law and compliance of administrative procedures with the Constitution
Vetting of Judges and Magistrates Act	January 2011	August 2011	March 22, 2011	
Judiciary Fund	January 2011	August 2011	March 22, 2011	
Review of Administrative Procedures				
Police Recruitment Guidelines	March 2011	March 2011	March 2011	Awaiting final draft of guidelines from the Police
CIC Process Circular for Implementing Agencies				
Draft Circular on Process	February 2011 March 2011	February 2011 April 2011	March 2011 N/A	Approval from AG, KLRC received. Awaiting sharing and discussing with Permanent Secretaries of Ministries
Notice to the public ready awaiting the conclusion of the circular				
Recruitment of CIC Staff				
Development of staff recruitment policy, including a CIC organogram and job descriptions	January 2011 March 2011 March 2011	March 2011 March 2011 June 2011	March 2011 April 2011 N/A	Awaiting further action from MOJNCA Awaiting procurement of the advertisements Awaiting for advertisements to be circulated in the press by MOJNCA
Competitive recruitment of key personnel				
Deployed Staff	January 2011	February 2011	February 2011	Staff have been deployed pending competitive recruitment
Budget for 2011-2012				
Preparation of Budget and Work Plans (Thematic and CIC)	January 2011	March 2011	March 2011	Submitted on March 23, 2011
Chapter 15 Commissions				
Engagement with Commissions	January 2011	March 2011	April 2011	Awaiting establishment of some commissions
Rapid Action Plan January-June, 2011				
Rapid action work plan developed	February 2011	February 2011	February 2011	Implementation of the plan is ongoing
Article 249 Functions(protect the sovereignty of the people, secure observance by state organs of democratic values and principles and promote constitutionalism				
CIC's position on Nominations to Constitutional Offices	January 2011	February 2011	February 2011	Nominations were withdrawn and post of Chief Justice and DPP has been advertised.
Case filed in court seeking advisory opinion from the Court	February 2011	March 2011	June 2011	Proceedings are ongoing
Police recruitment – CIC urged the police service to review their recruitment procedures so that they are in line with the letter and spirit of the constitution, before recruitment				
Ministry of Public works – Proposed County Assemblies, offices and governors' residences Standard March 23, 2011				

Annex II

Legislative Priorities for the period ending 30th August 2011

Article	Legislation	CIC Proposed Deadline	Schedule 5 End Date	Status to date	Remarks
Priority one					
	Representation & Legislature:				
Art 88	IEBC	Mid-March 2011	26/8/11	Draft obtained from KLRC.	Bill should be published

Article	Legislation	CIC Proposed Deadline	Schedule 5 End Date	Status to date	Remarks
				Internal discussions and stakeholder completed. Final draft presented to AG on the 21st March 2011	and passed by April 15th to allow IEBC to be set up
Arts 82-90, 93-105, 136-142, 148	Elections related legislation including quotas for women and marginalized groups in elective offices	End of July 2011	26/8/11	Awaiting draft bill from KLRC. Expected by 8th April	Bill urgent and should be concluded by early May to enable IEBC commence election planning
Art. 127	Parliamentary Service Commission	End of July 2011	26/8/11	Awaiting draft bill from Parliament and KLRC	
Arts 91-92	Political parties	End of June 2011	26/8/11	Draft bill received from KLRC. Undergoing internal and stakeholder review	Bill urgent and should be concluded by early May to enable IEBC commence election planning
	Judiciary:				
Art 163	Supreme Court	End of March 2011		Draft bill received from KLRC. Undergoing internal review and stakeholder consultation	This bill is urgent so as to conclude the judicial reforms in time for the general elections
Art 162	System of Courts	End of June 2011		Awaiting Bill from KLRC and implementing ministry	
	Public Finance:				
Art 201-214	Public Finance Management legislation including the budget process, the role of Treasury and matters of fiscal decentralization	End of June 2011	26/8/11	Policy on proposed public finance management law received from Treasury. Draft Bill under preparation by Treasury. Consultations ongoing and stakeholder forum planned for 8th April 2011	There is urgent need to synchronise the Treasury team and devolution taskforce on fiscal decentralization issues and have PFM and related financing bills ready by end of June 2011
Art 215	Commission for Revenue Allocation	End of March 2011	31/3/11	Draft under discussion by CRA.	Bill should be enacted urgently since CRA is now in operation
Art 230	Salaries and Remuneration Commission	End of March 2011	31/3/11	Draft bill obtained from KLRC. Internal discussions and stakeholder completed. Final draft presented to AG on the 21st March 2011	
Art 228 and 229	Auditor General & Controller of Budget	End of March 2011	31/3/11	Draft bill on appointments to the two offices obtained from KLRC. Internal discussions and stakeholder completed. Final draft presented to AG on the 21st March 2011. Bill on substantive functions and operationalisation of two offices to be prepared after PFM law.	Bill on the appointments of independent offices should be published by end of April to allow appointment of officers. Substantive law on functions and operational issues should be finalized by August when the current Auditor General shall leave office.
	Public Service & Leadership:				
Art. 79	Ethics and anti-corruption commission	End of April 2011	26/8/11	Awaiting bill from KLRC and KACC	
Art. 74-80	Legislation on leadership, foreign bank accounts for state officers, and disciplinary procedures in the public service	End of April 2011	26/8/11	Awaiting bill from KLRC and KACC	Legislation urgent to facilitate process of vetting state officers
	Priority Two				
	Public Service & Leadership:				
Art 233	Public Service Commission	End of July 2011	26/8/11	Draft Bill received from PSC. Undergoing internal review and discussions with KLRC and AG	Bill urgent in view of the critical role of PSC in ongoing public service reform.
	Bill of Rights & Citizenship:				
Art. 11,12,14,15 & 18	Citizenship	End of July 2011	26/8/11	Awaiting task force report and draft bill	Bill urgent in view of citizenship implications on elections
Art 22 (3)	Rules to enforce human rights	End of July 2011	26/8/11	Rules awaiting appointment of Chief Justice	
Art 24 (5)	Limitation of rights to disciplined forces	End of July 2011	26/8/11	Draft bill on police including proposals on limitation received. Internal review completed. Undergoing stakeholder	

Article	Legislation	CIC Proposed Deadline	Schedule 5 End Date	Status to date	Remarks
				consultations	
Art 59 (4) and (5)	Kenya National Human Rights and Equality Commission	End of July 2011	26/8/11	Undergoing discussions with both commissions to build consensus on number and nature of ultimate commission (s).	
	Security Sector:		26/8/11		
Art. 238	Principles of national security: Amendment of existing rules and regulations to integrate the principles into the operations of the national security organs.	End of June 2011	26/8/11	Draft Bills on security sector received. Internal review completed. Undergoing stakeholder consultations	
Art. 240, 241	National Security Council	End of June 2011	26/8/11	Awaiting Bill from KLRC and implementing ministry	
Art. 242	National Intelligence Service	End of July 2011	26/8/11	Awaiting Bill from KLRC and implementing ministry	
Art 243	National Police Service and related Bills	End of July 2011	26/8/11	Draft Bills on National Police Service, Independent Police Oversight Authority Bill and Private Security providers Bill received from KLRC. Internal review completed. Undergoing stakeholder consultations	CIC fast tracking the Laws on security sector reforms in view of their critical impact on elections
	Devolution:				
Art 99, 177-196	County Assembly legislation including qualifications for election, gender balance and diversity and support for county governments	End of August 2011	26/8/11	Awaiting task force report and draft bill from KLRC and implementing ministry	Laws of devolution urgent in view of need to prepare structures and systems for elections in good time.
Art 189(4)	Settlement of intergovernmental disputes	End of August 2011	26/8/11	Awaiting task force report and draft bill from KLRC and implementing ministry	
	General				
Art. 2(6)	Incorporation of international Law obligations – Ratification through parliament	End of August 2011		Awaiting draft bill from KLRC and implementing ministry	
Art 67	National Land Commission	End of August 2011		Awaiting draft bill from KLRC and implementing ministry	In view of the sensitive nature of land it's important that this Commission be set up as early as possible so that it can oversee much needed land reforms.

Annex III

Consultations with Stakeholders and Development Partners

ORGANISATION	VENUE	DATE & TIME OF MEETING	Topic
Commission on Revenue Allocation C.R.A	CIC Board Room	12th Jan, 2011 -	
Stakeholders meeting with the CIC Commissioners	CIC Board Room	Friday 14th January, 2011- 11.30 am	Meeting on Technical Consultative Forum to discuss the Vetting of Judges and Magistrates Bill, 2010 and the Judicial Service Bill 2010
Meeting with IMF/World Bank	Treasury	14th Jan 2011 -7.30 am	
Minister for Justice National Cohesion and constitutional Affairs and the AG	CIC Board Room	17th Jan, 2011 8.00 am	
LSK –	CIC Board Room	18th January, 2011 – 2.00 pm	
IMF/Treasury/CIC	CIC Boardroom	19th January, 2011 -8.00 am	
Parliamentary Oversight Committee on the implementation of the Constitution	Parliament	18th January, 2011 – 10.00 pm	
Parliamentary Justice and Legal Affairs Committee	Parliament		
Kenya Parliamentary Network	CIC Boardroom	18th January, 2011 – 03.00 pm	
Various stakeholders Retreat – Induction for CIC Commissioners	Naivasha	24-26th January, 2011	Induction Course for CIC Commissioners
Meeting with the Judicial Service Commission	High court Boardroom	31st Jan, 2011 – 11:00 am	
Courtesy Call by Judges of the Interim Constitutional Dispute Resolution Court	CIC Boardroom	31st Jan 2011 – 03:00pm	

ORGANISATION	VENUE	DATE & TIME OF MEETING	Topic
DGDG	Canadian Embassy	1st Feb, 2011 – 3.00 pm	
Kenya Editors Guild	Panafric Hotel	8/02/2011 – 7:30 am	
IDLO Representative	CIC Boardroom	8/02/2011- 2.30 pm	
Workshop to validate the APSEA Policy Brief on the Implementation of the Constitution -	Pride Inn Hotel Rapha Road Westlands	10th Feb, 2011- 9 am	
Courtesy call by Chairman - IIEC	CIC Board Room	10/02/2011 – 11:00 am	
UNPD Consultative meeting	CIC Board Room	14th Feb, 2011- 2.30 pm	
NCCK Courtesy call	CIC Board Room	15th Feb, 2011 – 3.00pm	
European Union to Kenya – Heads of Mission	EU Offices on Ragati Road, Upper Hill	16th Feb, 2011 – 8.00 am	
Meeting with AG and chairman Kenya Law reform Commission	CIC Boardroom	28th Feb. 2011 - 2.00 pm	
Retreat for the CIC	New Stanley Hotel	9th – 10 March 2011	
Meeting with secretary to the Cabinet	Harambee House 2nd Floor	16th March 2011 – 3 pm	
Meeting with Ministry of Justice National Cohesion and Constitutional Affairs and UNDP on constitution conference	CIC Boardroom	21st March, 2011 – 8.30 am	
Meeting with ICPS(K)	CIC Boardroom	21st March, 2011 – 7.00 am	
Meeting with AG, Minister and the PS for Justice National Cohesion and Constitutional Affairs	CIC Boardroom	21st March, 2011 – 2.30 pm	

GAZETTE NOTICE No. 2054

THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

SECOND QUARTERLY REPORT ON THE IMPLEMENTATION OF THE CONSTITUTION

June 2011

FOREWORD

Since its establishment on 4th January 2011, the Commission for the Implementation of the Constitution (CIC) has successfully undertaken activities geared towards the realization of its mandate. In its first quarterly report January-March 2011, CIC focused predominantly on providing an understanding of its mandate and highlighting the start-up activities which are common to any new organization. In the first quarter there were a number of milestones achieved which included the enactment of the Judicial Services Act, the Vetting of Judges and Magistrates Act and the establishment of working modalities with key implementers, stakeholders and development partners. CIC put in place its Secretariat to support its functions.

As part of its mandate, CIC is required to prepare and submit quarterly reports to the Constitution Implementation Oversight Committee of Parliament the Public, the President and the Prime Minister. In this quarter, CIC activities focus on the activities it has undertaken under the eight thematic areas, that is, *Public Service and Leadership; Judiciary and Constitutional Commissions; Devolution; Public Finance; Bill of Rights and Citizenship; Land and Environment; Executive and Security; Representation of the People & the Legislature*. In addition, this report includes submissions from and an analysis of reports by implementing agencies and ministries. A list of ministries, which have not submitted their quarterly report, is included.

In exercising its mandate CIC enhanced effective stakeholder participation in the implementation process, and, in this regard, CIC ensured that each of the bills under consideration was subjected to a review by stakeholders from Nairobi and counties across the country. Public participation was enhanced by the successful launch of a vibrant and interactive website. Kenyans from within and without the country can now access bills and updated information on the implementation of the Constitution.

CIC also finalized and disseminated, under the auspices of the Office of the Head of the Civil Service, the Process Circular for Implementing Agencies. The circular not only serves as a basis of engagement between CIC and the ministries in the constitutional implementation but also enhances CIC's monitoring role based on reports received from ministries on their implementation status particularly with regards to the review of laws, policies and administrative procedures. These reports are an important monitoring and evaluation tool.

One of the hallmark events of this quarter was the successful hosting of the 1st Annual National Constitution Implementation Conference, in conjunction with the Ministry of Justice, National Cohesion and Constitutional Affairs. The high-level conference brought together policy leaders from the government and the non-state sector to galvanize the nation to focus on timely and full implementation of the Constitution. The conference was also attended by representatives from counties. There are plans to also have similar conferences in counties to ensure that a greater percentage of people of Kenya are reached.

Further to the discharge of the CIC mandate of monitoring Constitutional implementation in line with Article 249 requirements of rule of law and constitutionalism, CIC was vigilant on actions and omissions by implementers. Violations of the Constitution were flagged out to the concerned parties directly and, in cases of public interest, to the public through publication of the legal advisories in the print media and issuance of press statements. Most notable of the violations is the delayed release of budget estimates and the continued holding of office in political parties by appointed state officers, in violation of Article 210 and 77(2) of the Constitution, respectively. Additionally, where CIC felt the need for judicial intervention to clear questions of the interpretation of the Constitution, it did not hesitate to move to court in search of the jurisprudence of such provisions and their interpretation. For instance, CIC filed a request for an Advisory Opinion seeking the Supreme Court's opinion on several questions relating to appointments to Constitutional offices and commissions and the relationship between the Sixth Schedule of the Constitution and appointments to Constitutional offices. CIC also enjoined the case requesting for the construction, interpretation and determination of the actual date of the next general elections.

CIC encountered a number of challenges in the first quarter as it set out to discharge its mandate; some of the challenges have been progressively addressed, but some of them remain and, like the sword of Damocles, threaten to derail the implementation process. The continuous wrangles resulting in the disbandment of the Justice and Legal Affairs Committee delayed the enactment of bills as well as the engagement of Supreme Court Judges. Action by the Speaker to confer the duties of the disbanded committee on the Constitution Implementation Oversight Committee was timely.

Constitutional building as well as constitutionalism requires positive reaction and response from every citizen. The absence of good values from the citizenry and government officials is a significant challenge to the implementation process.

CIC acknowledges the efforts made by the executive, the judiciary and the legislature to keep the implementation process on course. CIC also wishes to thank development partners for financial and technical support, which has seen CIC achieve the milestones reported herein. Non-state actors, other implementation partners, stakeholders and members of the public were instrumental and supportive for the

implementation process. The commissioners and staff of CIC are the backbone of the work of the CIC and without whose commitment and hard efforts the implementation process would not be where it is today. The next quarter will see more results as other requisite legislation is enacted and CIC strengthens its Secretariat to enhance efficiency.

Once again I wish to state that CIC is accessible to the people of Kenya and undertakes to remain open to public scrutiny. CIC calls upon Kenyans to appreciate their role in constitutional implementation and thus continues to encourage Kenyans to read and internalize the Constitution and remain vigilant by using the Constitution as the basis to monitor the implementation process to ensure that the letter and spirit of the Constitution is upheld, protected and defended at all levels and at all times.

Charles Nyachae
Chairperson

EXECUTIVE SUMMARY

Ten months following the promulgation of the Constitution, the Commission for the Implementation of the Constitution (CIC) has successfully undertaken numerous activities towards constitutional implementation. In exercising its mandate, CIC underscores the emphasis that the Constitution of Kenya 2010 places on the national values and principles of governance set out in Article 10 of the Constitution, including transparency, accountability and inclusiveness of the people, in the exercise of the powers of the state and in decision-making on issues affecting the people.

In the spirit of constitutionalism and in accordance with the statutory requirement to report regularly to Parliament, and by extension to the public, as provided for in Section 6(c) of the Sixth Schedule to the Constitution and Section 4 (d) of the Commission for the Implementation of the Constitution Act, CIC has prepared its second quarterly report for the period between April and June 2011. The report gives an account of the experiences of CIC in the realization of its facilitative, monitoring and constitution-implementation oversight role. Through this report, CIC seeks to create an avenue for engagement and consultation, with the public and all stakeholders, on the progress of, impediments to and achievements in the implementation of Constitution. The second quarterly report also serves as a scorecard for the public to determine how effective CIC has been in executing its mandate and functions during the period between April and June 2011.

During this second quarter, CIC interpreted its mandate and determined its operational vision, mission, and strategic outcome results that should determine delivery of its mandate. Although it is yet to undertake full strategic planning, CIC is resolute to work towards effective realization of its mandate, through feeding into four key outcome results:

- ◆ A respected, well-functioning and independent commission effectively delivering on its mandate.
- ◆ A policy framework that is compliant with the letter and spirit of the Constitution.
- ◆ A legal framework that is compliant with the letter and spirit of the Constitution.
- ◆ Effective institutional frameworks and administrative procedures for the implementation of the Constitution.

CIC made significant progress in strengthening its working relations with partner institutions for effective constitutional implementation. In this regard, through the Office of the Head of Civil Service, CIC finalized and disseminated the Process Circular for Implementers, and, with its partners, developed timelines for implementing key legislation by 30th August 2011. CIC also advised on the review of recruitment policies and procedures for the National Police Service. Policy provisions, which were flagged out for correction before the recruitment exercise, include issues which would have amounted to violations of the principle of equality and non-discrimination contrary to Article 27 of the Constitution. Further, CIC held stakeholders' consultations with key implementing partners including state actors, civil society organizations, international development partners and members of the public on their role as implementers.

At the same time, CIC had several achievements including the review of laws among other issues. CIC facilitated the enactment of the Supreme Court Act 2011 into law during the second quarter. Bills passed by Parliament and currently awaiting presidential assent

include the Independent Electoral and Boundaries Commission Bill, the Salaries and Remuneration Commission Bill, and the Independent Office Bill. In addition the bills forwarded by CIC and waiting for approval by the Cabinet include the Kenya Human Rights Commission Bill, the National Gender and Equality Commission Bill, the Commission on Administrative Justice Bill, and the Political Parties Bill. CIC has finalized and forwarded bills to the Attorney-General for publication; these include the National Police Service Commission Bill, the National Police Service Bill, and the Independent Policing Oversight Authority Bill. As part of its mandate, to work with constitutional commissions to ensure that the letter and spirit of the constitution is respected, CIC held meetings with the Commission on Revenue Allocation on the areas of engagement such as the Public Finance Management Bill, which is essential to the success of the workings of the Commission on Revenue Allocation.

With a backlog of laws to be enacted, CIC has continued to pay particular attention to ensuring that the bills set out in the Fifth Schedule to the Constitution are finalized and enacted within the set timeframe. What is more, during the next quarter, CIC is scheduled to hold county visits, and take part in capacity building and civic education forums on thematic issues, such as public participation, human rights, devolution and public finance, for CIC commissioners and staff as well as implementers of the Constitution.

CIC's process of executing its mandate has not been without challenges, which impacted on its effectiveness. These include resistance to change and an inclination to operate with a business-as-usual attitude, impunity by some government ministries, a lack of consensus by stakeholders on the content of bills forwarded to CIC, a lack of understanding of the constitution-implementation process at all the levels of government ministries, an apparent reluctance by technocrats to implement the Constitution in their particular sectors, a lack of awareness of the Constitution-implementation process, belated submission of bills to CIC, and poor drafting of bills. In addition, CIC's administrative operations have been hampered the following challenges: Weak liaison processes with the Ministry of Justice, National Cohesion and Constitutional Affairs, lack of a status update on CIC's expenditure and low staffing levels.

CIC also encountered impediments, which are likely to continue to affect its work into the next quarter. These include: selective reading and misinterpretation of provisions of the Constitution by implementing agencies, deliberate misinformation to members of the public by some members of both the Executive and the Legislature, a lack of guidance from the Office of the Attorney-General in the process of implementation of the Constitution, political risk, and the increasing trend by the Executive and some members of the Legislature to create grey areas regarding the interpretation of the Constitution. All these have the unfortunate propensity to create confusion and to delay the implementation of provisions of the Constitution.

Despite all these challenges and impediments, CIC is pleased with its achievements during the quarter. As a result of these challenges and impediments, however, CIC makes a number of legal, administrative, policy, and financial recommendations in the last chapter of this report, which CIC hopes the government and other stakeholders will take on board in support of the implementation of the Constitution. The recommendations include the following: Political leaders and the Executive should demonstrate stewardship to facilitate the smooth implementation of the Constitution, constitutional references relating to the implementation of the Constitution should be fast-tracked to avoid abuse resulting in impeding the implementation of the Constitution, targeted civic education should be rolled out by implementing agencies, existing legislation and administrative procedures should be revised by ministries to align them with the Constitution, implementing agencies need to adopt a systematic and integrated approach in their agencies to involve all their staff and to prioritise the implementation of the Constitution in their work, and implementing agencies should ensure involvement of CIC at the earliest opportunity in the review of their policies and administrative procedures to ensure that the focus remains on the bills and the national interest.

1. INTRODUCTION

Six months since the Commission for the Implementation of the Constitution (CIC) was established and its commissioners sworn in,

the process of implementing the Constitution of Kenya 2010 is well under way and about to reach the critical milestone of the first year of its implementation. As required by the CIC Act, CIC takes this opportunity to make its second quarterly report to the people of Kenya. The report takes off from where the first quarterly report left off on 30th March 2011 and charts the next three month journey of the implementation of the Constitution up to 30th June 2011 from the perspective of the CIC in the exercise of its mandate.

CIC's mandate of monitoring, facilitating, coordinating and overseeing the development of legislation and administrative procedures in the implementation process aims to ensure that genuine participation by the people of Kenya takes place at every stage of the implementation process; policies, sessional papers, laws and administrative procedures amended or developed are technically sound and are in line with the letter and spirit of the Constitution; service delivery and application of the policies, laws and administrative procedures are in line with the national values and principles as set out in Article 10 of the Constitution.

The report is divided into five main parts.

- ♦ The first part discusses the CIC mandate in relation to the process of the implementation of the Constitution.
- ♦ The second part expounds on the exercise of the CIC mandate with regard to the development of legislation and administrative procedures in each of the eight thematic areas that CIC has established.
- ♦ The third part is divided into two sections. The first section sets out the activities at a thematic level that CIC undertook between April and June 2011, while the second section shows the progress of various government ministries and agencies in implementing the Constitution.
- ♦ The fourth part sets out the challenges in and impediments to the implementation of the Constitution. CIC expects these shall be addressed to ensure that the implementation of the Constitution is not thrown off track and delayed. This part also sets out the key recommendations that should inform future interventions to safeguard the implementation process; the recommendations arise from the work of CIC during the second quarter.

2. THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

2.1 The Mandate and Role of CIC

The mandate of CIC is to:

- (e) Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution;
- (f) Coordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement the Constitution;
- (g) Report regularly to the Constitutional Implementation Oversight Committee on:
 - (iii) the progress in the implementation of the Constitution; and
 - (iv) any impediments to this implementation.
- (h) Work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.

As a constitutional commission, the CIC mandate is amplified in Article 249 of the Constitution along these lines:

- (a) Protect the sovereignty of the people
- (b) Secure the observance by all state organs of the democratic values and principles
- (c) Promote constitutionalism

Delivering on its mandate, CIC is subject only to the Constitution and the law. On this basis, CIC performs its functions by ensuring that it is accountable to the Kenyan people, upholding the principle of public participation and securing the observance of all state organs of the values and principles without fear or favour. CIC guards its independence zealously and is not subject to direction or control by any person or authority. This independence is particularly important because it empowers CIC to constantly monitor any violation of the Constitution and administrative procedures by all actors including the Judiciary, Parliament, and the Executive. Overall, the fulfilment of the CIC's mandate is guided by the national values and principles as stipulated in Article 10 and other articles of the Constitution.

With regard specifically to the implementation of devolved government, the Constitution says in Section 15 (2) (d) of the Fifth schedule, that Parliament shall by legislation provide mechanisms that ensure that the Commission for the Implementation of the Constitution can perform its role in monitoring the implementation of the system of devolved government effectively. This provision emphasises the centrality of devolution to the successful implementation of the Constitution. The country has through the Constitution of Kenya 2010 adopted a devolved system of government. One of CIC's functions therefore is to see to it that devolution is successfully implemented. All functions, whether allocated to the national government or the county government, will take place or be performed at the county level. In discussing any legislation for example CIC considers it absolutely necessary to establish how the legislation will effect and be affected by the functions at the county level. Similarly, when discussing functions CIC always emphasises the impact of such functions at the county level.

CIC is yet to undertake full strategic planning, but it has interpreted its mandate and determined an operational vision and mission and strategic outcome results that should determine delivery on its mandate. The outcome result areas are geared towards laying down relevant policy and legal and administrative systems to ensure the required firm foundation for the full implementation of the Constitution. It takes into account that CIC is not a long-term institution and should at the end of its term have worked with all key implementers in establishing this foundation.

Vision and Mission

The vision of CIC is:

A united, peaceful and prosperous Kenya in which all citizens including leaders respect the rule of law, uphold national values and live by the Constitution.

Its mission is:

To ensure that policies, laws, structures, systems and administrative procedures developed and applied at all levels are consistent with and according to the letter and spirit of the Constitution of Kenya.

2.2. Strategic Outcome Results

CIC has organized its administrative and programmatic operations to feed into four key results areas at the outcome level:

Outcome Result 1

A respected, well-functioning and independent Commission effectively delivering on its mandate

Outcome Result 2

Policies which are compliant with the letter and the spirit of the Constitution

Outcome Result 3

Laws which are compliant with the letter and the spirit of the Constitution

Outcome Result 4

Effective institutional frameworks and administrative procedures for the implementation of the Constitution

CIC is and will continue undertaking various activities to deliver numerous outputs that will collectively contribute to the achievement of the four outcome results. To this end, the results are to be attained through a design of its activities into eight thematic areas that are drawn from the subject matter in the different chapters of the Constitution but that inter-relate and sometimes cross-cut:

1. Bill of Rights and Citizenship.
2. Public Service and Leadership.
3. Judiciary and Constitutional Commissions.
4. Devolved Government.
5. Public Finance.
6. Land and Environment.
7. Executive and Security.
8. Representation of the People and the Legislature.

2.3. Role of Implementers

CIC notes that the Constitution will only be fully implemented if constitutional implementers in the various arms of the government set the systems right in their sectors and prepare their personnel to adapt to a culture of constitutionalism. It is in this regard that the CIC, working in consultation with implementers and stakeholders in different sectors is developing modalities of work for effective

implementation and facilitating key activities to be undertaken at different levels by individuals and institutions.

Working in consultation with the executive as the primary implementing arm of the government, CIC has released a circular that gives a clear roadmap to implementers to guide them on what needs to be done to ensure that the implementation of the Constitution is effected. The circular has been issued to all ministries and public institutions. In summary the circular requires:

- (a) The need to internalise the provisions of the Constitution in general and, in particular, with respect to the provisions relevant to the sector or institution in question.
- (b) The need to review or audit existing sessional papers, policies, laws, and administrative procedures against the Constitution to identify any gaps or review needs or both.
- (c) The need to develop any new laws, new policies and administrative procedures required to implement the Constitution.
- (d) The need to put in place structures necessary to effect the Constitution especially the devolved government.

These requirements will also apply to the implementation of the Constitution, one, at the devolved governance levels, two, at the parliamentary level to take into account the new structure of two houses, and, three, with the Judiciary and even with the independent constitutional commissions.

2.4. Implementation in the Context of the Mandate of CIC

The implementation of the Constitution with regard to the mandate of the CIC involves:

- (a) Developing new laws, new policies and administrative procedures required to implement the Constitution.

Box 1 Constitutional Values and Principles

1. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people
2. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised
3. Good governance, integrity, transparency, and accountability
4. Sustainable development

- (b) Reviewing existing laws, policies, administrative procedures and legislation required to implement the Constitution.
- (c) Putting in place structures necessary to effect the Constitution especially in relation to the devolved government.
- (d) Ensuring the participation by the people of Kenya in the review process; the Constitution provides that all power belongs to the people of the Republic of Kenya, and the people shall determine how they wish to be governed at the national level and at the county level (Articles 1, 10, 118, 232 of the Constitution).
- (e) Ensuring that where new laws are developed or existing ones are amended, or both are done, the new laws and the policies which informed their development should be forwarded to the Attorney-General/the Kenya Law Reform Commission and CIC.
- (f) Ensuring that the legislative process adheres to the provisions of Article 261 of the Constitution on consequential provisions.
- (g) Coordinating with the Attorney-General/the Kenya Law Reform Commission in drafting bills in coordination with originating institutions.
- (h) Coordinating with the Attorney-General/the Kenya Law Reform Commission, the Constitution Implementation Oversight Committee and parliamentary committees to ensure timely passage of bills in Parliament.
- (i) Coordinating development of change-management strategies.

- (j) Monitoring effective implementation of the Constitution in devolved units of governance.
- (k) The implementation of the devolved government would require:
 - i) The development of standing orders to guide debate in the county assembly and senate. The standing orders must be consistent with the Constitution and legislation on the devolved government. While CIC will not develop the standing orders, it will review the standing orders that will have been developed
 - ii) A review of existing parliamentary standing orders to bring them in line with the new Constitution.
 - iii) The bills to have been passed by Parliament and assented to by the President.

Performing its functions, CIC is bound by national values and principles of governance laid out in Article 10(2) of the Constitution. The national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

3. ACTIVITIES IMPLEMENTED DURING THE SECOND QUARTER

3.1 Commission for the Implementation of the Constitution: Activities by each Thematic Area

3.1.1 Public Service and Leadership Thematic Area

> Introductory Remarks

Under Chapter Six and Chapter Thirteen, the Constitution ably provides for matters of public service and leadership. Under Article 232, the Constitution elaborately emphasizes on principles and values of public service that must be adhered to by state organs in the two tiers of government, State corporations and agencies, and all commissions established under the Constitution. It is apparent that successful governance must have at its core a set of principles and values that are enduring and relevant to the people. Strategies and tactics may change, but principles and values are anchors that give the government a firm footing even in uncertain or turbulent times. To that end, CIC recognizes the importance of principles and values enshrined in the Constitution in its quest to entrench constitutionalism in the people of Kenya and state organs. During the period under review, CIC undertook a number of activities under the rubric "Public Service and Leadership" thematic area that are summarised under three headings: achievements, challenges, and planned activities for the next quarter.

> Achievements

i) Internal Review of the Ethics and Anti-Corruption Bill

CIC undertook internal review of the Ethics and Anti-Corruption Bill, 2011, and held various consultative fora with the civil society, county representatives and state agencies among other relevant stakeholders that are involved in enforcing laws relating to corruption. The consultations identified several contentious issues that require further consultation and redress before the finalization of the bill.

CIC convened a technical meeting with the Ministry of Justice, National Cohesion and Constitutional Affairs and the Kenya Law Reform Commission on 15th June 2011. The objective of the meeting was to discuss how best the Ethics and Anti-corruption Bill would address contentious issues. The thematic team subsequently held a retreat on 23rd-24th June 2011 to finalize the draft EAC Bill and roundtable with the Kenya Law Reform Commission and the Attorney-General to sign off the bill and submit it to the Attorney-General for publication and transmission to Parliament.

ii) Consultant Engaged to Review the Ethics and Anti-Corruption Bill

Enforcement of Chapter Six is critical to the Constitution as it forms the basis on which the principles and values enshrined in the Constitution shall be enforced and guaranteed. The commission envisaged under Article 79 and Article 80 of the Constitution is very significant in enforcing the principles of leadership and integrity and the values provided for in the Constitution.

To ensure the development of effective legislation CIC engaged an international consultant to undertake a critical analysis of constitutional provisions for principles and values, including ethics, leadership, and integrity, and tasked to analyze the applicability of the

bill and its effectiveness. The reports generated by the consultant and stakeholders have since been incorporated into the bill.

iii) Consultants Engaged for Review of the Draft Public Service Bill

CIC engaged a consultant to review the Public Service Bill, 2011 to check its conformity with Chapter Thirteen of the Constitution. The Public Service Commission bill is still a working document and CIC is working with the Ministry of State for Public Service and the Public Service Commission to develop the bill.

iv) Consultation with the Kenya Institute of Administration

CIC held a meeting with the Kenya Institute of Administration to discuss how its policies and procedures can be streamlined to ensure compliance with the Constitution.

v) Consultation with the Office of the Prime Minister

The Office of the Prime Minister is responsible for the coordination and supervision of the execution of the functions and affairs of the government. Among other duties, the Prime Minister is specifically in charge of public service reforms, performance contracting, the Efficiency Monitoring Unit, and the Inspectorate of State Corporations. Guidance and drive from the Office of the Prime Minister is therefore crucial on public service reforms, especially on the compliance with the Constitution. Bearing this in mind, CIC held a meeting with the Office of the Prime Minister with a view to understand the efforts the office has made to ensure that existing and anticipated public service laws, procedures and policies comply with the letter and spirit of the Constitution.

vi) Police recruitment

The success of the recently held police recruitment is also a major achievement for CIC. The scheduled recruitment process was postponed in order to allow for a review of the police recruitment policy a process which was undertaken by the CIC to ensure compliance with the letter and spirit of the Constitution. This resulted in the implementation of administrative procedures which were compliant with the provisions of the Constitution. CIC with the support of Usalama Forum and UNIFEM, as observers, attended the recruitment exercise in all the 47 counties. The purpose of this was to ensure that recruits realized their constitutional rights.

> Challenges

Among the challenges encountered are that discussions of the Ethics and Anti-Corruption Bill raised various contentious issues that need to be resolved before the bill is finalized. The issues include whether the Ethics and Anti-Corruption Bill should have prosecutorial powers, whether the envisaged commissions' mandate should be extended to the private sector, whether the transition provisions comply with the requirements of a Chapter 15 on commissions and whether there is need to develop legislation on leadership.

> Planned Activities for the Next Quarter

The thematic area has plans to undertake these activities during the next quarter:

- i) Commence working on a CIC tool for results-based management to ensure all the implementing agencies implement the Constitution within agreed timelines.
- ii) Review the agreed draft Public Service Commission Bill.

3.1.2 Bill of Rights and Citizenship Thematic Area

Box 2

"The bill of rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies." Article 19(1) of the Constitution"

> Introductory Remarks

As indicated in the report of the first quarter, the Constitution is anchored on human rights principles, which are reinforced in nearly all the chapters. Chapter Three on Citizenship and Chapter Four on the Bill of Rights specifically emphasize the different rights while Article 2 has brought 15 human rights treaties into operation as part of the laws of Kenya.

During the period under review, the thematic area on Citizenship and Human Rights was, involved in a number of activities on monitoring the effective implementation of the Bill of Rights. The following are highlights of the activities undertaken in the thematic area during the period under review.

> Development of Bills

i) Kenya National Human Rights and Equality Commission KNHREC (Article 59)

The Constitution provides for the enactment of the Kenya National Human Rights and Equality Commission legislation as one of the priority laws, within the first years. Article 59 (4) provides for the enactment of legislation to give effect to the Kenya National Human Rights and Equality Commission, which law "may restructure the Commission into two or more separate commissions" and assign functions to each of the successor commissions. CIC received from the Ministry of Justice National Cohesion and Constitutional Affairs, three bills establishing, respectively, the Kenya National Human Rights Commission, the National Gender and Equality Commission, and the Commission on Administrative Justice as the successor commissions of the Kenya National Human Rights and Equality Commission. Given the divergent views on whether there should be one or more commissions, CIC organized stakeholder discussions on 6th and an expert consultation on 12th May 2011.

The forums, which had representatives from government ministries and human rights organizations, aimed at obtaining views from the stakeholders on their interpretation of Article 59 as well as analyzing the scenarios regarding establishing one or more commissions. A consultant was engaged to facilitate discussions and obtain a consensus; no consensus however was reached on an ideal number of commissions to be established pursuant to Article 59 of the Constitution. CIC developed and presented an advisory brief to the Ministry of Justice, National Cohesion and Constitutional Affairs, giving guidance on the key considerations in the development of the legislation to give effect to the Kenya National Human Rights and Equality Commission. CIC advised on the establishment of two commissions—a *National Commission on Human Rights* with general national human rights institutions functions including monitoring the implementation and investigation of violations of human rights together with the functions relating to the administration of justice and a *Gender and Equality Commission* to address matters relating to the principle of equality and freedom from discrimination as provided for in Article 27 of the Constitution with a mandate that focused on working with implementers to effectively integrate or mainstream this principle and work with various minority, vulnerable, marginalized and special interest groups to empower them to understand and demand the implementation of their rights. The CIC also proposed a single legislation to give effect to the two commissions.

In response to the Advisory the Ministry of Justice, National Cohesion and Constitution Affairs reiterated its proposal of the enactment of three pieces of legislation to provide for human rights, gender equity, and administrative justice, respectively. Given that the enactment of three Bills was not in any way a violation of the Constitution, CIC proceeded to audit the three bills and to hold the necessary consultations with the Attorney General, the Kenya Law Reform Commission, and the ministry. To avoid confusion, and conflict of functions, CIC also advised on the provision of clauses to facilitate collaboration and joint operation where necessary to ensure that all the commissions work for the benefit of the people of Kenya as envisaged in the Constitution.

Because of the necessary extensive consultations on these bills, it was inevitable that the Agreed Scheduled of Timelines for submission of bills was overshot. Having audited the bills, they were finalized within the quarter and submitted to the Attorney General for finalization and onward passage to Parliament. The CIC also forwarded its opinion on the subject to the Parliament for consideration as the bills are debated.

ii) Public Dialogue on Utilization by Women of Opportunities Created by the Constitution

The Constitution was a triumph for women as it created opportunities to finally ensure that women take their rightful place on the national podium. Some of the opportunities are in the public sector. Following the low level of response by women to the call for applications to the positions of members of the board for the vetting judges and magistrates, CIC organized a public dialogue forum on the gains for women in the Constitution and a discussion of strategies to enable women to fully utilize the spaces created by the Constitution. The one-day forum held on 4th May 2011, brought together women from different counties; in total there were over 80 participants. Participants included members of the legislature, executive, business community and professionals from the private sector; non-state actors and community-based organizations attended.

The forum identified and deliberated on key opportunities for women as provided for by the Constitution and resolved that:

1. Kenyan citizens will work tirelessly towards the implementation of the Constitution so that all women can rise up to the identified challenges and take advantage of all positions, whether elective or appointive offices, under the Constitution.
2. Women should realize that they have opportunities and will proceed to take advantage of these opportunities, defining the merit of these positions while embracing diversity and equity.
3. Women will guard against traditional tokenism by fighting for their full involvement at all levels of governance within the country.
4. Women will encourage each other, through deliberate initiatives, to come forth and utilize the spaces created in the Constitution.
5. Women will participate in the process of the enactment of key implementation legislation with a view to ensuring the integration of human rights and the principle of equality and non-discrimination in all the laws.
6. Women will monitor public and private sector policies, laws and administrative procedures to ensure integration of gender equality and access to equal opportunities and freedom from discrimination as stipulated in Article 27 of the Constitution. They will enhance women's participation in the political sphere and ensure that political parties come up with systems and policies that equally include men and women in their affairs.
7. Women's organizations will take steps to ensure awareness creation among fellow women, particularly at the grassroots level, of opportunities in private and public sectors. To this end, the organizations will ensure that past injustices in the public and private sectors that have contributed towards women not applying for top positions are addressed.
8. Women will more often review and audit the implementation of the constitutional provisions, especially as they relate to gender.

As a follow-up to the Forum on Opportunities for women in the Constitution, other consultations were organized by different stakeholders to continue discussions on the need for increased uptake of available opportunities by women.

iii) Ratification of Treaties Bill

The Constitution vests the legislative authority in Parliament while at the same time providing that ratified international treaties and conventions become part of Kenyan law upon ratification. To give effect to Article 2(5) of the Constitution as read together with Article 94(5) of the Constitution it was deemed prudent to enact legislation to provide for a ratification process that involves parliamentary approval for the ratification of treaties—hence the need for a Ratification of Treaties Bill.

CIC received a draft bill from the Kenya Law Reform Commission and reviewed it in plenary and further subjected it to review by a stakeholders' forum. The Stakeholders' forum also discussed the advanced draft private members' bill by Hon. Millie Odhiambo on the same subject. The consultative meeting agreed to merge the two bills into a single ratification of treaties bill. CIC has scheduled a follow-up stakeholder consultation. CIC facilitated two more technical committee discussions in the quarter and has planned another stakeholders' validation forum when the bill shall be finalized and forwarded to the AG for finalization. International law professors from law schools, the Ministry of Foreign Affairs, the Ministry of East African Community, the School of Defence, the School of Diplomacy and other stakeholders were the key reviewers of the amalgamated bill. It is expected that the bill will be cleared and forwarded to the Attorney-General by the end of July 2011.

iv) Citizenship Bill

Legislation on citizenship is one of the priority bills scheduled for enactment in the Fifth Schedule before August 2011. The legislation is aimed at giving effect to chapter 3 of the Constitution. With support from UNDP, the human rights thematic area will be engaging the services of a consultant to embark on an audit of the policies, laws and administrative procedures that are currently operational with respect to citizenship. The ministry responsible for matters of citizenship established an inter-ministerial task force on devolution to prepare a citizenship bill. CIC has met with members of the task force to get preliminary views of the progress pending receipt of the report and draft bill on citizenship from the task force.

The draft bill on citizenship is scheduled to be processed in July 2011 and enacted by the 26th August 2011. The CIC received a draft bill, and is currently reviewing it. This bill will be processed within the month of July 2011. In line with its procedures, CIC will review the bill and subject it to stakeholder forums to obtain and input views from stakeholders. CIC will also hold meetings with the Attorney-General and the Kenya Law Reform Commission on the proposed amendments to the bill before the bill is forwarded to Parliament for deliberation.

v) Participation at Stakeholder Forums

CIC participated at the Prime Minister roundtable on Gender Affairs held on 24th May 2011. The roundtable provided an opportunity for stakeholders to initiate discussions relating to the principles of equity and equality within the Constitution on gender responsive reforms and the content of the Family Protection Bill, the Marriage Bill, and the Matrimonial Property Bill. The roundtable which was chaired by the Prime Minister was attended by participants from the counties, civil society organizations, government representatives as well as members of Parliament.

The forum noted the need to ensure that the three laws establishing the Article 59 of the Constitution commissions, as referred to in the preceding paragraphs, are enacted without delay, and participants noted the need for women to take up leadership roles particularly at the political level. The forum also noted the need to have annual meetings to be facilitated by the ministry responsible for gender and a forum for stakeholders to assess and evaluate the progress of the implementation of proposed recommendations.

vi) Consultation with Implementing Agencies

CIC held a meeting with the Ministry of Justice, National Cohesion and Constitutional Affairs on 15th June 2011 to discuss the roadmap for the implementation of human rights as provided in the Constitution. The meeting agreed that the National Policy and Action Plan on Human Rights will be the guiding tool for implementers and in the final stages need to take note that human rights are cross-cutting and therefore applicable to all implementers. In this regard, the National Policy and Action Plan on Human Rights needs to be designed to ensure consistency with the Constitution and involve all implementers and be the reference tool on human rights in all sectors. It was also agreed that there is a need to establish a technical structure to develop standards for the implementation of socio-economic rights in line with Article 21 of the Constitution. In this regard, follow-up forums will be held with the Kenya National Human Rights and Equality Commissions.

> Challenges

The thematic area was faced by some challenges, which include:

- i) A lack of consensus on whether to form one or more commissions in line with Article 59 of the Constitution: The discussions on the merits of each option were clearly driven by self-interest and lobbying, making the process of the consideration of the bills take too long and resulting in CIC overshooting on the scheduled timeframe within which to submit the bills for Cabinet deliberation.
- ii) The implementation of socio-economic rights face a potential challenge if the key government development planning and supervisory offices and ministries fail to internalize their constitutional responsibility to deliver on these rights and on the principle of equality and equity in the sharing of national services, resources and opportunities. The CIC believes that all coordinating ministries and public departments including the ministries of Planning, Treasury and Public Service as well as the Vision 2030 and the Central Bureau of Statistics, working with the Kenya National Human Rights and Equality Commission and the CIC must relook at the national development policies and the available data and review it to enable the equitable sharing of resources and objective monitoring on compliance on the delivery on the socioeconomic rights. The CIC hopes to get a consensus on an agreeable way forward among the key stakeholder in the next quarter.

> Planned Activities for the Next Quarter

The thematic area plans to undertake the following activities during the next quarter:

- i) Facilitating the preparation of a guide on the implementation of human rights in consultation with the Kenya National Human Rights and Equality Commission institutions and other stakeholders.
- ii) Reviewing the national policies on the National Policy and Action Plan on Human Rights and the Kenya Vision 2030 to ensure the integration of the values and principles of the Constitution.
- iii) Identifying other priority bills relating to human rights and undertake internal review and stakeholder analysis.
- iv) Reviewing sectoral policies in two sectors to ensure the initiation of relevant steps for the full integration of human rights.
- v) Undertaking a training-needs assessment for key implementers on human rights and the rights approach to service delivery.
- vi) Facilitating the development of the national implementation monitoring and reporting tool on human rights
- vii) Finalise the review of the bills on Citizenship, Marriage, Freedom of Information, and Public Participation.

3.1.3 Representation of the People and the Legislature Thematic Area

➤ Introductory Remarks

The objective of the theme is to ensure that the policies, laws, systems, structures and administrative procedures developed/reviewed and applied at all levels of elections, in every political party, and in parliamentary and assembly affairs, are consistent with and according to the letter and spirit of the Constitution. The ultimate aim is to have all the people of Kenya, including leaders, respect the rule of law, uphold national values and live by the Constitution, with the eventual aim of all Kenyans living under the new dispensation in a united, peaceful and prosperous nation.

For this theme to contribute to CIC's role of monitoring, facilitating and oversight, along with working with constitutional commissions, the Representation and Legislature Thematic Team will ensure that the electoral system and process and the Independent Electoral and Boundaries Commission are put in place and applied. It will also ensure that guidelines for political parties, Parliament and county assemblies are developed and applied according to the letter and spirit of the Constitution.

➤ Achievements

i) Independent Elections and Boundaries Commission, Political Parties and Elections Bills

All the bills (Independent Elections and Boundaries, Political Parties and Elections Bills) under this theme had not gone through the process of obtaining input from the 47 counties much as the Constitution requires the people of Kenya to participate in their development. As a result, CIC had to have the people of Kenya (through representatives from the 47 counties) input their views before CIC finalized with the monitoring, facilitating and overseeing the implementation of the Constitution. The participation of the people of Kenya in the development of the bills was through three separate consultative forums, one for each bill. Additionally, eleven counties were visited by CIC and during the visits, views on how the electoral system and process may be improved were obtained from county residents. The Independent Elections and Boundaries Commission and Political Parties bills were then signed off by the Attorney-General/the Kenya Law Reform Commission/the Interim Independence Electoral Commission/CIC. The Independent Elections and Boundaries Commission Bill was passed by Parliament in May 2011 and it is currently awaiting presidential assent. The Elections Bill is delayed because it is awaiting input from the Devolved Government Task Force.

It may be interesting to note that the Independent Elections and Boundaries Commission is yet to be forwarded to the President for assent. CIC has been trying to understand why the delay yet this is one of the crucial bills for matters to do with elections.

ii) Monitoring the application of policies, laws and administrative procedures

The theme was also involved in monitoring the application of the policies, laws and administrative procedures. In pursuance of this, CIC wrote to the Registrar of Political parties in relation to political parties' compliance with the Constitution. CIC also monitored and oversaw the legislative process to ensure that each arm plays its role in a timely manner, as agreed and tabulated, plus, as per the Constitution. In this

endeavour, CIC wrote two advisories to Parliament concerning changes in the Independent Elections and Boundaries Bill. CIC now awaits the Independent Elections and Boundaries Act to check its constitutionality. The theme is currently developing a framework for monitoring, facilitating and overseeing the electoral process and system, Parliament and County Assemblies.

➤ Challenges

The challenges faced by the thematic team include the following:

- i) Changes happening after CIC has checked the constitutionality of the content of draft bills. To address this challenge, CIC had to write two advisories to the office of the Prime Minister, the Cabinet, the Ministry of Justice, National Cohesion and Constitutional Affairs, Parliament, the Attorney-General and the Kenya Law Reform Commission.
- ii) Official versions of bills keep on changing once CIC has started work on the bills.
- iii) The agreed changes at sign-off meetings were not fully incorporated thereby compelling CIC to do repeat jobs.
- iv) Staff who were sent to roundtable meetings by partners and implementing agencies were not able to make all final decisions during the sign off meetings.
- v) Delays in processing the Independent Elections and Boundaries Commission bill and this has had negative effects on moving the process forward
- vi) Parliament (Clerk to the National Assembly) has been slow in responding to CIC's request for an initial meeting to discuss how Parliament and CIC will work together in implementing the Constitution. CIC has twice written to Parliament requesting for appointments.

➤ Lessons Learnt

The thematic team drew some lessons from the challenges identified above. These may be summarised as follows:

- a) It would be better if bills have input from all key stakeholders and the people of Kenya before they are sent to CIC for review.
- b) The people of Kenya need to be continuously vigilant regarding the implementation process.
- c) All the arms of government need to develop policies/sessional papers before developing relevant legislation.

➤ Planned activities for July-September 2011 Quarter

The thematic area is programmed to undertake various activities in the next quarter. These include:

- i) Bills: the thematic team expects to develop new bills including the vetting bills and bills relating to the legislature both at the national assembly and county assemblies.
- ii) The thematic team anticipates to complete or ensure the following legislation is completed:
 - a) Elections Bill.
 - b) Political Parties Bill.
 - c) Bills relating to the legislature at national and county levels.
- iii) The thematic team anticipates completing the development of a framework for monitoring, facilitating and overseeing development of legislation, administrative procedures, and policies.
- iv) The thematic team anticipates to start applying the developed framework at both design and development of policies/sessional papers, legislation, and administrative procedures.
- v) The thematic team is anticipating the implementation of the Independent Elections and Boundaries Commission law once it is enacted. Towards this end the thematic team will enhance action to facilitate finalization of the delimitation of electoral boundaries.
- vi) The thematic team plans to start reviewing administrative procedures relating to the electoral system and process. The thematic team will facilitate vetting with the aim of ensuring that they are in line with the policies, laws and the letter and spirit of the Constitution.

➤ Financial Support by Development Partners/Donors

The UNDP facilitated the provision of two consultants to provide specialized expertise to review the Elections Bill.

3.1.4 Public Finance Thematic Area

➤ **Introductory Remarks**

The thematic area is tasked with the responsibility of guiding and coordinating the constitutional implementation activities relating to matters of public finance. This includes overseeing the development of legislation and administrative procedures that are reflective of the letter and spirit of the Constitution while ensuring that the process is both open and participatory. CIC's principal partner in this context is the Ministry of Finance, which is the key driver in public finance management reforms. In view of the implications of public finance management on devolved governments, CIC also partners with the Ministry of Local Government through the Taskforce on Devolved Government.

➤ **Achievements**

In light of the foregoing, the thematic area on public finance has undertaken various activities and discussions aimed at giving effect to Chapter 12 of the Constitution.

i) Public Finance Management and Fiscal Decentralization Principles Workshop

CIC, jointly with the Treasury held a consultative forum on public finance management and fiscal decentralization with the aim of discussing the principles of the public finance management framework as spelt out in the Constitution whilst also highlighting the Public Finance Management law as conceptualized. The meeting involved all government agencies dealing with public finance and fiscal decentralization including the Task Force on Devolved Government. The consultation with the Task Force on Devolved Government was intended to achieve a common understanding on the critical issues required in the anticipated legislation. The meeting provided an avenue for devising ways and strategies aimed at overseeing the transition to fiscal decentralization and the roles of the various institutions therein. The meeting availed an opportunity to sensitize key players on their roles regarding facilitating the rollover to the new fiscal decentralization/devolution framework.

The Ministry of Finance released a lay Draft of the Public Finance Management Bill and was soliciting views from the public regarding the contents of the Public Finance Management Bill. The importance of the bill cannot be gainsaid especially because Kenya has adopted the devolved system of government. CIC has been in constant consultation with the Ministry to ensure public participation in the preparation of the bill before its presentation to CIC for review.

ii) CSO Consultative Forum on the Public Finance Management Bill

On 17th June 2011, CIC held a technical workshop on key issues arising from the draft the Public Finance Management Bill, including issues of intergovernmental fiscal relations, roles of institutions and transparency and accountability mechanisms within the draft. The resolutions of that meeting fed into the stakeholder forum held on the 27th June 2011. The consultation is expected to involve a wider cross-section of stakeholders, including representatives from the counties.

iii) Discussion Forums with Experts on Public Finance Management

CIC held two working forums with international experts and practitioners in the public finance area including Professor Paul Smoke, Dr. Junaid Ahmad and the former Chief Executive Officer of the Johannesburg Municipal Council. The basis of the meetings was to sensitize CIC commissioners regarding the public finance processes by learning from comparative experiences on fiscal decentralization. The lessons learnt will enrich the implementation process in Kenya in light of Chapter Eleven of the Constitution while ensuring that the interests of the public are adequately catered for. In this regard, it was important to get the views of people who have had experience in successful systems. Kenya can learn from these experiences to implement a devolved system of government while avoiding challenges related to its implementation.

iv) Commission on Revenue Allocation Bill

CIC facilitated various discussions on the Commission on Revenue Allocation Bill with different stakeholders and was able to reach consensus on contentious issues regarding the bill.

The Commission on Revenue Allocation is an independent commission set up under Article 215 of the Constitution of Kenya. Its core mandate is to recommend the basis for equitable sharing of revenues raised nationally between the national and the county

governments and the sharing of revenue among the county governments. The Commission on Revenue Allocation Bill to expound on the role and functions of the Commission on Revenue is due for publication.

v) Salaries and Remuneration Commission Bill, 2011

CIC organized stakeholder consultative meetings to facilitate the deliberation of the contents of the Salaries and Remuneration Bill. The bill sets out the operations and structure of the Salaries and Remuneration Commission established by Article 230 of the Constitution. The mandate of the Salaries and Remuneration Commission is to set and regularly review the remuneration and benefits of all State officers. The Bill was passed by Parliament and is awaiting presidential assent.

vi) Consultative forum for Non-State Actors

CIC organised a consultative forum for Non-State Actors on 7th June 2011. The overall objective of the stakeholder participation was to share CIC's mandate and strategy and discuss how best to work with NSAs to achieve this mandate, discuss current implementation strategies among NSAs, discuss ways of enhancing stakeholder and public involvement in the implementation process. Some of the key outcomes of the meeting include, development of a mapping of non-state actors involvement in constitutional implementation at national and county level and a draft strategy for CIC's engagement with Non-State Actors.

➤ **Challenges**

The thematic area encountered some challenges in the course of assisting with the generation of bills. These include:

- i) A divergence of views regarding the interpretation and application of the provisions of Chapter Twelve of the Constitution on public finance, especially on the budgetary process.
- ii) A lack of coordination in the generation of bills in this area due to its cross-cutting nature. CIC has advised the parties involved in this process that such efforts would be best complemented if they were well coordinated and centrally worked on, thus avoiding a duplication of effort and resources.

➤ **Proposed activities in the Next Quarter**

During the next quarter, the thematic area on public finance has scheduled various activities such as:

- i) Stakeholder consultations on the final version of the Public Finance Management Bill.
- ii) Technical consultations regarding the revision of the Public Audit Act.
- iii) Oversight over the review of the Public Procurement law and the Central Bank law.
- iv) Oversight over preparation of regulations under the Public Finance Management law.
- v) Consultations with institutions dealing with Public finance.

➤ **Financial Support by Development Partners/Donors**

The GIZ facilitated the provision of a consultant to provide specialized expertise to review the Public Finance Management Bill and the Controller of Budget Bill.

3.1.5 Judiciary and Constitutional Commissions Thematic Area

➤ **Introductory remarks**

This thematic area is concerned with the constitutional establishment and/or institutional reform of the judiciary and constitutional commissions as respectively provided for in Chapter Ten and Fifteen of the Constitution of Kenya 2010. It addresses such matters as the enactment and/or amendment, of legislation, policy, development or review, and formulation of administrative procedures required to ensure effective and timely implementation of the Constitution in that regard.

➤ **Achievements**

i) Implementation of Chapters Ten and Fifteen

Since the last quarter, the Thematic Team on Judiciary and Constitutional Commissions completed a review of three bills that have been enacted into law, namely: the Judicial Service Act, 2011, the Vetting of Judges and Magistrates Act, 2011, and the Supreme Court Act, 2011.

ii) Public Participation in development of Bills

The internal review of the aforesaid laws involved numerous consultative workshops to ensure sufficient public participation in accordance with the requirements of Article 10 of the Constitution. On 30th March 2011, the Thematic Team successfully organized a multi-stakeholders' forum to discuss the Supreme Court Bill at Sankara Hotel, Nairobi as a follow-up to a similar meeting held on 18th March 2011. The object of the Bill is to make further provision for the operations of the Supreme Court pursuant to Article 163(9) of the Constitution. The forum was attended by stakeholders drawn from various Civil Society Organizations, namely, ICJ-Kenya, FIDA-Kenya and TI-Kenya. It was also attended by the Chairman of the Kenya Law Reform Commission. Participants at the stakeholders' forum exhaustively discussed the Supreme Court Bill, exchanged views and made suggestions for the improvement of some of its provisions. On 21st April 2011, CIC finalized review of the Supreme Court Bill and submitted Bill the Bill with amendments to the Attorney-General's Office for consideration. The bill was passed by Parliament on 16th June 2011 and subsequently assented to by the President on 23rd June 2011.

The Thematic Team on Judiciary and Constitutional Commissions also worked on the Salaries and Remuneration Commission Bill, 2011, and collaborated with the Public Finance Thematic Team on the Independent Officers (Appointment) Bill, 2011, both of which are awaiting presidential assent. Notably, the Salaries and Remuneration Commission Bill has recently been referred to Parliament by the President for minor amendments before assent.

Due to the significant amount of work undertaken by the Commission, CIC has been keen in determining priorities to be given to draft bills once it receives them. On 18th April 2011, CIC agreed on timelines for the development of priority bills for the period ending 30th August 2011. The Thematic Team worked in collaboration with the Bill of Rights Thematic Team on the following bills in harmony with the scheduled timelines:

- (a) Kenya National Human Rights Commission Bill, 2011,
- (b) National Gender and Equality Commission Bill, 2011, and
- (c) Commission on Administrative Justice Bill, 2011.

CIC has convened several workshops to gather views and comments from various stakeholders for purposes of enriching the abovementioned bills. Internal review of the bills is still ongoing and will be finalized by the end of the month.

iii) The Vetting of Judges and Magistrates Act

Following the enactment of the Vetting of Judges and Magistrates Act, 2011, the President, in consultation with the Prime Minister, declared vacancies in the offices of the members of the Judges and Magistrates Vetting Board. Applications were expected to have been submitted on or before 21st April 2011. However, only four people however applied for the position of chairperson and five for members of the Vetting Board by the closing date on 21st April 2011. Further, the number of applicants to the Vetting Board did not meet the constitutional requirement for gender equity, with only one female applicant.

Due to the low level of interest shown by women in applying for positions to the Vetting Board, the Thematic Team on Bill of Rights and Citizenship organized a consultative forum on 4th May 2011 to discuss ways in which women can meaningfully utilize opportunities created for them by the Constitution of Kenya, 2010. The workshop was well attended by women leaders, political leaders, lawyers and members of the general body of civil society.

To attract more applications for the vacancies, the Minister for Justice, National Cohesion and Constitutional Affairs, Hon. Mutula Kilonzo, tabled before Parliament the Judges and Magistrates (Amendment) Bill, 2011, on 4th May 2011. The Bill proposed to amend section 9(2) of the Vetting of Judges and Magistrates Act, 2011, which would extend the time for constitution of the Vetting Board. The Bill was passed by Parliament and subsequently assented to by the President on 21st March 2011. On 19th May 2011, the President, in consultation with the Prime Minister, via Gazette Notice No. 5366 of the same date, declared vacancies in the offices of members of the Judges and Magistrates Vetting Board and invited fresh applications from qualified persons for nomination for appointment to the offices. The closing date for submission of applications was set for 2nd June 2011.

iv) Appointment of Supreme Court Judges and the Director of Public Prosecution

The Judicial Service Commission conducted interviews from 3rd to 12th May 2011 to nominate persons for the positions of the Chief Justice, the Deputy Chief Justice and the Director of Public Prosecution, while interviews for the five other judges of the Supreme Court were conducted between 6th and 14th June 2011. The Judicial Service Commission nominated for approval by the Parliament Dr. Willy Mutunga, Ms. Nancy Baraza and Mr. Keriake Tobiko as the Chief Justice, the Deputy Chief Justice and the Director of Public Prosecution respectively. Five other judges were also nominated for approval by Parliament. They are Justice Philip Tunoi, Justice (Professor) Jacktone Ojwang, Justice Mohammed Ibrahim, Dr. Smokin Wanjala and Ms. Njoki Ndungu. The nominees were approved by Parliament and subsequently appointed by the President on 16th June 2011.

On 20th June 2011, Dr. Willy Mutunga, Ms. Nancy Baraza and Mr. Keriake Tobiko were sworn in to office as the Chief Justice, the Deputy Chief Justice and the Director of Public Prosecution respectively. The swearing in of the five other Supreme Court judges was restrained by an Order of the Court pending determination of a petition lodged by Federation of Women Lawyers (FIDA-Kenya) and five other NGOs seeking to nullify their appointment on the grounds of failure to comply with the constitutional values and principle of gender equity and equality as prescribed in Article 10 of the Constitution. The petition is scheduled for hearing on the 27th June 2011.

v) Public interest litigation

On 23rd March 2011, CIC requested the Court Appeal sitting as the Supreme Court to give an advisory opinion on various questions concerning the nomination and appointment of constitutional and public officers and the effect of the provisions of the Sixth Schedule (Transitional and Consequential Provisions) to the Constitution on these appointments. The matter was heard before Justices Tunoi, Bosire, O'Kubasu, Githinji and Waki on the 11th, 12th and 13th April 2011. The matter will be coming up for ruling on 8th July 2011 at 9:00 a.m.

➤ Activities for the Next Quarter

- i) Conduct stakeholder consultations/workshops to discuss:
 - (a) the system of courts;
 - (b) amendments to the Magistrates' Courts Act, Judicature Act, Kadhis' Court Act, Appellate Jurisdiction Act and Judicature Act to ensure consistency with the Constitution;
 - (c) court rules and administrative procedures (Chief Justice rules, Supreme Court rules, appellate and subordinate court rules etc.); and
 - (d) Teachers Service Commission Bill.
- ii) Hold public consultations on the administration of justice in Kenya (20 County Visits).
- iii) Study tour to Malaysia on court systems, ADR mechanisms and civic education- dissemination of information and materials to promote public awareness of the new laws and reformed judicial institutions.

3.1.6 Land and Environment Thematic Area

➤ Introductory Remarks

This thematic area on land and environment covers activities in the mandate of the following ministries: the Ministry of Land, the Ministry of Environment and Mineral Resources, the Ministry of Forestry and Wildlife, the Ministry of Water and Irrigation, Ministry of Tourism, the Ministry of Northern and Arid Lands, the Ministry of Regional Development, and the Ministry of Livestock Development. The latter ministries are by and large focused on the rangelands of Kenya and therefore have great impact on the range ecology of the area. Chapter Five of the Constitution provides the framework for this sector and in particular the principles that apply to land and the obligations of the state with respect to the environment.

➤ Achievements

In the period under review the thematic area had various achievements that include:

i) Consolidation of Bills, Policies, and Administrative Procedures

CIC has surveyed some of the existing policies and legislation pertaining to the sector with special reference to the above Ministries

and the relevant State corporations. Due to the possible risk of duplication of reform initiatives or conflicts, or both, the CIC is in the course of procuring a consultant to consolidate and ensure the integration of the various bills, policies and administrative procedures from the various ministries, departments and state corporations in the environment and natural resources sector. This will entail liaising with the sector actors to effectively map out their planned initiatives and focus these to bringing about conformity and coherence in their policies and legislation.

ii) Participation in Consultative Fora

a) National Land Commission Bill

CIC participated in a consultative forum on the National Land Commission bill organised by the Land Sector Non-State Actors under the auspices of the Institutions of Surveyors of Kenya.

b) Consultation with Implementing Agencies

CIC has had consultative meetings with the task forces/committees on constitutional reforms from the Ministry of Water and Irrigation, the Ministry of Forestry and Wildlife, and the Ministry of Northern Kenya and Arid Lands. The meetings were useful in forging a common approach to the process of developing the respective bills and policies.

c) Consultation with Civil Society Organizations

The thematic area received technical and financial support from the World Wide Fund to hold a workshop with the National Environment Civil Society Alliances of Kenya. The objective of the workshop was to establish a strategic alliance and commence dialogue with the civil society on pressing issues afflicting land and environment and the importance of ensuring robust public participation. CIC elaborated that the main motivations for an engagement with civil society organizations in the implementation of the Constitution are:

1. Management of natural resources as a constitutional requirement by providing opportunities for civil society organizations to participate in the review of the different policies and legislations at national and country levels
2. Ensuring that important issues that may be missed out are captured in the relevant land and environmental policies and legislation
3. Awareness support in the counties and nationally regarding the Constitution

iii) National Land Commission Bill

Most of the bills in the land and environment sector identified in the Fifth Schedule to the Constitution are required to be implemented within a timeframe of four or five years. Due to the central role of land in environment and natural resources management, However, CIC decided to fast-track the National Land Commission Bill to spearhead other bills in the sector. The bill is now under review and should be presented to Parliament for debate. It is projected that the bill will be passed by August 2011.

3.1.7 Executive and Security Thematic Area

➤ Introductory Remarks

Chapter Nine of the Constitution on the Executive provides for the functions and powers of the offices of the President, the Deputy President, the Cabinet and other offices such as the Attorney-General, the Director of public prosecutions and their removal. The Executive formulates government policies and priorities. It is also responsible for the execution and administration of government policies.

➤ Achievements

The thematic team had attained the following achievements during the period under review:

i) Consultative forum with Permanent secretaries

CIC engaged with the head of public service and permanent secretaries as chief executing officers to share with them the role they are expected to play with regard to the implementation of the Constitution. This was done through a workshop held on 4th April 2011.

ii) Progress by Implementing Agencies

In exercise of its mandate, CIC required all ministries as part of the executive to submit a progress report on the status of implementation and their proposed work plans for implementation of the Constitution in their specific sectors. A summary of the reports is set out in section 3.2 of this report.

iii) Consultation with the Office of the Prime Minister

The CIC held consultations with Office of the Prime Minister on May 17, 2011 to deliberate on the role of the executive in ensuring timely

implementation of the Constitution and the application of the Rapid Results Initiative.

iv) Police Recruitment guidelines made compliant with the Constitution

CIC is responsible for monitoring the administrative procedures and practices to ensure they are in compliance with the Constitution. In this regard, CIC advised on the review of the national police recruitment guidelines, which were amended to bring them into conformity with the Constitution. CIC in collaboration with Usalama Forum and UNIFEM monitored the police recruitment exercise conducted on 29th April 2011 to evaluate the extent to which the guidelines were followed. This was, among other issues, done to ensure compliance with the principle of equality and non-discrimination subject to Article 27 of the Constitution. The active monitoring role played by the CIC led to the realization that there is need for members of the Police Service to be trained on human rights at all levels if the culture of respect for the constitutional principles, particularly with regards to the bill of rights is to be instituted in their work. On the whole, the recruitment exercise was successful with regard to compliance on issues of transparency and public participation. There however were reported cases of non-compliance with the Constitution, including candidates being discriminated against on the basis of age, ethnic diversity or gender.

v) Vetting of Police

CIC has requested the Public Service Commission and the National Police Service to submit to it the criteria and standards being applied to undertake the ongoing police vetting exercise. This is aimed at ensuring that the process is conducted in accordance with the Constitution.

vi) Bills

CIC successfully completed the review of the following three police bills:

- a) National Police Service Bill.
- b) National Police Service Commission Bill.
- c) Independent Police Oversight Authority Bill.

The process of reviewing bills

The process of reviewing bills involved the following activities:

- i) Internal review of the bills by an international human rights and security expert from UNODC and DFID.
- ii) Stakeholders' forum held with the civil society to review the National Police Service Bill, the Independent Policing Oversight Authority Bill and the National Police Service Commission Bill.
- iii) County visits undertaken between April 10th and 18 April 2011 to get views of the public on issues relating to: the appointment and qualifications of the Inspector General of the National Police Service, public participation on community policing at the county level, county police authorities, the welfare of the police, and powers of the National Police Service Commission and the Independent Policing Oversight Authority.
- iv) Consultative meeting held with the Ministry of Provincial Administration and Internal Security and Police Reforms Implementation Committee to updated them on the progress made on the Police bills and receive their input on the bills.
- v) Roundtable held with Kenya Law Reform Commission, Attorney-General, Police Reforms Implementation Committee and the Ministry of Internal Security on the National Police Service Bill, the National Police Service Commission Bill and the Independent Policing Oversight Authority bill. These bills have been finalized and submitted to the Attorney-General and the line ministry for submission to the Cabinet.
- vi) Consultative meeting with the Director General of the National Intelligence Service to discuss the proposed draft bills on the National Security Council and the National Intelligence Service and the directorate's implementation plan on administrative procedures.

➤ Planned activities for the Next Quarter

i) National Security bills

Under chapter fourteen of the Constitution, provision is made for the development of legislation, and administrative procedures and the establishment of institutions in the security sector. The institutions include national security organs; the Kenya Defence Forces, the

National Intelligence Service and the National Police Service. In this last quarter, CIC has achieved the following in this thematic area:

ii) Review of the Bills

CIC is scheduled to review the following bills and administrative procedures:

- a) The Power of Mercy Bill (Article 133 of the Constitution). Towards achieving this thematic team shall hold a stakeholders forum in July, 2011.
- b) The National Security Council and National Intelligence Service bills to ensure compliance with the Constitution: towards attaining this, the thematic team shall hold a stakeholders' forum on the bills. The thematic team shall also hold a consultative meeting with the Kenya Defence Forces on the proposed military bill.
- c) The Police Reforms Implementation Committee programme document on reforms in the police service to assess its compliance with the letter and spirit of the Constitution.

3.1.8 Devolved Government Thematic Area

> Introductory Remarks

As reported in the first quarter, this thematic area deals with all matters relating to the operationalization of the constitutional provisions on devolved government as provided for in Chapter Eleven of the Constitution.

It is important to reiterate that since Kenya adopted a devolved system of government, all functions including the national level functions will affect and be affected by the devolved nature of the system. This reality must be emphasized to all those charged with the responsibility of implementing the Constitution. This also means that any bills being developed must take into account the requirements of devolution. In this regard the thematic area works with relevant ministries especially the Ministry of Local Government that is charged with the generation of policies, legislation and administrative procedures relating to devolution. As required by the Constitution, the devolution thematic team also works closely with non-state actors including civil society organizations, to facilitate the realization of devolution. In this regard, all implementing agencies are advised to ensure that any bill they generate takes into account that the bill may have relevance to devolution.

> Achievements

To date, the Ministry of Local Government has not submitted a single bill to CIC. CIC however is in touch with the ministry and the Taskforce on Devolved Government on the status of the implementation of the relevant bills required to implement devolution, and in one engagement with the Task Force on Devolved Government the following bills were identified as requiring priority attention:

- i) The elections bills which should be submitted to CIC by 30th June 2011.
- ii) The public finance bills that have implications on devolution; these should be submitted to CIC by 15th June 2011.
- iii) The transition bills should be submitted to CIC by 29th July 2011.
- iv) The principles guiding the establishment and governance of Urban Areas and cities should be developed by 30th June 2011.

CIC also is reviewing or has finalized some bills that also have implications on the devolved system of governance.

> Participation in Stakeholders' Fora

In addition to developing bills, the thematic area on devolution has participated in a number of consultative fora with key stakeholders. Below is a summary of the activities relating to these fora:

1. A consultative meeting held on 2nd June 2011 between CIC and the Taskforce on Devolved Government discussed the status of priority bills and set timelines for their finalisation. The meeting also discussed the relationship between legislation in national and county public services and the need to consider merging some bills that will apply at county and national government levels.
2. A meeting convened by the Institute for Social Accountability and CIC on 25th May 2011 brought together non-state actors. The meeting determined the need for increased collaboration between CIC and civil societies.

Further, it was agreed that CIC needs to have thematic study sessions with civil society organizations on a regular basis and that CIC's role of monitoring the legislative process would be enhanced through regular consultations with civil society organizations.

3. Consultation with the World Bank and international experts was held on 6th May 2011. The meeting was held to deliberate issues relating to devolved governance with a view to understanding the transitional process and establishing a system that is effective and efficient as the implementation process enters the operationalization of the devolution and fiscal decentralisation phase.
4. A meeting between CIC, the Task Force on Devolved Government, the Steering Committee on Devolved Government and the World Bank on 4th and 5th May 2011 was held to discuss issues concerning the structure, service delivery and finance in a devolved government. The issues revolved around the task force's interim report on devolved government. World Bank experts gave their opinion on best practices and lessons learnt from South Africa and La Paz Bolivia. The experts included Mr. Kesto Gordhan, the former City Manager of Johannesburg South Africa and Ronald Maclean, a former mayor of La Paz, Bolivia.
5. CIC held a one-day colloquium for all CIC commissioners on 29th April 2011 in Nairobi. The objectives of the colloquium were to:
 - a) Develop a shared understanding of the concept of devolution,
 - b) Identify potential challenges and risks attendant to implementing devolution,
 - c) Prepare and empower commissioners to critically examine draft devolution bills, policies and administrative procedures required to implement the Constitution of Kenya,
 - d) Sensitize commissioners on how to monitor the implementation of devolved governance, and
 - e) Provide key programmatic action plans in the various CIC thematic areas.
6. CIC held two meetings with the Ministry of Public Works. The meetings discussed the ministry's plan to develop county infrastructure including the construction of county headquarters, houses for county governors and offices for county assemblies. The meetings agreed that the planned activities were the exclusive mandate of county governments and therefore the ministry could not proceed with its plans in this regard. Official communication was given to them in this regard.

> Challenges

During the period in review, the thematic area encountered challenges that include:

- i) Poor coordination by the ministries of Finance and Local Government in the development of bills that have financial implications;
- ii) Failure by implementing agencies and especially those that generate bills to appreciate that devolution cuts across all ministries;
- iii) Some ministries such as Public Works and the Office of the Deputy Prime Minister and Ministry of Local Government are usurping the functions assigned to the counties especially during the transitional period;
- iv) Lack of a mechanism/institutional framework to guide transition from the current system to a devolved system; and
- v) Lack of coordination within civil society organizations working on devolution and uncoordinated initiatives relating to devolution on devolution by different civil society organizations.

> Planned Activities for the Next Quarter

For the next quarter, the thematic area has scheduled activities, which may be summarised as:

- i) Conducting benchmarking visit/study tours to countries operating a devolved system of government;
- ii) Auditing civic education materials on devolution;
- iii) Undertaking capacity-building programmes for CIC commissioners and staff on various aspects of devolution;
- iv) Conducting stakeholder consultations on bills relating to devolution submitted to CIC for review;

- v) Finalizing all bills relating to devolution submitted to CIC by the Kenya Law Reform Commission and transmitting them to the Attorney-General for publication;
- vi) Participating in regular meetings with civil society organizations working on issues relating to devolution; and
- vii) Undertake consultations with existing local authorities on issues relating to the implementation of devolution.

(See Table 2: Summary of progress in the development of legislation Annex V and Table 3: Summary of engagements with stakeholders per thematic area Annex VI)

3.1.9 Institutional Development

> Introductory Remarks

In addition to progress in the implementation of activities as reported in the respective thematic area and in the analysis of reports from the key implementing agencies and state organs, CIC undertook a number of activities to build the capacity of CIC as an institution for efficient and effective discharge of its mandate. In this sector, the activities undertaken range from institutional development to engagements with the private sector, the civil society, development partners and key implementing agencies.

These developments and engagements were important in giving visibility to CIC, establishing dialogue with the implementers of the Constitution, clarifying the mandate functions of CIC, working out modalities for implementing the Constitution, establish dialogue with development partners and promoting public participation in CIC activities and in the Constitution implementation process. The following are some activities undertaken under this area in the last quarter.

> Achievements

i) Public participation at county level

CIC held county visits to over 11 counties all over the Country on 10th – 18th April. The overall objective of the visits was for CIC to share its mandate and discuss how to achieve this mandate, to discuss with the people of Kenya ways in which the public can participate in the process of implementing the Constitution, and to observe, assess and discuss the status of the implementation of the Constitution at the county level. One of the key issues discussed during the visits was how to improve the electoral system and process. The public gave its views relating to ways through which the electoral system and process elections may be improved. The feedback from county visits was informative and provided input in the review of the Elections Bill and the various Police Service bills.

County visits will be a continuous exercise and CIC will undertake visits to the remaining counties within the next two quarters to complete the inaugural round of visits. The work and mandate of CIC will also involve more visits to counties as we monitor and ensure that the Constitution is fully implemented in all corners of the Republic of Kenya.

ii) Development of the agreed schedule of timelines for priority bills

Chapter Five of the Constitution sets out consequential legislation to the passing of the Constitution, which must be enacted within the next five years. The forthcoming General Elections call for the establishment of sound legal, institutional and administrative structures. With this in mind, CIC jointly with the Attorney-General, the Kenya Law Reform Commission, the Cabinet Office and Parliament put in place a process and an agreed schedule of priorities and deadlines to ensure the timely preparation and enactment of the legislation listed in the Fifth Schedule of the Constitution. The process agreed upon requires that once line ministries generate bills, they are forwarded to the Office of the Attorney-General, for submission to the CIC for review. Once CIC has reviewed the bills in accordance with its internal procedures, the Commission convenes a roundtable meeting with Kenya Law Reform Commission, the Attorney-General and the line ministry to sign off on the final version of the Bill. The Attorney-General formally submits the bill to the Cabinet for approval before it is published and tabled in Parliament. Thereafter, the bill is considered by the relevant parliamentary committee before it is debated in Parliament and passed. The Constitution Implementation Oversight Committee, which together with CIC, plays an oversight role on the implementation process and ensures that the bill is tabled

and debated in Parliament in a timely manner. These identified priority legislation includes the election laws, devolution laws and police reform laws. (See Table 1: Agreed schedule of timelines for preparation of priority bills in Annex IV).

Some bills are running behind schedule due to outstanding policy issues and a lack of consensus between and among different stakeholders. CIC has put in place mechanisms to urgently address the differences with having the timeline all the bills on the schedule passed by the Constitution and agreed deadline.

iii) National Constitutional Conference

The National Constitutional Conference was jointly organized by CIC and the Ministry of Justice, National Cohesion and Constitutional Affairs and was held in Nairobi between 20th and 22nd June 2011. The purpose of the conference was to undertake a focused account of the implementation process and yield a concrete agenda for outstanding priorities. The objectives of the conference were to refocus the country on the constitutional implementation process, take stock of the progress of the implementation process and outline the implementation agenda regarding outstanding priorities. The participants included His Excellency the President, the Right Honourable Prime Minister, the Honourable Vice-President and members of the public drawn from the public sector, the civil society, professional organizations and counties. The participants deliberated on the status of the implementation of the Constitution, and challenges of and opportunities in the Constitution.

The deliberations at the conference were important as the achievements were celebrated, challenges were flagged and proposals made on how to overcome the challenges and a closer working relationship between and among the implementing partners and stakeholders was forged with a view to ensuring that the Constitution would be implemented for the benefit of the people of Kenya.

iv) Monitoring Police recruitment

The Constitution obliges the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights which includes the right to fair labour practices as provided in Article 41 of the Constitution. As part of monitoring the administrative practices to ensure that these provisions are applied in all government policies, CIC reviewed and advised on policies and procedures for recruitment into the National Police Service. Policy provisions, which were flagged out for correction before the recruitment exercise, include issues which would have amounted to violations of the principle of equality and non-discrimination contrary to Article 27 of the Constitution. These include:

- a) Prescription of minimum height,
- b) Gender-based discrimination, and
- c) Exclusion of persons with certain physical features such as being flat footed, being knock kneed, and being scarred.

In terms of human rights, CIC noted that, following its timely intervention most recruitment centres adhered to the constitutionally required 30% threshold of women recruits. The police recruitment exercise was one of the many monitoring activities that CIC will undertake to ensure that the administrative procedures are in line with the constitutional provisions. The active monitoring role played by CIC led to the realization that there is need for members of the Police Service to be trained on human rights at all the levels if the culture of respect for the constitutional principles is to be achieved in their work.

v) Capacity Building

CIC noted the need to learn from other jurisdictions that undertook a comprehensive revision of their national constitutions and implemented the changeover successfully. CIC undertook its first benchmarking visit to India from 14th to 18th June and held consultations with national institutions of the Government of India in areas of devolution, representation and legislature. The CIC delegation consisting of commissioners and senior members of staff held consultations with the following offices.

a. Study tour to India

CIC undertook a benchmarking study tour of India. The purpose of the tour was to interrogate the process of legislation, devolved administrative procedures and service delivery to the people at lower level of government in India.

The visit was coordinated by the Kenyan High Commission India. The CIC delegation visited the following offices:

1. The Attorney-General of the Republic of India
2. The Ministry of Law and Justice
3. The Ministry of Finance
4. The Parliament of India (both the Lok Sabha and the Rajya Sabha)
5. The State of Haryana, which is one of the most stable states of India
6. The Haryana Legislative Assembly, situated at the Vidhan Bhawan building, a common building shared by both the Haryana and the Punjab State Legislative Assemblies
7. The Panchkula District (the district level the delegation visited)
8. The Panja Village where CIC delegation met the village leaders

The visits were very instrumental in the conceptualization of devolution generally, the interrelation between the national and other tiers of government, security matters, public service, among other important constitutional issues.

Lessons Learnt

1. Adherence to the principle of constitutionalism: Where people inculcate the values and principles of the constitution, social cohesion is enhanced. The Constitution of India puts emphasis on social solidarity including; unity, group consciousness, and social cohesion. It was reported that the respect for the constitution has resulted to observance of the rule of law and the common good for all.
2. Establishing strong institutions: The Constitution of India forms part of a structured and well-established system. India has institutionalized its laws and established strong institutions to manage the people's welfare hence people have trust in state institutions.
3. Governance: The governance systems in India seem to be predictable. This is premised on the perception of supremacy of the constitution. It was reported that the rule of law is observed at all the levels of the society.
4. Checks and balances: It is imperative to establish checks and balances in governance institutions.
5. Public participation: Public participation is paramount in constitutional implementation. Where, at all the levels of the government, there is inclusion in governance system, the governance system gets the required legitimacy.
6. Deliberate efforts towards the preservation of national history and cultural heritage.

(b) Change Management

Some members of CIC attended a change-management course to understand the needs for change managements. This is important as it informed the review of change management strategies developed by all implementing agencies to implement and accommodate the changes that will be occasioned by the full implementation of the Constitution.

vii) Public interest litigation

a) Constitutional Petition No. 65 of 2011

In exercise of its mandate, CIC has on a number of issues relating to interpretation sought the court's guidance. CIC with the support of GLZ instituted court proceedings in two occasions. The cases in which CIC is currently an interested party are as follows:

In the Matter of the Construction, Interpretation and Determination of the Actual Date of the Next General Elections (Between Milton Mugambi Imanyara & others and the Attorney-General and others).

The Interim Independent Electoral Commission, being the 3rd Respondents, filed a Preliminary Objection contesting the jurisdiction of the High Court on the matter. The basis of the Preliminary Objection is the argument that the petitioners can only obtain an advisory opinion from the Supreme Court and in its absence, the Court of Appeal. The parties have made submissions on their respective viewpoints and the court is set to rule on the question of jurisdiction on 23rd June 2011.

In the Court of Appeal sitting as the Supreme Court at Nairobi (Constitutional Application No. 1 of 2011) in the matter of Advisory Opinions of the Court under article 163 (6) of the Constitution and in the Matter of Section 21 (2) of the sixth

schedule of the Constitution and in the matter of the Commission for the Implementation of the Constitution as the applicant.

CIC filed a Request for an Advisory Opinion seeking the Court's opinion on several questions relating to appointments to state offices and commissions and the relationship between the Sixth Schedule of the Constitution and these appointments. CIC is using Article 163(6) to obtain the advisory opinion on the meaning of nine articles and two sections of the transitional clauses and it is the commission's expectation that the court shall address the matter with finality while setting the record straight for future appointments made pursuant to the Constitution.

An objection as to jurisdiction was raised when the matter first came up for hearing and the matter is set to be ruled upon by the Court of Appeal sitting as the Supreme Court on the 8th July 2011.

vii) Institutional support

As reported in the first quarter, CIC has continued to develop its staff structure and has put in place a secretariat to support its functions. During this quarter CIC contracted Researchers, a Legal Officer and staff in the support departments including Administration; Finance; Procurement; Human Resource Management; Accounts; Media and Communication; ICT; Internal Audit; Hansard; Records Management and Security personnel, who are the backbone of the success of CIC. The secretariat is currently headed by an Acting Chief Executive Officer who is responsible to CIC for ensuring the implementation of policies, strategies and decisions of the commission; facilitating the functions of the thematic groups, supporting drafting of legal opinions and other relevant documents; appraising progress on the various programmes; and ensuring prudent management of resources and assets. CIC also launched its vibrant and interactive website which continues to play a key role in providing information to the public on bills and other activities related to constitutional implementation. The website also enhances public participation in line with the spirit and letter of the Constitution.

viii) Financial Independence

With regard to finances, CIC was allocated Kshs 262 million by Parliament for implementing various programmes/activities by Parliament for the six months between January and June 2011. The funds were included in the Ministry of Justice, National Cohesion and Constitutional Affairs 2010/11 financial year revised budget and the Ministry has continued to administer the funds. In fulfilment of the provisions of the Constitution of Kenya 2010, the Treasury has allocated CIC its own Vote and Budget with effect from July 2011. CIC is in the process of setting up the necessary structures in readiness for operations under the new status. During the 2011/12 financial year, CIC will require Kshs 1,147,536,545 for implementing various programmes/activities. Parliament has allocated Kshs 524 million to it for the same period, resulting in a Kshs 623,536,545 financing (resource) gap.

3.2.0 Strategic Partnerships

➤ Achievements

i) Establishment of liaisons with implementers

CIC held a one-day consultative forum with permanent secretaries to sensitize them on the role of CIC and their role as key implementing agencies in the Constitution implementation process. CIC also held a one-day constitutional implementation workshop with representative from civil society organizations. The workshop was instrumental in establishing linkages with the civil society in view on the need for civic education, hence the need for the civil society to play its traditional role of effectively educating the public on the Constitution and the rights of the public but in a coordinated manner and in conformity to the constitutional provisions of adhering to national values and promoting accountability and transparency when interpreting and applying the Constitution.

ii) Engagement with Development Partners

In the first quarter CIC received tremendous support from the donor community through technical and financial assistance. CIC has continued to engage with donors and, to this end, has held meetings with UNDP, GLZ, Friedrich Ebert Stiftung, and DFID. CIC also made a presentation to a roundtable meeting organized by the Frient, a working group composed of members from the civil society and non-state actors from Germany. The roundtable meeting reviewed the status of the implementation of the Constitution and explored possibilities on the way forward in view of apparent delays in the implementation process, especially identifying the role of the civil society and development partners in the reform process.

CIC has prepared a comprehensive work plan for the next financial year and is in the process of mobilizing resources to meet the activities in the work plan. A meeting with a group of development partners keen on supporting the constitutional implementation process was scheduled for 29th June 2011 to identify projects for technical assistance in line with the work plan.

➤ **Activities Planned for the Next Quarter**

CIC plans to implement various activities in the next quarter. Some of these activities are listed below:

- i) It is imperative to note that CIC's work goes beyond legislation; it includes monitoring any implementation of the Constitution to ensure constitutionalism. It is for this reason that CIC will seek to establish a unit to monitor any constitutional violations by the three arms of the government.
- ii) There is need to set a minimum standard for the development of legislation. In this regard every ministry is required to generate a policy before developing legislation.
- iii) CIC also intends to commence working on a tool for results-based management to ensure all the implementing agencies implement the Constitution within agreed timelines.

(See Table 4: schedule of engagements with partners and stakeholders in Annex VIII)

3.2 Progress by Implementing Agencies

Constitution implementation involves actors from the State, which is the key implementer, as well as Non-State Actors and the Public. Effective and efficient constitutional implementation can only be achieved through a coordinated approach. This requires an orderly synchronization of the efforts of all implementers in order to avoid duplication of efforts. In this regard, CIC, under the auspices of the Office of the Head of Civil Service finalized and disseminated the process circular for implementing agencies to state implementers (See Circular in Annex D). The Circular is aimed at providing guidance to state implementers on their role in the implementation process. CIC further held forums with both state and non-state actors, prepared and disseminated to each of the implementing ministries, an implementation status reporting matrix. This was done in fulfilment of the mandate of the CIC.

CIC sent out over 43 matrixes to the Ministries out of which only 16 responses were received. (See Table 5: Matrix of Ministerial reports in annex VIII). It is a matter of concern to the CIC that some implementing agencies were yet to submit their status reports at the time of publication of this report. This failure contravenes the principles of accountability and transparency in line with the spirit of the Constitution and the national values and principles of governance as set out in Article 10 of the Constitution.

The reports provided as follows:

a) Familiarization with the Constitution

Of the reports received only eight of the Ministries and one Commission reported having uploaded the Constitution on their websites and sensitized staff on the provisions of the Constitution. Among these, only the Ministry of State for Public Service reported that it has sensitized staff in all the counties and developed a sensitization curriculum on the implications of the Constitution on service delivery. Most of the ministries however had only successfully sensitized the senior staff and have scheduled to cascade the sensitization program down to the staff in the lower cadres within the next financial year. The eight ministries and the Commission include the Ministry of State for Public Service; the Ministry of Fisheries Department; the Ministry of State for Immigration and Registration of Persons; the Ministry of Information and Communication; the Ministry of Forestry and Wildlife; the Ministry of Justice, National Cohesion and Constitutional Affairs; the Ministry of Water and Irrigation; the Ministry of Northern Kenya and other Arid Lands; and the Commission for revenue Allocation.

b) Identification and Audit of Laws, Policies and Administrative Procedures

Some of the ministries outlined various laws, policies and administrative procedures that should either be enacted or audited to ensure effective implementation of the Constitution. These included:

- i) **Laws:** The Urban Areas & Cities Bills; the County Public Service Bill; the Devolution Bill; the County Government Finance Management Bill; the Intergovernmental Fiscal

Relations Bill, and Transition Bill within the Office of the Deputy Prime Minister and Ministry of Local Government; the Energy Bill within the Ministry of Energy; the Media Bill; and the Independent Communications Commission Bill within the Ministry of Information and Communication and the Commission for Revenue Allocation Bill by the Commission for Revenue Allocation.

- ii) **Policies:** The Citizenship & Immigration Policy; the Registration of Persons Policy; the Refugee Affairs Policy and the Civil Registration Policy within the Ministry of State for Immigration and Registration of Persons; the National Human Rights Policy and the National Anti-Corruption Policy within the Ministry of Justice, National Cohesion and Constitutional Affairs; the National Forest Policy; National Wildlife Policy within the Ministry of Forestry and Wildlife and the Internally Displaced Persons Draft Policy; the Disaster Management Draft Policy; and the Fire Draft Policy in the Ministry of Special Programmes and National Irrigation Policy within the Ministry of Water and Irrigation.

CIC noted with concern that some ministries have narrowed their focus, on their role in the enactment of constitution enabling legislation predominantly around the consequential legislation in the Fifth Schedule of the Constitution. This is illustrated in the text box below, obtained from a constitution implementation status report of one of the Ministries:

Box 3
Case Study on Ministerial Constitution Implementation Status Reporting

"The Ministry does not have a lead role in preparation of priority bills for implementation of the Constitution pursuant to the provision of Article 261(1) of the Constitution and agreed timelines for development of priority bills issued by the Commission."

c) Establishment of Constitution Implementation Units

The Ministry of Energy; the Ministry of State for Immigration and Registration of Persons; the Ministry of Northern Kenya and Parliament reported that they have set up Constitutional Implementation Units or taskforces to facilitate and expedite constitutional implementation including enactment of legislation to operationalize the Constitution. The Commission for Revenue Allocation has also prioritised implementation of the Constitution.

While CIC acknowledges receipt of the reports from the Ministries that reported, CIC wishes to highlight that where Ministries fail to submit their implementation status progress reports, this frustrates the efforts of CIC to effectively realize its monitoring, facilitation, coordination and oversight mandate. The reports serve as a basis for engagement between CIC and other implementers and as monitoring tools. CIC therefore calls upon Ministries to ensure commitment to the constitutional implementation process, part of which involves reporting on the measures undertaken by the Ministries towards constitutional implementation.

4. KEY ACHIEVEMENTS OF, CHALLENGES OF, AND POTENTIAL IMPEDIMENTS TO THE IMPLEMENTATION OF THE CONSTITUTION

Within the quarter under review, CIC realized various achievements, in addition to the achievements reported in the thematic areas and in other preceding chapters. There have been other significant achievements in the Constitution implementation process both at the CIC level and with other implementers. The implementation process was not without challenges and this section highlights challenges which need to be addressed. CIC also identifies a number of impediments, which may hinder the implementation process if they are not addressed timely.

➤ **Achievements**

The achievements in this quarter include:

- i) CIC enhanced effective stakeholder participation in the constitution-implementation process by subjecting each of the bills under review to stakeholder participation.

Representatives from Nairobi and the counties played a key role in reviewing and providing input into the bills. Stakeholder participation was further enhanced by putting in place an interactive website from which the stakeholders could easily access bills and other related information. Notably a substantial number of bills reviewed by CIC, all of which were subjected to stakeholder participation were reviewed and forwarded to the Attorney-General for publication and onward transmission to Parliament.

- ii) In collaboration with the Ministry of Justice, National Cohesion and Constitutional Affairs, CIC held a successful three-day high level 1st Annual National Constitutional Implementation Conference that brought together local and international policy leaders from the government and the non-state sector to galvanize the nation to focus on timely and full implementation of the Constitution. The conference which comprised representation from all the counties provided an environment where stakeholders deliberated on thematic issues revolving around the CIC's thematic areas of work.
- iii) The finalization and dissemination of the Process Circular for Implementing Agencies with the support of the Office of the Head of Civil Service was another major achievement of CIC. The circular enhances engagement between the CIC and implementers and forms a basis for monitoring stakeholder implementation of the Constitution through receipt of ministerial implementation status reports. The CIC also held two forums with permanent secretaries and non-state actors where clear proposals on the mode of engagement and the role of the stakeholders in the constitutional implementation were agreed. The effect of this will be a structured manner of constitutional implementation.
- iv) The success of the police recruitments is a major achievement for the CIC. The scheduled recruitment process was postponed to allow for a review of police recruitment policy, a process which was undertaken by CIC to ensure compliance with the letter and spirit of the Constitution. This resulted in the implementation of administrative procedures which were compliant with the provisions of the Constitution ensuring that the recruits realized their constitutional rights.

➤ Challenges

The specific challenges facing institutional development are:

1. **Resistance to change and the inclination to operate with a business-as-usual attitude:** Resistance to change and the inability to contemplate a life different from one's prevailing life experiences has led to entities establishing deliberate schemes to undermine and delay the constitution-implementation process.
2. **Impunity by some government ministries:** Impunity is the driving force behind the failure of implementing agencies to appreciate that the Constitution was promulgated in August 2010 and thus requires that each of the implementing agencies should ensure that the laws, policies and administrative procedures are aligned to the constitutional provisions. This further impediment has resulted result in delays in the constitution-implementation process.
3. **Lack of consensus by stakeholders on the content of bills forwarded to CIC:** This has led to the development of different versions of bills regarding the same subject in some cases thereby occasioning delay in the process of development of bills.
4. **Lack of understanding of the constitutional-implementation process at all the levels of government ministries:** To many, constitution-implementation is principally about changes of leadership and the electoral process. The lack of awareness leads to a laissez-faire attitude and business-as-usual mentality. A culture of ignorance is nurtured and allows the development of pseudo-knowledge of an alternative "effective date" of the Constitution centred around 2012.
5. **Apparent reluctance by technocrats to implement the constitution within their particular sectors:**

Reluctance by technocrats to embrace the Constitution implementation process. Some of the constitutional implementation status reports received from Ministries reported the following: "The Ministry does not have a lead role in preparation of priority bills for implementation of the Constitution pursuant to the provision of Article 261(1) of the Constitution and agreed timelines for development of priority bills issued by the Commission"

6. **Lack of awareness of the Constitution implementation process:** Lack of awareness is also manifested in the myopic understanding and interpretation of the 5th Schedule of the Constitution. Certain ministries glance through the Schedule and conclude that their ministries are not cited and can therefore forward any legislation to Parliament without auditing such with CIC. Twice CIC has advised the Ministry of Environment and Mineral Resources and has yet to get response from the ministry.
7. **Delays in the preparation of bills:** Belated submission of bills to CIC and/or responses resulting in the erosion of effectiveness of the implementation process.
8. **Poor drafting of bills:** Poorly drafted bills in terms of content and conservative drafting. This results in time-consuming editing. Further, most bills are not founded on any existing polities, which impairs the effectiveness of the implementation of the Constitution.

In addition, CIC's administrative operations have been hampered by the following challenges:

1. **Weak liaison processes:** The funds allocated to the CIC for the financial year 2010/2011, totalling K.shs. 262 million were included in the Ministry of Justice, National Cohesion and Constitutional Affairs 2010/11 financial year revised budget. Therefore the Ministry has continued to administer the funds on behalf of CIC. Although the CIC has largely been able to undertake its activities the bureaucratic processes involved in appropriating funds and procuring work equipment through the Ministry have significantly inconvenienced and delayed the Commission's day to day operations.
2. **Lack of status update on CIC's expenditure:** The Ministry of Justice National Cohesion and Constitutional Affairs has not been forthcoming with CIC's expenditure returns from the time the Commission was set up. This is despite several requests. As a result CIC does not have accurate records detailing its expenditure from the time the Commission was established upto the close of the financial 2010/2011. This has compelled the CIC to petition the Auditor General to address this issue with urgency.
3. **Staffing levels:** CIC has in the last two quarters faced various challenges including low staffing levels, inadequate and inaccessibility of its space, and challenges related to financial independence all of which are common to an institution in its formative stage. The CIC is temporarily housed under an ad hoc arrangement with the Ministry of Justice, National Cohesion and Constitutional Affairs, which is also the Ministry through which the CIC has been carrying out its procurement activities. In the new financial year, however, CIC will be financially independent and will thus be in a position to recruit more staff, and undertake its activities with financial independence all of which is key in fast-tracking constitutional-implementation.

➤ Impediments

The realization of the mandate of the CIC was not without its impediments which impacted on the CIC's effectiveness. These may be summarised into the following:

1. **Misinterpretation:** Selective reading and misinterpretation of provisions of the Constitution by implementing agencies. (See *Advisory opinion regarding Article 77(2) of the Constitution in Annex III*).
2. **Deliberate misinformation:** Deliberate misinformation to members of the public by some members of the Executive and the Legislature
3. **Lack of guidance from the Office of the Attorney general:** The Office of the Attorney-General has given little guidance in the process of implementation of the Constitution. The Office of the Attorney-General has fallen short of its mandate to give legal opinion in terms of faithful implementation of the Constitution and this has led to a lack of clarity in the implementation process.

Box 5**Case Study on the Budget process**

In the period leading to the presentation of the budget as required under the Constitution the Minister for Finance failed to submit to the National Assembly estimates of revenue and expenditure for tabling in the National Assembly two months before the end of the financial year 2010/2010.

As a result, CIC brought this to the attention of the Prime Minister and the Office of the Prime Minister and as a result the Minister for Finance did not read the budget statement but instead read a ministerial statement. *(See Advisory opinion in Annex II)*

4. **Political Risk:** As mentioned in the first report, the wrangles in the Judicial and Legal Affairs Committee led to a delay in finalization of bills and the implementation process, thereby forcing the Speaker to constitute the Constitution Implementation Oversight Committee as an ad hoc committee to facilitate the constitutional-implementation agenda. This impediment persists from the first quarter and is likely to continue to affect the implementation process.
5. **Grey areas:** CIC has noted with concern that there is an increasing trend by the Executive and some members of the legislature to create grey areas regarding interpretation of the Constitution, even in the face of clear Constitutional provisions, this has the unfortunate propensity to create confusion and to delay implementation of provisions of the Constitution.

➤ **Recommendations**

To ensure the effective implementation of the Constitution, the CIC makes the following recommendations aimed at providing a remedy for the challenges and impediments outlined above:

1. **Systematic and integrated approach:**

Implementing agencies need to adopt a systematic and integrated approach within their agencies. They should involve all their staff and prioritize the implementation of the Constitution in their work. They should adopt sectorial approach towards the implementation in view of the fact that the Constitution provides for a maximum of 22 ministries.

2. **Civic education:**

Civic education should be rolled out by implementing agencies however, there is need to ensure that the content complies with the letter and spirit of the Constitution.

3. **Targeted sensitisation:**

Existing legislation and administrative procedures should be revised by ministries to align them with the Constitution. There is need for targeted civic education to ensure an understanding of the implementation process.

4. **Public participation:** Implementing agencies must uphold the principle of public participation in developing legislation and administrative procedures.

5. **CIC participation in development of legislation and administrative procedures:** Implementing agencies should ensure involvement of CIC at the earliest opportunity in the review of their policies and administrative procedures as well as at an early stage during the development of the bills as this will ensure that the focus remains on the bill and the content therein and the national interest of the people of Kenya. Public participation should also be part and parcel of the legislative review and development process.

6. **Role of the political leadership:** Political leaders and the Executive should demonstrate stewardship to facilitate the smooth implementation of the Constitution. Constitutional references relating to implementation of the Constitution should be fasttracked to avoid abuse so as to impede the implementation of the Constitution, but should facilitate the meeting of timelines. In addition, statements of commitment by leaders should be demonstrated in action.

5. ANNEXURES

Annex I

THE ROLE OF GOVERNMENT INSTITUTIONS AND COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC) IN THE PROCESS OF IMPLEMENTING THE CONSTITUTION OF KENYA

The objective of this communication is to advise all Government Ministries, Parastatals, Regulatory Boards and all Constitutional Commissions and other institutions that have the primary responsibility for generating policies, proposed legislation and administrative procedures required for the implementation of the Constitution of Kenya 2010, on the process to be followed in undertaking the exercise.

The procedures outlined in this communication take cognizance of the values enshrined in Article 10 of the Constitution and which are deemed necessary for the furtherance of the mandate of the Commission for the Implementation of the Constitution (CIC) as spelt out below.

The Commission for the Implementation of the Constitution (CIC) is established under Section 5(1) of the Sixth schedule to the Constitution. The mandate of CIC is stipulated in Section 5(6) of the same schedule and Section 4 of the Commission for the Implementation of the Constitution Act 2010.

The functions of CIC are to:-

- (a) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;
- (b) co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement this Constitution;
- (c) report every three (3) months to the Constitutional Implementation Oversight Committee on:
 - (i) progress in the implementation of this Constitution; and
 - (ii) any impediments to its implementation; and
- (d) work with each Constitutional Commission to ensure that the letter and spirit of this Constitution is respected; and
- (e) exercise such other functions as are provided for by the Constitution or any other written law.

The mandate of CIC is further amplified by Article 249 (1) which sets out the objects of the Constitutional Commissions and the independent offices to include:-

- a) protecting the sovereignty of the people;
- b) securing the observance by all State organs of democratic values and principles; and
- c) promoting constitutionalism.

Further Article 261 extends the mandate of the CIC as follows:

Article 261 (1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

Article 261 (4) For the purposes of Clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified.

Section 15 (d) of the Sixth schedule requires CIC to ensure that the system of devolved government is implemented effectively.

PROCESS

To enable it carry out its constitutional mandate effectively, CIC advises that the following procedure be followed by the Public Service:-

- (e) Each of the Institutions listed above should familiarize itself with the entire Constitution and its implications and ensure that:-
 - a) In the course of performing its duties the constitution is not violated;
 - b) In performing its duties all new and existing policies, laws and administrative procedures that are being applied are consistent with the letter and spirit of the constitution; and

- c) Implementation of the Constitution is integrated in performance contracts. In this regard, implementing institutions should provide for implementation in its goals, set targets for measuring performance and provide incentives for achieving these targets. The performance contract should incorporate an evaluation model that shall provide feedback on performance and best practice in the implementation process.
- 2) The aforementioned familiarization with the Constitution will enable the institutions to undertake a comprehensive audit of all existing Sessional papers; laws, by-laws and regulations; policies; administrative procedures; government guidelines and circulars relating to its functions and to the sector in which the Institution operates.
- 3) The intention of the audit is to determine the compliance of such sessional papers; laws, by-laws and regulations; policies; government guidelines; circulars and administrative procedures with the letter and spirit of the Constitution.
- 4) Upon audit of all such existing sessional papers; laws, by-laws and regulations; policies; government guidelines; circulars and administrative procedures, any language that is inconsistent with the Constitution be identified and a plan for its review developed and the necessary review subsequently undertaken.
- 5) Each Institution, in consultation with the Attorney General (AG) should also identify any new laws that are required for the implementation of the Constitution. The legislation in question will include but not be limited to those listed in the Fifth Schedule of the constitution. In undertaking this activity the Institutions are also free to consult CIC.
- 6) Each Institution should identify any new administrative procedures that may be required to implement the constitution.
- 7) Each Ministry should, within the shortest time possible after issuance of this circular, submit its comprehensive plan for the development and review of Sessional papers; laws, by-laws and regulations; policies and administrative procedures required to implement the constitution to the following:
- The Commission for the Implementation of the Constitution;
 - The Ministry of Justice, Constitutional Affairs and National Cohesion being the Ministry coordinating the implementation of the constitution within Government;
 - The Attorney General, and
 - The Kenya Law Reform Commission,
 - The plans submitted by Ministries should indicate:
 - The sessional papers; laws, by-laws and regulations to be reviewed;
 - The policies and administrative procedures to be developed or reviewed; and
 - Nature of the reviews to be undertaken.
 - The steps in reviewing the by-laws, laws, sessional papers, policies and administrative procedures already taken and the expected timeframes for outstanding activities,
- 8) In reviewing existing policies, administrative procedures and legislation, and determining the necessity of new laws, institutional policies, administrative procedures and legislation, each Ministry or other institutions participating in such processes should in particular take into account the following:-
- The existence of any international treaty ratified by Kenya relating to any matter concerning the sector and which has not been domesticated
 - The provisions relating to the Bill of Rights in the Constitution and in particular the need to incorporate the requirement for progressive implementation of the socio-economic rights under Article 43 of the Constitution in appropriate legislation
- c) The values and principles articulated in Article 10, Chapter 6 (Leadership and integrity) and Chapter 13 Part I (values and principles of public service) of the Constitution including:-
- Participation of the people;
 - Equity, inclusiveness, human rights, social justice, equality, non-discrimination and protection of the marginalized;
 - The principle of gender equity and regional balance in the consideration of opportunities;
 - Sharing and devolution of power;
 - Good governance, integrity, transparency and accountability
 - Sustainable development;
 - The principles on leadership and integrity in Chapter 6 of the Constitution;
 - The principles of fairness, prudence, clarity and the need for fiscal responsibility in the management of public resources in Chapter 12 of the constitution; and
 - Any other principle within the Constitution.
- 9) In determining new policy and administrative procedures, and generating new legislation, every Ministry and every Institution involved in implementing the Constitution should ensure that the process leading to the determination of policy and generation of legislation and administrative procedures is undertaken in a participatory and transparent manner. In this respect, the public and in particular sectoral stakeholders including members of Civil Society Organisations and Community Based Organisations should be given reasonable opportunity to **effectively** participate in the process taking into account all relevant factors, including the nature of the policy, administrative procedures and legislation, its implications and the applicable time constraints.
- Public participation includes any or all of the following:-
- Structured process of gathering views of the public during policy formulation or Bill preparation;
 - Stakeholder input via workshops, seminars or other fora;
 - Dissemination of draft Bill to the public for discussion through various media outlets;
 - Focused media debate on policy or draft Bill;
 - Credible process of considering public views; and
 - Validation workshops.
- 10) In determining whether any draft legislation forwarded to CIC for review is consistent with the letter and spirit of the constitution, CIC will take the following criteria into account:-
- The extent to which the public participated effectively in generating the policy or legislation;
 - The consistency of any sessional papers; laws, by-laws and regulations; policies and administrative procedures within the letter and spirit of the constitution;
 - The adequacy and sufficiency of the sessional papers; laws, by-laws and regulations; policies and administrative procedures in enabling implementation of the constitution; and
 - The impact of the sessional papers; laws, by-laws and regulations; policies and administrative procedures on other laws, institutions and the two levels of government i.e. national and county governments.

Change Management**CIC recommends:**

- 11) That each Institution in consultation with the Government Department coordinating the implementation of the Constitution within government and CIC develops a change management strategy and applies it in all the activities of the Institution.
- 12) The change management strategy should outline how each Institution plans to effect the change necessary for the realisation of the requirements of the Constitution.
- 13) That within the next three (3) months each Institution submits to CIC and to the Government Department coordinating the activities relating to the implementation of the Constitution its change management strategy to enable efficient monitoring of the process of the implementation of the Constitution.
- 14) For the purposes of this Circular change management is a structured and systematic approach to transforming individuals, groups of people or institutions usually after a situational analysis. In the Kenyan case the change anticipated was triggered by the promulgation and coming into effect of a new constitution, **The Constitution of Kenya, 2010**. The goal of change management shall be to entrench the culture of constitutionalism within the institution and in service delivery.

MODE OF COLLABORATION AND WORKING WITH THE CIC

- 15) Each implementing institution should establish an implementation unit that shall oversee the implementation of the work plan and report on the progress and impediments to implementation of the Constitution. The implementation unit shall work with CIC in ensuring that progress is on track.
- 16) The implementation institution shall ensure that it trains its staff to internalize the objectives of implementation of the Constitution. This will ensure that all actors share the same vision and avoid the risk of discordant or conflicting implementation initiatives. Upon request, CIC shall provide advice on the training guidelines to ensure that it reflects the letter and spirit of the Constitution.
- 17) To enable CIC report on the progress of implementation as required by the Constitution, each ministry should submit its implementation report to CIC three weeks before the end of each quarter. For the purposes of this circular, the **first quarter ends on the 30th of June 2011**. The report should be provided in a format to be provided by CIC after consultation with the ministries.
- 18) CIC, in pursuance of its mandate to monitor the implementation of the Constitution, will from time to time undertake an audit of the different sectoral policies, laws, and administrative processes and structures to determine compliance with the letter and spirit of the Constitution.

FRANCIS K. MUTHAURA, EGH
PERMANENT SECRETARY, SECRETARY TO
THE CABINET AND HEAD OF THE PUBLIC SERVICE

Copy to:-

The Rt. Hon. Prime Minister
 H.E. the Vice-President and Minister for Home Affairs
 The Hon. Deputy Prime Minister and Minister for Finance
 The Hon. Deputy Prime Minister and Minister for Local Government
 All Hon. Ministers
 All Hon. Assistant Ministers

Annex II**ADVISORY OPINION: IN THE MATTER OF THE BUDGET PROCESS UNDER ARTICLE 221 OF THE CONSTITUTION****Introduction:**

The budget is a vital instrument that is ordinarily used by governments to enumerate its national policy whilst also highlighting on the cost implications of its programmes and the possible sources of revenues in

a given fiscal year. Further, it is acknowledged that a good budget system is founded on several objectives including: maintenance of stable macro-economic environment, enhancing fiscal discipline, attainment of allocative efficiency and operational/technical efficiency. In the circumstances of Kenya, the quest for budget reforms has inter alia been premised on the need to attain and maintain fiscal discipline, ensure equity whilst imbuing transparency and public participation in the Budget process.

Prior to the passage of the new constitution, various statutes together with the repealed Constitution under Sections 48, 99 to 105 lay a framework for the conduct of public finances related activities in the country.

Statement of the Problem:

Treasury and the National Assembly are locked in a dispute as to how the next budget ought to be presented. On its part, treasury prefers to proceed the old way where the finance minister prepares both the budget estimates and the Finance Bill then proceeds to the floor of the house to defend the budget proposals.

On the other hand, the National Assembly through the Parliamentary Budget Committee contends that treasury sticks to the provisions of the New Constitution and in that regard, the budget ought to be submitted as per the constitution especially as is provided for under Article 221. In their view, treasury ought to have submitted the revenue estimates and proposals for government expenditure two months (end of April, 2011) before the expiry of the current financial year in June, 2011. Curiously, the budget Committee at the request of the Treasury, "granted" an extension of the period for submission of the estimates to the end of May 2011. The committee also raises issue with the notice by the Minister of Finance of his intention to read the budget statement on the 8th of June 2011.

The Constitution of Kenya – 2010

On 27th August 2010, Kenya adopted a new constitution which has an entire chapter (12) dedicated to Public Finance. This chapter on Public Finance has revolutionized Public Financial Management and is a radical departure from the status that existed as was provided for by the former constitution.

One of its core principles of Public Finance is outlined in Article 201 (a) of the Constitution and it demands for openness and accountability, including public participation in financial matters.

As to the budgetary process, Article 221 is quite instructive:

221. (1) At least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly.

(2) The estimates mentioned in clause (1) shall—
 (a) include estimates for expenditure from the Equalisation Fund; and
 (b) be in the form, and according to the procedure, prescribed by an Act of Parliament.

(3) The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under Articles 127 and 173 respectively.

(4) Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly.

(5) In discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

At the outset it is important to emphasize that the Chapter on Public Finance is operational and took effect immediately the new constitution was promulgated. Specifically Article 221 is operational to its fullest extent and places clear obligations on various institutions.

Article 221 bestows the Cabinet Secretary for Finance (and in light of the transitional provisions in the constitution, the current Minister for Finance) with a constitutional obligation to provide the National Assembly with the estimates of the revenue and expenditure of the national government for the next financial year at least two months before the expiry of each financial year.

In an apparent recognition of this obligation, the Permanent Secretary to the Treasury issued the **Treasury Budget Circular No. 2/2011** dated 17th March 2011, to all Accounting Officers. The contents of this Circular are categorical and in accordance with the Constitution and read, in part, that it is,

“ intended to guide „Ministries, Departments and other government agencies (MDAs)... on planning for FY2011/12 Budget which will be presented to Parliament in accordance with Article 221 of the new constitution.”

It is also instructive that towards the end of the constitutional deadline in April, Treasury sought Parliament's leave to extend the period for presenting the estimates by one month on the basis that the estimates could not be prepared within the constitutional timelines. It is clear from these acts that compliance with Article 221 was never in doubt.

The intent of Article 221 is to enable the National Assembly participate effectively in the budget process. It is on this basis that the constitution requires that before the budget estimates presented by the Minister are considered by the National Assembly, the latter is expected to constitute a committee with the task of discussing and reviewing the estimates and as a result, making recommendations to the Assembly. The committee is also mandated to seek representations from the public and take the same into account when making its recommendations to the National Assembly. This requirement resonates with the provisions of Article 201 (a) of the Constitution which in principle calls for openness, accountability and public participation in such financial matters.

It thus means that the provision of these revenue estimates and expenditures reports in advance, serve to give transparency to the process whilst also opening the said reports to public scrutiny as is demanded by the constitution. This is provided for as a right on the part of the public in terms of their participation.

Issues have been raised on the implications of the absence of the laws contemplated by Article 221(2)(b) which stipulates that the estimates under Article 221 (1) shall be in the form and procedure provided for by an Act of parliament. Tied to this is the provision of Article 225 (1) which calls for an Act of Parliament to provide for the establishment, functions and responsibilities of the national treasury.

It must be noted that Article 221(1) is a constitutional provision which takes precedence over legislation. In the context of the Constitution and the requirement for the passage of enabling legislation, the main purpose of such legislation is to supplement or in the best manner possible, give effect to the provisions of the constitution. It cannot contradict or take away that which the constitution has mandated. Thus the current absence of the Acts contemplated under Articles 225(1) and 221(2)(b) does not negate the essence of the constitution as already provided for in Articles 221(1)(3)(4)(5) of the constitution. In any event existing statutes including the Government Financial Management Act 2004, the Financial Management Act 2009 and existing Government Financial Regulations can provide guidance on the form and procedure of presentation of the estimates, provided that those statutes comply with Section 7 of the 6th schedule which provides that all existing law, whilst applicable, must be

“construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution”

From the foregoing it is clear that Treasury, in failing to present the estimates to the National Assembly within the constitutional timelines violated the provisions of Article 221 of the constitution. This violation ought to be redressed as urgently as possible so as not to impede the constitutional implementation process, particularly the need for public participation in the budget formulation process.

Finally the Commission did seek clarification from the Treasury on this failure to comply with the constitution. The treasury has informed the Commission that they intend to present the estimates by the 30th of May 2011 which was the date that was “extended” by the Parliamentary Committee. The view of the Commission is that no

organ has the power to extend constitutional timelines. That notwithstanding, it is important that all parties involved in this matter, including Parliament, make all efforts to ensure that this matter is concluded within the shortest time possible so that the spirit of the constitution is respected and complied with.

Annex III

ADVISORY OPINION: INTERPRETATION OF ARTICLE 77(2) OF THE CONSTITUTION OF KENYA 2010

1. Background

The Registrar of Political Parties by a letter dated 3 May informed the Commission for Implementation of the Constitution (CIC) that the Political Party ODM have informed her office that they would like to hold national elections for the party to comply with the provisions of the Political Parties Act and the Constitution of Kenya. The registrar attached the letter from ODM party in her correspondence to us. Pursuant thereto the Registrar of Political Parties has requested CIC to construe the purport of Article 77(2) of the Constitution of Kenya, 2010 *vis-a-vis* the structure of political parties registered in Kenya. Below is an advisory opinion regarding interpretation of Article 77(2) of the Constitution.

2. The Constitution of Kenya, 2010

The mandate of the Commission for the Implementation of the Constitution is to ensure that the letter and spirit of the Constitution is respected. The Commission notes that the Constitution contains provisions specific to the conduct of affairs of political parties and members of Parliament.

Article 77(2) of the Constitution expressly states that any appointed State officer shall not hold office in a political party. Within the same context Article 260 of the Constitution provides that a “State officer” means a person holding State Office. The same Article defines “State office” to mean any of the following offices:

“State office” means any of the following offices:

- (a) President;
- (b) Deputy President;
- (c) Cabinet Secretary;
- (d) Member of Parliament;
- (e) Judges and Magistrates;
- (f) Member of a commission to which Chapter Fifteen applies;
- (g) Holder of an independent office to which Chapter Fifteen applies
- (h) Member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;
- (i) Attorney-General;
- (j) Director of Public Prosecutions;
- (k) Secretary to the Cabinet;
- (l) Principal Secretary;
- (m) Chief of the Kenya Defence Forces;
- (n) Commander of a service of the Kenya Defence Forces;
- (o) Director-General of the National Intelligence Service;

(p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or

(q) An office established and designated as a State office by national legislation;

The significance of the Article 77(2) and Article 260 provisions is that persons appointed to hold the state offices outlined above are prohibited from holding official positions in political parties. The interpretation of the effect of Article 77(2) hinges on the meaning of the word “appointed” although the Constitution is silent on the interpretation of the word “appointed”.

It is imperative to note that State officers come into office through different procedures and terms of service prescribed by the Constitution or by legislation including nomination, election, appointment to service or office on a permanent or temporary, or paid or unpaid terms among others. Therefore where a state officer comes into office exclusively by way of elections as prescribed in the Constitution the prohibition in Article 77(2) shall not apply to them. However where a state officer is appointed e.g. as provided in Article 152(2) of the Constitution the prohibition to hold office in a political party applies to them.

On the contrary Article 260 of the Constitution defines "public officer" to mean any State officer; or any person, other than a State Officer, who holds a public office. Further a "public office" means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. In effect a public officer includes a state officer. Further, it is worth noting that Section 75 of the Constitution prescribes the conduct of State officers. It states that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids:

- (a) any conflict between personal interests and public or official duties;
- (b) compromising any public or official interest in favour of a personal interest; or
- (c) demeaning the office the officer holds.

A person who contravenes these provisions or Article 76, 77 or 78(2) of the Constitution shall be subject to the applicable disciplinary procedure for the relevant office; and may, be dismissed or otherwise removed from office. Further, a person who has been so dismissed or otherwise removed from office under these provisions is disqualified from holding any other State office.

3. Conclusion

Consequently, any person appointed to hold a State office is prohibited from holding office in a political party. However, elected state officers

may hold office in political parties. In the current scenario after the promulgation of the Constitution in accordance with Article 263 of the Constitution Parliament is mandated to enact legislation required to give full effect to the Constitution. Article 152 of the Constitution provides that Cabinet consists of the President, Deputy President, the Attorney General and Cabinet Secretaries. The President shall nominate, and with the approval of the National Assembly appoint Cabinet Secretaries who shall not be members of Parliament. However, because this is a transitional period Section 2(1)(c) of the Sixth Schedule of the Constitution applies; the provisions in Article 129 to 155 of Chapter Nine of the Constitution are suspended until after the final announcement of all the results of the first elections for Parliament under the Constitution (in 2012). Therefore Cabinet Ministers are also Members of Parliament in accordance with the provisions of the former Constitution. It follows that the restriction in Article 77(2) applies to Cabinet Ministers to the extent that they are appointed state officers. It is worth noting that Article 91 of the Constitution provides for basic requirements for political parties. Article 91(g) mandates political parties to promote the objects and principles of the Constitution of Kenya and the rule of law. Further Article 92 mandates Parliament to enact legislation to provide for among other things: regulation of political parties, roles and functions of political parties, the establishment and management of political parties and any other matters necessary for the management of political parties.

Annex IV

TABLE 1: AGREED SCHEDULE OF PRIORITY BILLS

Agreed timelines for the development of priority bills for the period ending 30th August 2011. To guide relevant institutions including Line Ministries, AG, KLRC, CIC and Parliament.									
Bill	Raw draft and policy docs from line Ministry/institution released to KLRC/AG by	Draft Bill by KLRC/AG released to CIC by	Round table by AG/CLRC/CIC/Ministry/institution finalized by	Final draft bill released by AG to Cabinet by	Post Cabinet consultations where substantive changes are made finalized by	Publication by	Constitution-(Schedule 5) Deadline	Proposed date for enactment By	
Representation & Legislature:									
1	Vetting of public appointments by Parliament	30/5/2011	15/6/2011	27/6/2011	26/6/2011	7/7/2011	10/7/2011	One Year (26/8/2011)	15.8.2011
2	Bills relating to legislative structures	15/6/2011	10/7/2011	22/7/2011	25/7/2011	8/8/2011	10/8/2011	2 years (26.8.2012)	25/8/2011
3	IEBC						Published	One Year (26/8/2011)	15.5.2011
4	Political parties		15/5/2011	23/5/2011	25/5/2011	7/6/2011	9/6/2011	One Year (26/8/2011)	23/6/2011
5	Elections (National & County)		15/5/2011	8/6/2011	12/6/2011	21/6/2011	24/6/2011	One Year (26/8/2011)	8/7/2011
Judiciary & Constitutional Commissions									
6	System of Courts	30/5/2011	15/6/2011	27/6/2011	26/6/2011	7/7/2011	10/7/2011	One Year (26/8/2011)	25/8/2011
7	Salaries & Remuneration Commission							Published	15.5.2011
8	Article 59 Commissions (3 Bills)		15/5/2011	30/5/2011	3/6/2011	16/6/2011	18/6/2011	One Year (26/8/2011)	3/7/2011
9	Supreme Court				Done (Bill in Cabinet)	15/5/2011	20/5/2011	One Year (26/8/2011)	30/5/2011
10	Public Service Commission	30/5/2011	15/6/2011	28/6/2011	30/6/2011	14/7/2011	16/7/2011		30/7/2011

Agreed timelines for the development of priority bills for the period ending 30th August 2011. To guide relevant institutions including Line Ministries, AG, KLRC, CIC and Parliament.

Bill	Raw draft and policy docs from line Ministry/institution released to KLRC/AG by	Draft Bill by KLRC/AG released to CIC by	Round table AG/KLRC/CIC/line Ministry/institution finalized by	Final draft bill released by AG to Cabinet by	Post Cabinet consultations where substantive changes are made finalized by	Publication by	Constitution-(Schedule 5) Deadline	Proposed date for enactment By	
Public Finance:									
11	Commission for Revenue Allocation	20/4/2011	4/5/2011	18/5/2011	21/5/2011	6/6/2011	8/6/2011	3 months (26/11/2010)	22/6/2011
12	Independent Offices (Appointment)				Done (Bill in Cabinet)	15.5.2011			30.5.2011
13	Auditor General & Controller of Budget	30/5/2011	15/6/2011	30/6/2011	4/7/2011	18/7/2011	20/7/2011		3/8/2011
14	Public Finance Management	30/5/2011	15/6/2011	30/6/2011	4/7/2011	18/7/2011	20/7/2011	2 Years (26/8/2012)	3/8/2011
Public Service & Leadership:									
15	Ethics and Anti-corruption Commission	15/5/2011	30/5/2011	14/6/2011	17/6/2011	1/7/2011	2/7/2011	One Year (26/8/2011)	16/7/2011
16	Ethics and Leadership	15/5/2011	30/5/2011	14/6/2011	16/6/2011	30/7/2011	2/8/2011	2 Years (26/8/2012)	16/8/2011
Bill of Rights & Citizenship:									
17	Citizenship		16/7/2011	28/7/2011	31/7/2011	9/8/2011	11/8/2011	One Year (26/8/2011)	25/8/2011
18	Ratification of International Treaties	10/6/2011	10/7/2011	24/7/2011	27/7/2011		7/8/2011		21/8/2011
Executive and Security Sector:									
19	Power of Mercy	30/6/2011						One Year (26/8/2011)	
20	Independent Police Oversight Authority		30/6/2011	13/7/2011	16/7/2011	30/7/2011	2/8/2011		16/8/2011
21	National Police Service		15/6/2011	30/6/2011	14/7/2011	28/7/2011	30/7/2011	2 years (26/8/2012)	14/9/2011
22	NSIS		31/7/2011	14/8/2011	16/8/2011	30/8/2011	2/9/2011	2 Years (26/8/2012)	16/9/2011
23	National Police Service Commission		22/5/2011	6/6/2011	8/6/2011	21/6/2011	23/6/2011	2 years (26/8/2012)	7/7/2011
Devolved Government									
24	Bills relating to devolved government							Between one and two years	
25	Urban Areas and Cities	15/6/2011	30/6/2011	14/7/2011	16/7/2011	28/7/2011	30/7/2011	One Year (26/8/2011)	14/8/2011
Land and Environment									
26	National Land Commission	30/5/2011	15/6/2011	30/6/2011	4/7/2011	18/7/2011	20/7/2011	18 months (26.3.2012)	3/8/2011

Annex V

TABLE 2: SUMMARY OF PROGRESS IN THE DEVELOPMENT OF LEGISLATION

Bill	Draft Bill by KLRC/AG released to CIC	Stakeholder Forums	Round table AG/KLRC/CIC/line Ministry/institution finalized	Final draft bill released by CIC to AG	Date/Status of Enactment
Public Service and Leadership:					
Ethics and Anti-Corruption Bill	25th May 2011	CIC held a technical meeting with Ministry	30th June, 2011	-	Review of the Bill by CIC is ongoing

Bill	Draft Bill by KLRG/AG released to CIC	Stakeholder Forums	Round table AG/KLRG/CIC/ line Ministry/institution finalized	Final draft bill released by CIC to AG	Date/Status of Enactment
		of Justice national Cohesion and Constitutional Affairs on 15th June 2011, carried out a stakeholders meeting on 2nd and 8th of June, 2011 and on 23rd and 24th June 2011			
Citizenship and Human Rights:					
Kenya National Human Rights Commission Bill	8th April 2011	6th and 13th May 2011	9th June 2011	28th June 2011	Awaiting cabinet approval as at 29th June 2011
Commission on Administration of Justice Bill	8th April 2011	6th and 13th May 2011	9th June 2011	28th June 2011	Awaiting cabinet approval as at 29th June 2011
National Gender Commission and Equality Bill	8th April 2011	6th and 13th May 2011	9th June 2011	28th June 2011	Awaiting cabinet approval as at 29th June 2011
Ratification of Treaties Bill	11th May 2011	17th June 2011	-	-	Review of the Bill by CIC is ongoing
Representation of the People & Legislature:					
Independent Electoral and Boundaries Commission Bill	Qtr 1	County Visits 10th – 18th April 2011 Workshops 16th-17th May 2011	Qtr 1	Qtr 1	Published and awaiting presidential assent
Political Parties	15th May 2011	Workshops 26th-27th May 2011	20th and 23rd May 2011	25th May 2011	As of 20/6/2011, the AG had released the Bill to the Cabinet
Elections (National & County) Bill	21st May 2011	County Visits 10th – 18th April 2011	-	-	CIC has been awaiting input from the Task Force for Devolved Government
Public Finance:					
Public Finance Management Bill, 2011	16th May 2011	17th June, 2011 – CIC meeting with Non State Actors 27th June 2011 – CIC meeting with Government Agencies and Non State Actors	Tentative Date – 17th July 2011	-	Review of the Bill by CIC is ongoing
Controller of Budget Bill (from Treasury)	16th June 2011	27th June 2011	Tentative Date - 15th July 2011	Not Yet	Review of the Bill by CIC is ongoing
Commission on Revenue Allocation Bill	09th May 2011	-	18th May 2011	The Bill is pending finalization by Cabinet	-
Judiciary and Constitutional Commissions:					
Supreme Court Bill	14th May 2011	18th and 30th May 2011	21st April 2011	23rd June 2011	Enacted into law on 27th June 2011
Independent Offices Bill	-	-	-	The Bill is before Parliament for debate	-
Land and Environment:					
National Land Commission	20th June 2011	-	-	-	Review of the Bill by CIC is ongoing
Executive and Security:					
National Police Service Bill	9th February 2011	Consultation with National Police 8th April 2011, Consultation with Civil Society Organisations on 24th May 2011	29th June 2011	29th June 2011-	Finalised and forwarded to the Attorney General for Publication
National Police Service Commission Bill	9th February 2011	Consultation with National Police 8th April 2011, Consultations with Civil Society Organisations on 24th May 2011	18th June 2011	27th June 2011-	Finalised and forwarded to the Attorney General for Publication

Bill	Draft Bill by KLRG/AG released to CIC	Stakeholder Forums	Round table AG/KLRG/CIC/ line Ministry/institution finalized	Final draft bill released by CIC to AG	Date/Status of Enactment
Independent Policing Oversight Authority	9th February 2011	Consultation with National Police 8th April 2011, Consultations with Civil Society Organisations on 24th May 2011	29th June 2011	29th June 2011-	Finalised and forwarded to the Attorney General for Publication

Annex VI

TABLE 3: SUMMARY OF ENGAGEMENTS WITH STAKEHOLDERS PER THEMATIC AREA

ORGANISATION	EVENT	DATE OF MEETING
Public Service and Leadership Thematic Area		
Kenya Institute of Administration	Consultation to discuss how the policies and procedures of the Kenya Institute of Administration can be streamlined to ensure compliance with the Constitution	18th May 2011
The Office of the Prime Minister	Consultation to understand the steps taken to ensure that existing and anticipated public service laws, procedures and policies comply with the Constitution.	17th May 2011
Bill of Rights and Citizenship Thematic Area		
Women members of the legislature, executive, business community and professionals from the private sector; non-state actors and community-based organizations	Public dialogue forum on the gains for women in the Constitution and a discussion of strategies to enable women to fully utilize the spaces created by the Constitution.	4rd May 2011
The Office of the Prime Minister	Consultation with Prime Minister roundtable on Gender Affairs	24th May 2011
Ministry of Justice, National Cohesion and Constitutional Affairs	Consultations on how to ensure the National Policy and Action Plan on Human Rights is in compliance with the Constitution.	15th June 2011
Public Finance Thematic Area		
CIC and Treasury	Consultative forum on Public Finance Management and Fiscal Decentralization Principles	June 2011
Civil Society Organisations	Technical workshop on the Public Finance Management Bill with Civil Society Organisations	17th June 2011
Stakeholders	Consultative Forum on the Public Finance Management Bill	27th June 2011
Prof Paul Smoke, Dr. Junaid Ahmed and Mr. Gordhan the former Chief executive Officer of the Johannesburg Municipal Council	Discussion with experts on the Public Finance Management Bill to Sensitize CIC commissioners regarding the public finance processes and comparative experiences on fiscal decentralization	4th and 5th May 2011
Land and Environment Thematic Area		
National Environment Civil Society Alliances of Kenya	Workshop develop a strategic alliance and commence dialogue with the civil society on pressing issues afflicting land and environment and ensuring robust public participation	10th May 2011
Land Sector Non-State Actors under the auspices of the Institutions of Surveyors of Kenya.	Consultative forum on the National Land Commission Bill	27th May 2011
Ministry of Water and Irrigation, the Ministry of Forestry and Wildlife, and the Ministry of Northern Kenya and Arid Lands.	Consultative meetings with the task forces/committees on constitutional reforms relevant to the ministries	10th May 2011
Executive and Security Thematic Area		
Permanent Secretaries	Workshop with the head of public service and permanent secretaries (Chief executing officers) to share with them their role with regard to the implementation of the Constitution.	4th April 2011
The Office of the Prime Minister	Consultation with the Office of the Prime Minister to deliberate on the role of the executive in ensuring timely implementation of the Constitution and the application of the Rapid Results Initiative.	17th May 2011
The National Police Service	Review of the national police recruitment guidelines and supervision of police recruitment nationwide to ensure compliance with the provisions of the Constitution	29th April 2011
Devolved Government Thematic Area		
Taskforce on Devolved Government	Consultative meeting to discuss the status of priority bills and set timelines for their finalisation	2nd June 2011
Institute for Social Accountability	Meeting with Non-State Actors to discuss ways of increasing collaboration between CIC and with civil society	25th May 2011
World Bank and international experts	Consultation to deliberate issues relating to devolved governance with a view to understanding the transitional process and establishing effective devolved systems	6th May 2011
Task Force on Devolved Government, the Steering Committee on Devolved Government and the World Bank	Meeting to discuss issues concerning the structure, service delivery and finance in a devolved government.	4th and 5th May 2011
CIC Commissioners	Colloquium to develop a shared understanding on devolution, risks and how best to implement it across all thematic areas	29th April 2011
Ministry of Public Works	Meeting to discuss the ministry's plan to develop county infrastructure	4th May 2011

Annex VII

TABLE 4: CONSULTATIONS WITH STAKEHOLDERS AT INSTITUTIONAL LEVEL

ORGANISATION	EVENT	DATE OF MEETING
Institute of Certified Public Secretaries of Kenya	Dinner	1st April 2011
Executive	Permanent Secretaries' Forum	2nd April 2011
Kenya Anti-Corruption Commission	Breakfast Meeting	5th April 2011
Freidrich Ebert	Security Sector Reforms	6th April 2011
International Commission of Jurists-Kenya	Launch of Media Handbook	7th April 2011
Constituency Development Fund	Launch of Strategic Plan	20th April 2011
Task Force on Devolution	Presentation of the Report	20th April 2011
Media Owners' Association	Media Owners' Association Breakfast	21st April 2011
The Constitution Implementation Oversight Committee	Meeting on Working Modalities	21st April 2011
Freidrich Ebert Stiftung	Constitutional Conference Meeting	21st April 2011
World Wide Fund	Stakeholders Consultative and Wildlife Matters	10th May 2011
German Non-State Actors	Friend Roundtable on Status of Implementation	11th – 13th May 2011
Media Council of Kenya	Training of Senior Editors	16th May 2011
Office of the Prime Minister	Roundtable on Gender	24th May 2011
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)	Judicial Reform and Rule of Law Forum	25th May 2011
Parliament	Prayer Breakfast	26th May 2011

Annex VIII

TABLE 5: MINISTERIAL REPORTING MATRIX

Ministries/State Corporations	Ministry submission of Status report to CIC	Analysis of the Status of Constitutional Implementation
Ministry of Agriculture	Not Submitted	
Ministry of Co-operatives Development	Not Submitted	
Ministry of East African Community	Submitted	The ministry has undertaken a Rapid Result Initiative program that has resulted in: <ul style="list-style-type: none"> i) draft Miscellaneous Amendment Bill ii) audit report on the compliance of the East African Community laws with the Constitution and thus their suitability for domestication
Ministry of Education	Not Submitted	However, the Teachers Service Commission has since prepared and submitted to the CIC the Teachers Service Commission Bill.
Ministry of Public Works	Not Submitted	
Ministry of Energy Kenya Electricity Transmission Co. Ltd	Submitted	Ministerial taskforce set up to fast-track implementation of the Constitution. A technical committee of the taskforce tasked to review existing sector laws, bylaws and regulations to determine compliance with the Constitution and come up with a new Energy Bill. The taskforce has developed a harmonized sector position paper to guide review.
Ministry of Environment and Mineral Resources	Not Submitted	
Ministry of Gender, Children and Social Development	Not Submitted	
Ministry of Fisheries Development	Submitted	The ministry has undertaken the following: <ul style="list-style-type: none"> i) uploaded and availed copies of the Constitution to heads of departments and their deputies and held sensitization workshops for their heads of departments. This is being cascaded to lower levels ii) working to set up and staff county offices through amalgamation of existing district-based offices into one county office iii) review of the Fisheries Management and Development Bill
Ministry of State for Planning, National Development and Vision 2030	Not Submitted	
Ministry of Higher Education, Science & Technology	Not Submitted	
Ministry of State for Immigration and Registration of Persons	Submitted	The ministry has undertaken the following: <ul style="list-style-type: none"> i) uploaded Constitution and undertaken two sensitization workshops for all heads of departments and section heads and selected technical officers ii) established Ministerial Constitutional Implementation Committee iii) constituted taskforce on citizenship to draft the citizenship and immigration law
Ministry of Housing	Not Submitted	
Ministry of Industrialization Anti-Counterfeit Agency	Not Submitted	The Agency has put in place an implementation unit to oversee the development of its workplan and to report on the implementation progress.
Ministry of Information and Communication	Submitted	The ministry has undertaken the following: <ul style="list-style-type: none"> i) familiarization of the senior offices and its state corporations of the Constitution and its implications. Activity being cascaded to other

Ministries/State Corporations	Ministry submission of Status report to CIC	Analysis of the Status of Constitutional Implementation
		<ul style="list-style-type: none"> ii) staff generated two draft bills: Media Bill, 2010, and Independent Communications Commission Bill, 2010 iii) comprehensive audit of all existing laws, regulations, policies, administrative procedures, circulars and government guidelines relating to the functions of the ministry
Ministry of Public Health and Sanitation	Not Submitted	
Ministry of Regional Development Authorities	Not Submitted	
Ministry of Forestry and Wildlife	Submitted	The ministry has undertaken the following: <ul style="list-style-type: none"> i) uploaded and availed copies of the Constitution to staff and sensitized fora with staff and stakeholders ii) reviewed and provided comments on the National Land Commission Bill
Ministry for Local Government	Submitted	The ministry's taskforce on devolved government is in the process of preparing the following legislation: <ul style="list-style-type: none"> i) Urban Areas & Cities Bills ii) County Public Service Bills iii) Devolution Bill iv) County Government Finance Management Bill v) Intergovernmental Fiscal Relations Bill vi) Transition Bill
Ministry of State for National Heritage and Culture	Not Submitted	
Ministry of Justice, National Cohesion and Constitutional Affairs	Submitted	The ministry has undertaken the following: <ul style="list-style-type: none"> i) uploaded and availed copies of the Constitution to staff and stakeholders and held departmental sensitization workshops ii) validated the National Human Rights Policy and prepared a cabinet memo revising concept note on the development of the National Anti-Corruption Policy iii) review and development of legislation
Ministry of Labour	Not Submitted	
Ministry for Home Affairs	Not Submitted	
Ministry of Lands	Submitted	The ministry has prepared the Land Commission Bill, awaiting submission to the Kenya Law Reform Commission
Ministry of State for Provincial Administration and Internal Security	Not Submitted	
Ministry of State for Defence	Not Submitted	
Ministry of Livestock Development	Submitted	Review of various policy statements, legislations governing the livestock sector and administrative procedures are underway to ensure conformity with the Constitution
Ministry of Medical Services	Not Submitted	
Ministry of Roads	Not Submitted	
Ministry of Special Programmes	Submitted	Ministerial Constitution Implementation Unit appointed to spearhead implementation of the Constitution in the ministry. Ministerial Constitution Implementation Unit working on a plan for development review of: <ul style="list-style-type: none"> i) Ministry Strategic Plan ii) Internally Displaced Persons Draft Policy iii) Disaster Management Draft Policy iv) Fire Draft Policy v) Disaster Risk Reduction Strategy
Ministry of Nairobi Metropolitan Development	Not Submitted	
Ministry of Transport	Not Submitted	
Minister for Finance	Not submitted	
Ministry of Tourism	Submitted	Tourism Bill No. 19 of 2010 passed by Parliament on Thursday 21st April 2011 and is awaiting Presidential assent
Ministry of Trade	Not Submitted	
Ministry of Water and Irrigation	Submitted	The ministry has undertaken the following: <ul style="list-style-type: none"> i) availed copies of the Constitution to staff and sensitized senior staff ii) validated the reviewed of National Irrigation Policy 2011 iii) Prepared an updated National Land Reclamation policy iv) engaged consultant to review the Irrigation Bill 2011
Ministry of State for Public Service	Submitted	The ministry has undertaken the following: <ul style="list-style-type: none"> i) developed sensitization curriculum on implication of Constitution on service delivery and sensitized public servants in all the counties ii) identified suitable skills for re-deployment to counties and assisted counties in staffing their establishments

Ministries/State Corporations	Ministry submission of Status report to CIC	Analysis of the Status of Constitutional Implementation
Ministry of Youth and Sports	Not Submitted	
Attorney-General	Not Submitted	
Registrar-Judiciary	Not Submitted	
Ministry of Northern Kenya and other Arid Lands	Submitted	The ministry has undertaken the following: i) availed copies of the Constitution to all staff ii) uploaded soft copy of the Constitution on their website and undertaken a sensitization workshop for all staff iii) held stakeholder consultations on the draft national ASAL policy iv) established a Committee to oversee implementation of the Constitution
Clerk-National Assembly	Submitted	Taskforce on the Implementation of the Constitution established to among other tasks facilitate the enactment of laws required to operationalize the Constitution

Annex IX

COMMISSIONERS OF THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

CHAIRPERSON: MR. CHARLES NYACHAE

VICE-CHAIRPERSON: DR. ELIZABETH MULI

Dr. Elizabeth Muli is the Convener of the Public Service and Leadership Thematic Team at the CIC.

IMAANA KIBAAYA LAIBUTA

Mr. Kibaya Laibuta is the Convener of the Judiciary and Constitutional Commissions Thematic Team in CIC

PROF. PETER WANYANDE

Professor Peter Wanyande is the Convener of the Devolution Thematic Team at CIC.

KAMOTHO WAIGANJO

Mr. Kamotho Waiganjo is the Convener of the Public Finance Thematic Team.

Ms. CATHERINE MUYEKA MUMMA

Ms. Catherine Muyeka Mumma is the Convener of the Bill of Rights and Citizenship Thematic Team.

DR. IBRAHIM M. ALI

Dr. Ibrahim Ali is the Convener of the Land and Environment Thematic Team.

Mr. PHILEMON MWAIKAKA, EBS, SS

Mr. Philemon Mwaisaka is the Convener of the Executive and Security Thematic Team.

DR. FLORENCE OMOISA

Dr. Florence Omosa is the Convener of the Representation of the People & the Legislature Team.

GAZETTE NOTICE NO. 2055

THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

THIRD QUARTERLY REPORT ON THE IMPLEMENTATION OF THE CONSTITUTION

July–September 2011

FOREWORD

During the third quarter that is the subject of this report, Kenya marked the one-year anniversary since the promulgation of the Constitution. The Constitution sets down timelines for laws to be passed and activities to be undertaken within one year from the effective date. Consequently, this quarter, CIC recorded heightened activities in the legislative arena as a result of which all but two of the priority laws in the fifth schedule to the Constitution were enacted.

Further, in the period under review, Kenya witnessed more competitive recruitment and public vetting of state officers resulting in the appointment of the Attorney General, Controller of Budget, Auditor General, Supreme Court Judges and Judges of the High Court among others. CIC has played and continues to play a key role in the establishment of the key constitutional commissions and state offices.

Unfortunately, cases of impunity and misinterpretation of the Constitution reported in the second quarter report have worsened. This quarter witnessed blatant violation of the Constitution through enactment of unconstitutional laws, proposals to change the date of the election through an amendment of the Constitution. CIC notes that it

may be necessary to amend the Constitution in some cases, such amendments need careful consideration and proper justification as well as be based on broad consultations. CIC will however therefore take all necessary measures to ensure that the rights granted to the people of Kenya in the Constitution are not taken away through unjustifiable constitutional amendments that are not made in the interest of the people of Kenya.

In accordance with the statutory requirement to report regularly to Parliament and by extension to the public, we have prepared this report for the third quarter covering the period between July and September 2011. Through this report, CIC seeks to create an avenue for engagement and consultation, with the public and all stakeholders, on the progress of, impediments to and achievements in the implementation of Constitution. It is our belief that this report will elicit constructive feedback to enrich the implementation process.

CIC appreciates the support it has received from key implementers, constitutional commissions, state agencies, non-state actors and development partners in course of discharging its mandate. At CIC we appreciate that all persons have a role to play in the Constitution implementation process and that it is only when we pool our resources together and pull the implementation agenda forward that the people of Kenya will truly realize the fruits of a new Constitutional dispensation.

I thank commissioners and staff of CIC for once again working beyond the call of duty to ensure that the Constitution implementation process is on course.

I commend the people of Kenya for their continued resolve to uphold, protect and defend the Constitution of Kenya, and I urge them to

maintain utmost vigilance regarding the implementation process and to continue to hold accountable all organs and offices mandated to manage the implementation process.

Charles Nyachae
Chairperson

EXECUTIVE SUMMARY

One year after the promulgation of the Constitution the Commission for the Implementation of the Constitution (CIC) in consultation with implementation partners including the Attorney General (AG), the Kenya Law Reform Commission (KLRC), the Ministry of Justice, National Cohesion and Constitutional Affairs (Ministry of Justice) and the Constitutional Implementation Oversight Committee (CIOC) have successfully undertaken numerous activities towards constitutional implementation. In exercising its mandate, CIC has continued to underscore the fact that the Constitution of Kenya 2010 places significant importance on the national values and principles of governance set out in Article 10, including transparency, accountability and inclusiveness of the people, in the exercise of the powers of the state and in decision-making.

In the third quarter of 2011, CIC was able to achieve key milestones in the delivery of its mandate in line with its vision, mission and strategic outcomes. Although CIC is yet to develop a comprehensive strategic plan, CIC developed a tentative work plan to facilitate effective realization of its mandate. The work plans are modeled on the need to achieve CIC's four strategic outcomes including operationalizing a respected, well functioning, and independent CIC, developing policies, laws, administrative procedures, an Institution that is fully compliant with the Constitution, developing a functional framework for effective public participation and a comprehensive monitoring, evaluation and reporting framework.

Through its strong working relations with partner institutions, CIC was able to review various legislations with input from stakeholders and forwarded the bills to the AG for publication and onward transmission to Parliament for debate and enactment. After the Bills were enacted into law CIC wrote advisories on some provisions that were deemed to be unconstitutional. The advisories were written to the CIOC, the Ministry of Justice, the Clerk of the National Assembly and the Speaker of the National Assembly. CIC is continuously monitoring implementation to ensure the relevant institutions take the appropriate steps to ensure that any unconstitutional provisions within any Acts of Parliament are amended. Pursuant to enactment of the Independent Electoral and Boundaries Commission (IEBC) Act, 2011, the seven members of the IEBC Selection Panel were appointed and sworn in on 8th August 2011. The IEBC Selection Panel is currently overseeing the process of selecting Commissioners for the IEBC. CIC is monitoring the appointment process of Constitutional Offices and bodies advising various processes including the appointment bodies, for example, the IEBC Selection Panel, to ensure that all public appointments comply with the national values and principles of gender, regional and ethnic balance as outlined in the Constitution.

Legislation on the System of Courts was one of the priority legislations scheduled for enactment under the 5th Schedule of the Constitution. The system of courts consists of two levels of courts: superior courts and subordinate courts. One of the most significant milestones for the quarter is appointment of judges of the Supreme Court and their swearing in on 26th August 2011. CIC also facilitated enactment of the Industrial Court Act, 2011 and the Environment and Land Court Act, 2011 to deal with specialized cases with respect to employment and labour relations and the environment and the use and occupation of, and title to, land respectively. Further, CIC held consultations with stakeholders including civil society organisations, line departments and ministries, international development partners and the people of Kenya with the aim of ensuring continued cooperation and support in the implementation process.

During the quarter CIC attained several other achievements including reviewing of laws among other issues. The achievements are reported extensively thematic area reports and reports submitted by Ministries and implementing agencies.

In undertaking its mandate on the legislative agenda, the CIC faced some challenges, which impacted on its effectiveness. The challenges include: late submission of draft bills, and substantive amendment to draft bills after the contents have been mutually agreed upon between

the AG, KLRC, and the line Ministries and stakeholders without further reference to the CIC as well as enactment of laws without due regard to the laid down procedures.

To address these challenges CIC has made a number of recommendations to Parliament, the President and all implementing agencies. The recommendations include, the need to develop a systematic and integrated approach within implementing agencies, involvement of CIC at the earliest opportunity in the review of policies and administrative procedures, adoption of the principle of public participation as part and parcel of the legislative development and review process and the need for public leaders to facilitate the smooth implementation of the Constitution.

1. INTRODUCTION

This report is the third in a series of quarterly reports by the Commission for the Implementation of the Constitution (CIC) to Parliament and the people of Kenya to inform them about the progress being made in the implementation of the Constitution of Kenya 2010. The report highlights the achievements in the implementation process as well as the challenges that have impeded implementation. Some of the challenges that were highlighted in the first and second quarterly report included resistance to change by some stakeholders, lack of consensus on the content of bills and deliberate misinformation to the public by some parts of the executive. Many of these challenges remain.

This report, as with the first two, therefore also makes recommendations on how various stakeholders can work together to overcome these challenges and ensure the full implementation of the Constitution. By preparing and publicising these quarterly reports, the CIC has kept the public apprised on how the Constitution is turning into reality and, ultimately, ensured that the Commission is accountable to the people of Kenya in line with the national principles and values set out in the Constitution.

This third quarter report contains six main parts:

- The first part is about the CIC and enumerates CIC's statutory mandate with regard to implementation of the Constitution. It also discusses the agreed processes and strategy on how CIC shall exercise its mandate in consultation with key implementing partners and the role of key implementing partners.
- The second part summarises the key milestones in the implementation process during the third quarter of 2011.
- The third part expounds on the activities undertaken by CIC thematic areas between July and September 2010 and the activities undertaken by implementing agencies in including government ministries, state corporations and constitutional commissions in the implementation of the Constitution.
- The fourth part summarises how the CIC has engaged with and the activities of the various implementing partners during the reporting period.
- The fifth part sets out an overview of the key achievements and summarises the challenges, encountered in the work of the CIC during the reporting period.
- The sixth and final part contains a number of legal, administrative and policy recommendations, which should be put in place to safeguard the implementation process.

Seven annexes attached to it compliment the main report. The annexes contain additional information on various issues covered in the report including the role of the CIC and government institutions in the implementation process, key advisories and press releases, audit of Acts of Parliament, list of Ministries that have submitted implementation status reports and those whose implementation reports have not been received and information on the Commissioners of the CIC.

2. ABOUT THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

The CIC is the focal institution charged with facilitating, monitoring and overseeing the implementation of the new Constitution. Its work is being carried out in the context of a well defined vision, mission and strategic outcome framework and based its mandate as defined in the

Constitution of Kenya 2010. This section elaborates on the vision, mission, strategic outcome results and the mandate of the Commission.

2.1 Vision, Mission and Strategic Outcome Results

In order to fulfil its mandate the CIC has developed a clear vision and mission to guide its work. Based on this vision and mission the Commission undertakes its work within an outcomes framework under which it has defined key result areas. These outcome results assist in guiding the Commission's work and providing the basis for accountability to other institutions and the public at large. These vision, mission and the outcome results are as follows:

Vision: A united, peaceful and prosperous Kenya in which all citizens including leaders respect the rule of law, uphold national values and live by the Constitution.

Mission: To ensure that policies, laws, structures, systems and administrative procedures developed and applied at all levels are consistent with and according to the letter and spirit of the Constitution of Kenya.

Strategic Outcome Results:

Outcome Result 1: A respected, well-functioning and independent Commission effectively delivering on its mandate.

Outcome Result 2: Policies which are compliant with the letter and the spirit of the Constitution

Outcome Result 3: Laws which are compliant with the letter and the spirit of the Constitution

Outcome Result 4: Effective institutional frameworks and administrative procedures for the implementation of the Constitution

1.1 The Mandate and Role of CIC

The mandate of CIC is to:

- (i) Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution;
- (j) Coordinate with the Attorney-General (AG) and the Kenya Law Reform Commission (KLRC) in preparing for tabling in Parliament, the legislation required to implement the Constitution;
- (k) Report regularly to the Constitutional Implementation Oversight Committee (CIOC) on:
 - (v) The progress in the implementation of the Constitution; and
 - (vi) Any impediments to the implementation process.
- (l) Work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.
- (m) Monitor the implementation of the system of devolved government effectively.

As a constitutional commission, CIC mandate is amplified in Article 249 of the Constitution of the Constitution of Kenya 2010 along these lines:

- (d) Protect the sovereignty of the people.
- (e) Secure the observance by all state organs of the democratic values and principles.
- (f) Promote constitutionalism.

This provision also guarantees the independence of CIC by ensuring that CIC is not subject to direction or control of any person or authority.

1.2 Key Processes in Constitutional Implementation

The implementation of the Constitution with regard to the mandate of CIC involves:

- a. Developing new laws, new policies and administrative procedures required to implement the Constitution.
- b. Reviewing existing laws, policies, administrative procedures and legislation required to implement the Constitution. Putting in place structures necessary to effect the

Constitution especially in relation to the devolved government.

- c. Ensuring the participation by the people of Kenya in the review process; the Constitution provides that all power belongs to the people of the Republic of Kenya, and the people shall determine how they wish to be governed at the national level and at the county level (Articles 1, 10, 118, 232 of the Constitution).
- d. Ensuring that the legislative process adheres to the provisions of Article 261 of the Constitution on consequential provisions.
- e. Coordinating with the Attorney-General/and the Kenya Law Reform Commission in drafting bills in coordination with originating institutions.
- f. Coordinating with the Attorney-General/and the Kenya Law Reform Commission, the Constitution Implementation Oversight Committee and parliamentary committees to ensure timely passage of bills in Parliament.
- g. Coordinating development of change-management strategies.
- h. Monitoring effective implementation of the Constitution in devolved units of governance.

In performing its functions, CIC is bound by national values and principles of governance laid out in Article 10(2) of the Constitution. The national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

Box 1

Constitutional Values and Principles

5. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people
6. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised
7. Good governance, integrity, transparency, and accountability
8. Sustainable development

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3. KEY MILESTONES AND ACTIVITIES UNDERTAKEN IN IMPLEMENTATION OF THE CONSTITUTION

In the third quarter of 2011 the CIC continued to engage with the public both directly and indirectly. CIC interacted with the public and stakeholders through attendance of workshops and meetings, media briefings and making of presentations to targeted audiences. Engagements with stakeholders entailed meetings with the Executive, Parliament, Judiciary, Constitutional Commissions and non-state actors. CIC also conducted a benchmarking visit to learn from experiences by other parties who have implemented a new Constitution.

3.1 Key Activities Undertaken in the Third Quarter of 2011

3.1.1 Key meetings with stakeholders and implementing partners

(a) Parliamentary Committees

The CIC met the CIOC to review progress in the implementation of the Constitution. The meetings were useful in ensuring that all actors in the implementation process are focused on the agreed priorities in the implementation process and any potential setbacks are addressed at the outset.

(b) Benchmarking Tour

In July 2011, CIC sent a team comprising of Commissioners and senior technical staff on a benchmarking visit to the Republic of South Africa. The main purpose of the visit was to study the processes and mechanism employed to implement the 1996 Constitution of South Africa. The choice of South Africa as a host nation was informed by the fact that in addition to having a commonwealth background, the Republic of South Africa adopted a new Constitution in 1996 leading

to a paradigm shift in governance based on a constitutional democratic governance system. In addition South Africa has successfully implemented a devolved system of government. The delegation, led by Dr. E. Muli, Vice- Chairperson of the Commission held meetings with the following groups and institutions.

- Kenyans living in South Africa;
- Department of Justice;
- The Constitutional Court;
- The Department Public Service and Administration;
- The Department of Rural Development and Land Reform;
- The Gauteng Legislature, provincial and local Government;
- The Independent Electoral Commission; and
- The National Police Service

The first point of contact for the CIC delegation was a meeting with Kenyans leaving in South Africa and Kenya High Commission Staff in South Africa. The meeting, held in Johannesburg on Sunday, 24th July 2011 was highly successful and mutually beneficial to CIC and the Diaspora Kenyans. Firstly, CIC sensitized Diaspora Kenyans on the Constitution, the mandate of the Commission, achievements and milestones in the implementation process and the role of Kenyans at home and abroad. They were advised that they had a unique opportunity to voice their views on the Constitution and the implementation process and, in particular, to express their aspirations and concerns on the Constitution implementation.

The benchmarking tour was instrumental in informing the work of the CIC as the Commission learnt important lessons from the South African experience. The lessons were documented and have been useful in the preparation and development of legislation and overall discharge of the CIC mandate.

(c) Parliamentary Service Commission Taskforce on Implementation of the Constitution

CIC held a meeting with the Taskforce on the Implementation of the Constitution of the Parliamentary Service Commission, on 2nd August 2011. The meeting focused on the working relationship between the two institutions. At the meeting it was agreed that the two institutions would work together to implement legislation and the values and principles outlined in the Constitution.

(d) Kenya Women Parliamentarians Association

CIC also held a meeting with the Kenya Women Parliamentarians Association on 7th September 2011. The objective of the meeting was to discuss the ongoing issue of implementing the affirmative action principle, which requires that not more than two-thirds of members of the next Parliament, after the next general elections, shall be of the same gender. Further talks on the matter will be scheduled after both parties have had discussions with other stakeholders.

(e) Constitutional Commissions

CIC worked with other Constitutional Commissions and bodies charged with appointment of state officers, such as the IEBC Selection Panel, the Judicial Service Commission (JSC), the Parliamentary Service Commission and the Public Service Commission (PSC) on the need to ensure that all public appointments of public officers comply with Constitutional values and principles including the affirmative action principles. CIC will continue to monitor all public appointments to ensure that these constitutional requirements are implemented.

CIC also held a meeting with the Commission for Revenue Allocation. The meeting with CRA discussed progress of implementation of the Constitution by both Commissions and agreed to have a more comprehensive session to develop and agree on working modalities that will ensure concerted efforts in the implementation of the Constitution.

(f) The East African Legislative Assembly (EALA)

Some members of the EALA paid a courtesy call to CIC on the 26th of July 2011. These were: Hon. Gervase Akhaabi, Hon. Catherine Kimura and Hon. Sarah Bonaya. The objective of the meeting was for the EALA representatives to present their recommendations on ways through which the electoral laws of Kenya, particularly those relating to transparency, accountability and offences, could inform the election of members to the EALA. Consequently, the EALA representatives

requested for the process of election of Kenyan members to the EALA to be included in the Elections Act, 2011. A resolution was reached that because the Executive arm of the government generates legislation, the matter should be referred to the AG's office and the KLRC to address.

3.1.2 Enactment of legislation

Article 261 (4) of the Constitution spells out the procedure for drafting and tabling of bills in Parliament.

Box 2

Procedure for Preparing and Tabling Bills in Parliament

Article 261(4) provides, "For the purposes of clause (1), the Attorney-General in consultation with the Commission on the Implementation of this Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period mentioned."

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CIC, KLRC, AG, CIOC and Ministry of Justice prepared a schedule setting out the process and procedure to be followed in the preparation of laws. The law making process (also known as the policy Process) refers to the series of stages/steps that policy must go through in order to become law. The stages involve cooperation amongst all the stakeholders. Various State organs are engaged in this process. Each of these organs has a specific and vital role to play in the process. The following is a summary of the process:

Stage 1:

A layman's or raw draft Bill emanates from the line Ministry, Government Department or any Institutions mandated with the generation of bills. Under Article 10 of the Constitution, on public participation, the generating institution is required to obtain the views of the public before preparing the policy and Bill. Often, the KLRC and AG work with the line Ministries and State Departments in the generation of these Bills. The drafts are then released to KLRC and AG's office for technical drafting. The KLRC and the AG's office are the bodies mandated with drafting of Bills. The CIC does not generate Bills. However, in the spirit of the Constitution, CIC may require the Ministry or Department to state the process undertaken in the development of the policy informing the drafting of the Bill.

Stage 2:

The draft bills from the KLRC and the AG's office are then released to CIC. In the spirit of encouraging transparent debates and public participation from various stakeholders, the CIC uploads the draft from KLRC or AG on its website (www.cickkenya.org) to allow the public to review and give feedback on how best to improve the draft bills. CIC also releases the draft bills to the widest possible range of stakeholders.

Stage 3:

While receiving comments and input from various stakeholders, the CIC convenes a series of stakeholder consultations to seek consensus and/or fill any gaps of a constitutional nature, which will not have been addressed during the line ministry public consultations. At this stage CIC works with AG, KLRC and line Ministries or Departments to review how such gaps can be addressed.

Stage 4:

CIC then convenes a roundtable over the draft bill incorporating the participation of the AG, the KLRC, Line Ministries and any Institution involved in the generation of the bill to finalize the bill by making various amendments, which will have been informed by the internal and external consultations. At this stage, the CIC oversees this final development of the proposed bill to ensure it is in line with the letter and spirit of the Constitution.

Stage 5:

The AG prepares the Bill and the Bill is then released to Cabinet for approval.

Stage 6:

Cabinet receives the proposed Bill, if need be, changes to the Bill are made and finalized before it is approved. Where any of the changes made have impact on constitutionality, post Cabinet consultations with CIC ought to be undertaken to review the changes made by Cabinet.

Stage 7:

The AG then publishes the Bill as approved by Cabinet and the Bill is then tabled in Parliament for debate. Where necessary, CIC issues an advisory note to Parliament in the event that there are unconstitutional provisions in the draft that may have been incorporated at any stage after the Bill leaves CIC.

Stage 8:

One of the major roles of Parliament is to debate and enact laws. After Parliament debates and passes the Bill, it is taken back to the AG for preparation of the vellum copy before being handed over to the President for assent.

Stage 9:

The President assents to the Bill by signing it. Thereafter, the Bill is published by the Government Printer and comes into force on the appointed date.

Based on the above process the third quarter of 2011 witnessed significant legislative work by the CIC. In exercise of its mandate, CIC in the first quarter of the year held planning meetings with other constitutionally mandated implementation partners including the AG, the KLR, the Ministry of Justice and the CIOC. The meetings identified the priority laws to be passed as provided in the Fifth Schedule to the Constitution and other laws related particularly to the next general elections. Through these consultations, the bills set out below were agreed as the priority bills to be enacted within one year of the promulgation of the Constitution. Table one shows the status of those bills as at 26th August 2011 when the one-year anniversary was celebrated.

Table 1

STATUS ON ENACTMENT OF LEGISLATION UNDER THE FIFTH SCHEDULE TO THE CONSTITUTION AND THE AGREED SCHEDULE OF BILLS TO BE ENACTED BY 26 TH AUGUST 2011		
1	The Industrial Court Act, 2011	✓
2	The National Police Service Act, 2011	✓
3	The Urban Areas and Cities Act, 2011	✓
4	The Environment and Land Court Act, 2011	✓
5	The National Gender and Equality Commission Act, 2011	✓
6	The Independent Ethics and Anti-Corruption Commission Act, 2011	✓
7	The Elections Act, 2011	✓
8	The Kenya Citizenship and Immigrations Act, 2011	✓
9	The Commission on Revenue Allocation Act, 2011	✓
10	The Power of Mercy Act, 2011	✓
11	The Vetting of Judges and Magistrate Act, 2011	✓
12	The Judicial Service Act, 2011	✓
13	The Independent Electoral and Boundaries Commission Act, 2011	✓
14	The Supreme Court Act, 2011	✓
15	The Independent Offices (Appointment) Act, 2011	✓
16	The Kenya National Human Rights Commission Act, 2011	✓
17	The Commission on Administrative Justice Act, 2011	✓
18	The Political Parties Act, 2011	✓
19	The Salaries and Remuneration Commission Act, 2011	✓
LAWS ENACTED UNCONSTITUTIONALLY		
1	The Contingencies Fund and County Emergency Funds Act, 2011	x
2	The National Government Loans Guarantee Act, 2011	x

As the table demonstrates there was impressive achievement in this area. Save for Chapter 12 laws which the CIC considers were enacted unconstitutionally as they did not follow the procedure of Article

261(4), all the other priority laws were enacted through the laid down procedures and in time. In this regard, The Commission has prepared an audit report. The audit report highlights the legislative issues of concern in the laws passed and assented to by the President. The report categorizes the issues into those that in CIC's opinion:

- Are in conflict with the letter and spirit of the Constitution.
- May not be strictly in conflict with the letter of the constitution but may bring about conflicts with the spirit of the constitution.

The audit report has been forwarded to the AG to initiate relevant amendments. Extracts of the report with regard to unconstitutional provisions are attached to this report. (see Audit of acts of parliament in Annex V).

During the reporting period, the Commission also undertook work on other laws where priority needs have been identified for the second year of implementation. Table 2 below shows the relevant bills that are undergoing review. The status is that 5 bills are with Parliament and CIC has 19 bills that will be processed as part of the scheduled bills for the second year ending 26th August 2012.

Table 2

BILLS BEFORE PARLIAMENT OR UNDER REVIEW		
	BILLS	STATUS OF THE BILLS
1	The Ratification of Treaties Bill, 2011	Before Parliament
2	The National Police Service Commission Bill, 2010	Before Parliament
3	The Independent Policing Oversight Authority Bill, 2010	Before Parliament
4	The Kenya Citizens and Foreign Nationals Management Service Bill, 2010	Before Parliament
5	The National Coroners Service Bill, 2010	Undergoing internal review by CIC
6	The Private Security Industrial Regulation Bill, 2010	Undergoing review internal by CIC
7	Freedom of Information Bill, 2008	Undergoing review internal by CIC
8	Data Protection Bill, 2009	Undergoing review internal by CIC
9	Births and Deaths Registration Bill, 2009	Undergoing review internal by CIC
10	Identification and Registration of Citizens Bill, 2011	Undergoing review internal by CIC
11	Refugee Bill, 2011	Undergoing review internal by CIC
12	Marriage Bill, 2011	Undergoing review internal by CIC
13	Matrimonial Property Bill, 2011	Undergoing review internal by CIC
14	Family Protection Bill, 2011	Undergoing review internal by CIC
15	Public Finance Bill, 2011	Undergoing review internal by CIC
16	Controller of Budget Bill, 2011	Undergoing review internal by CIC
17	National Land Commission Bill, 2011	Undergoing review internal by CIC
18	National Intelligence Service Bill, 2011	Undergoing review internal by CIC
19	National Security Service Bill, 2011	Undergoing review internal by CIC
20	County Government Financial Management Bill, 2011	Undergoing review internal by CIC
21	Transition to Devolved Government Bill, 2011	Undergoing review internal by CIC
22	Intergovernmental Fiscal Relations Bill, 2011	Undergoing review internal by CIC
23	Devolved Government Bill, 2011	Undergoing review internal by CIC

3.2 Institutional Developments at the CIC

During the early days of its life, the Commission operated under the Ministry of Justice. To ensure its independence in line with the Constitution, the Commission officially de-linked from the Ministry from the beginning of the financial year 2011- 2012. Though faced with teething problems as the new systems are put in place, the administrative and financial independence for CIC will no doubt increase efficiency and reduce bureaucracy. In terms of institutional development, achievements in are on two levels administrative and technical. On the administrative front CIC is still collaborating with the executive to ensure that the CIC Secretariat is adequately resourced to facilitate its operations. The Commission has, however, made significant progress in the following areas during the third quarter of 2011:

Human Resources:

CIC now has basic staff at the secretariat including an acting Chief Executive Officer (CEO), researchers and other administrative staff to oversee the technical and day-to-day operations. CIC plans to recruit more technical personnel in next quarter for the enhanced service delivery.

Financial management:

The Commission also commenced its own financial operations under an independent vote, sub-vote and head with effect from 1st July 2011 with an allocation of Kshs. 524 million. However, financial operations have been hampered due to lack of computerised systems specifically IFMIS and G-Pay. A planning unit has been accordingly established to oversee the expenditure review for the financial year 2010/2011, kick-start the budgetary process and finalize the strategic plan.

Media and communications:

CIC espouses the Constitutional principles of public participation and access to information and as such has established a media liaison office to act as link of communication between the Commission and the public. During the reporting period, the work of the Commission has been publicized through numerous media interactions facilitated through print, electronic and print media. The media strategy adopted by the Commission has so far seen the extensive coverage of the implementation process with sizeable continuous coverage of the status of implementation, the gains and challenges in the implementation process. The CIC's website has also been a key communication tool. An important attribute of the website is the fact that the information stored on site is guaranteed to have a longer "shelf-life" availing information continuously. The site also offers a crucial feedback loop where the Commission continues to gather inputs and feedback from the public.

The CIC objective is to have a respected, well-functioning and independent Commission effectively delivering on its mandate. The process of establishing a fully-fledged Secretariat has been slow and painstaking but it is anticipated that the next quarter will see significant gains on this front.

4. THEMATIC AREA REPORTS

This part of the Quarterly Report highlights, the activities undertaken in each of the eight thematic areas under which the Commission is organised. The reports highlight, for each area, achievements, status of implementation of bills, strategic consultations held including public participation, challenges faced in undertaking thematic area activities and activities projected for the next quarter.

4.1 Public Service and Leadership Thematic Area

The Public Service and Leadership Thematic Area draws its mandate from Chapters Six and Thirteen of the Constitution. Chapter Six of the Constitution provides for leadership and integrity, it provides for responsibilities of leadership; Oath of office of State officers; Conduct of State officers; Financial probity of State officers; Restriction on activities of State officers; and Citizenship and leadership. The Chapter obligates Parliament, under Articles 79 and 80, by legislation, to establish the Ethics and Anti-Corruption Commission and legislation on leadership.

4.1.1 Achievements

Legislation/policies/administrative procedures

With regard to the Public Service and Leadership Thematic Area, the Fifth Schedule to the Constitution, require that the following laws be enacted:

- (i) Ethics and Anti-Corruption Commission (Article 79)
- (ii) Legislation on Leadership (Article 80)
- (iii) Legislation on Values and Principles of Public Service (Article 232).

The Thematic Area has undertaken extensive consultations on the implementation requirements of Chapters Six and Thirteen of the Constitution, and has come up with a list of priority legislation affecting the two Chapters that require review or enactment to conform to the letter and spirit of the Constitution.

The proposed laws include:

- (i) Public Service Bill
- (ii) Public Officers Ethics (Amendment) Bill
- (iii) Proceeds of Crime and Money Laundering (amendment) Bill
- (iv) Economic Crimes and Anti-Corruption (Amendment) Bill.

The Thematic Area also recognizes the need to formulate bills only after formulation of policies and as such, recommend that the implementing partners, State departments and organs affected by Chapters Six and Thirteen should deliberately undertake needs assessment analysis and policy development that will inform the proposed bill. The Thematic Area further recognizes the need to review all existing administrative measures, including Subsidiary Legislation, guidelines, codes and any other measure, to ensure that they comply with the letter and spirit of the Constitution.

The Thematic Area made significant effort in ensuring that all the objectives set out for realization in the Third Quarter have been achieved, including finalisation of the laws required Fifth Schedule. The enactment of the Ethics and Anti-Corruption Commission Act was a major achievement. Another planned activity for the previous quarter was to review the agreed draft of the Public Service Commission bill. An international consultant was hired, with the assistance of GIZ, to review the agreed bill to check on its conformity to Chapter thirteen of the Constitution.

The Thematic Area undertook internal review of the Ethics and Anti-Corruption Commission Bill and Public Service Commission Bill. It is worth of mention that the Ethics and Anti-Corruption Commission Bill was enacted, and is awaiting publication pursuant to Section 46 of the former Constitution. The Public Service Commission Bill is currently undergoing internal review.

4.1.2 Interaction with stakeholders

The Thematic Area endeavours to ensure sustainable interactions with the stakeholders, civil societies, line departments and Ministries, and the people of Kenya with the aim of ensuring continued cooperation and support in the implementation process. During the reporting period, the Thematic Area held a number of meetings with the implementing partners and State departments. The meetings proved critical as they assisted in the review of the Bills and ensured adequate participation and consultation amongst the key stakeholders.

The Thematic Area, as already noted, also undertook a benchmarking visit to South Africa to learn from their experiences in implementing the Constitution and in particular, the public service and ethics and leadership areas. The report of the study visits were developed and were very instrumental in informing the internal review of the Ethics and Anti-Corruption Commission Bill and the same will be used to review the Leadership legislation envisaged by Article 80 of the Constitution, Public Service Commission Bill and the amendment to the Public Officers Ethics Act.

4.1.3 Challenges and recommendations on addressing them

In undertaking its activities, the Thematic Area, encountered some challenges. Some of which significantly affected its work on Acts. First, the Thematic Area was caught in a situation where it had to write to the AG to seek confirmation on the veracity of the bills submitted.

Second, the slow pace at which the bills were submitted to the Commission significantly hampered the thematic Area's work

In order to address these challenges, the Thematic Area recommends that all the implementers should adhere to the agreed upon timelines to ensure that every implementer has an opportunity to give input. It is also important that the concerned department or ministry undertake sufficient consultation and stakeholder involvement pre, during and post formulation stages. The Thematic Area also recommends that the line ministries, departments or the state organ concerned, develop a policy that would inform the formulation of bills. This will help the ministry, department or state organ to think through the legal problem, understand a need analysis of the existing legal framework and propose the necessary amendment to existing legal and administrative measure and at the end achieve a holistic success in implementing the Constitution.

4.1.4 Activities planned for the next quarter.

(a) Development of Bills/Policies/Administrative procedures

- a) The Thematic Area intends to work closely with the respective line ministries, departments and state organs in the formulation of policies that will inform the development of the various Bills required to be enacted in accordance with the Fifth Schedule to the Constitution.
- b) The Thematic Area is in the process of engaging at least two consultants to undertake a review of existing administrative measures and procedures to audit their conformity to the letter and spirit of the Constitution. Based on these analyses the Thematic Area will recommend the revision, amendment or even repeal and replacement of obsolete and unconstitutional administrative procedures and laws.
- c) There is likelihood that the development of certain bills will necessitate amendment or repeal of existing laws or formulation of new laws to give full effect to the Constitution.

(b) Interaction with stakeholders

- a) Owing to their significance in the law making process, the Thematic Area plans to work closely with the various stakeholders to ensure ownership of the entire process of implementation.
- b) The Thematic Area recognizes the significance of public service delivery and leadership values and principles enshrined in the Constitution. In this regard, the Thematic Area plans to reach out to the departments concerned and to the people of Kenya who are directly affected by the services delivered. The Thematic Area also recognizes the need to work closely with the leadership and the public service in general to ensure that the letter and spirit of the Constitution is realized.
- c) Further the Thematic Area will also use the media and other forums to reach out to the people of Kenya and inform or educate them of their rights, duties obligation, and responsibilities.

4.2 Bill of Rights and Citizenship Thematic Area

The human rights Thematic Area led the work of reviewing a number of bills required for implementation during the July – September 2011 period. The thematic area also undertook planning for the activities of the financial year to end in June 2012. Meetings were also held with key implementers to discuss implementation of the rights in the constitution.

On the legislative agenda, CIC received 12 Bills under the Thematic Area during the first two quarters of 2011. Some of these were required to be enacted within the one year period stipulated under the Fifth schedule of the Constitution. Two more Bills were forwarded in August 2011. Below are the Bills that were forwarded to CIC and were or are under the charge of this Thematic Area:

1. Kenya National Commission on Human Rights Bill 2011
2. The Gender and Equality Commission Bill 2011
3. The Commission on Administrative Justice Bill 2011

4. The Citizenship and Immigration Bill 2011
5. The Foreign Nationals Service Management Bill 2011
6. Marriage Bill 2011
7. Matrimonial Property Bill 2011
8. Family Protection Bill 2011
9. Births and Deaths Registration Bill 2011
10. Identification and Registration of Citizens Bill 2011
11. Refugee Bill 2011
12. The Ratification of Treaties Bill 2011
13. Freedom of Information Bill 2008
14. Data Protection Bill 2009

4.2.1 Achievements

Legislation/policies/administrative procedures

Out of the Bills that were received under the thematic area, four (4) were enacted into law by the 26th August 2011 and one is before parliament at committee stage. The Thematic Area reviewed the following bills within the current quarter:

Kenya National Human Rights and Equality Bills (Article 59)

In line with Article 59(4) the Kenya National Human Rights and Equality Commission was restructured into three separate Commissions, namely:

- Kenya National Commission on Human Rights
- National Gender and Equality Commission
- Commission on Administrative Justice

The processing of the 3 Bills for establishing these commissions took a little longer than it should have done due to differences among the members of the former Kenya National Commission on Human Rights (KNCHR), the former National Commission on Gender and Development (NCGD), the former standing committee on administrative justice and stakeholders at large on whether the Article 59 institution should be one or more.

Stakeholder consultations organized by CIC and other stakeholders including the former teams did not yield any consensus. Consequently, CIC released the final draft of the bills to the AG on 28th June 2011 who subsequently forwarded it to Cabinet for approval.

The bills were published on 15th July 2011 and tabled before the National Assembly. The publication of these Bills brought the debate on one or more commission/s at the level of parliament. The former KNCHR and Gender commission organized separate meetings with parliamentarians to lobby for their positions and also used the media to argue out their positions.

CIC's review of the published bills identified some issues of concern, particularly on the Kenya National Commission on Human Rights Bill, which were raised through an advisory dated 28th July 2011 to the Speaker of the National Assembly, CIOC; Committee on Justice and Legal Affairs; Committee on Equal Opportunities as well as the Clerk of the National Assembly for onward transmission to members of other committees.

In the advisory, CIC reiterated its view that:

- That the Kenya National Human Rights and Equality Commission were operationalised on the date of the promulgation of the Constitution on 27th August 2010. This is clear from the provisions of Article 59 as read together with section 26 of the transitional clauses.
- That because of the continued operation of the members of the former KNCHR and the NCGD as though the former commissions still exist is a contravention of the provisions of the Constitution.
- That Article 59 (4) of the Constitution clearly mandates Parliament to enact the legislation to "put into full effect" the provisions of Article 59 and such legislation may restructure the KNREC into one or more commissions. In this regard we advised that the creation of one or more commission to give effect to Article 59 would not be unconstitutional.

In the advisory, CIC also provided the Parliamentary committees with the different arguments that stakeholders advanced in favour of or against one or more commissions. The advisory also pointed out key

issues in some of the Bills, especially in the Kenya National Commission on Human Rights Bill. The issues raised included those that touched on constitutionality and others that were thought to be of value addition. They included the following:

- A proposal that provisions that were intended to deter the KNCHR from conducting investigations on criminal offences and matters relating to the exercise of the prerogative of mercy were unconstitutional.
- That the limitation of the power of the KNCHR from investigating human rights violations by security forces was unconstitutional
- That function of working with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution earlier on provided in the Kenya national Commission on human rights Bill be reinstated.
- That some editorial concerns be taken into account.

The three bills were passed by Parliament and assented to by the President on 27th August 2011. CIC has audited the Acts of Parliament establishing the three commissions and has so far established that the changes proposed above, were not incorporated in the subsequent Acts of Parliament.

The Citizenship and Immigration Act 2011 (Article 18)

The processing of the Kenya Citizenship and Immigration Bill 2011 and the Kenya Citizens and Foreign Nationals Management Service Bill 2011 was done in a collaborative manner with all stakeholders including the Ministry of Immigration, the taskforce members, the AG's Office, the KLRC, civil society representatives working with CIC. The Commission worked closely with the taskforce throughout the review process including during the stakeholder consultations held on 25th and 26th July 2011. This initiative enhanced stakeholder appreciation of the provisions of the bills. As a result, consensus on most of the provisions of the bills was achieved in a shorter period of time. The task force members and the Ministry personnel were also open to free discussion of the issues in the bills and were ready to change provisions where proposals were made that justified such changes.

CIC also engaged Kenyans in the diaspora by availing the bills to them through the different embassies and missions as well as through forums organized in different States in the United State of America, where the CIC delegation held consultations on the provisions of the bills.

The two bills were approved by Cabinet and published on 22nd August 2011. Once published, CIC convened a brief stakeholder meeting on 23rd August 2011 to review the provisions of the published bills against the Constitution and prepared an advisory to parliament on proposed changes. The advisory was forwarded on 24th August 2011 to the Speaker of the National Assembly as well as the Clerk of the National Assembly for onward transmission to members of relevant parliamentary committees. The key issues in the advisory were as follows:

- The need to provide for the limitation on citizenship by descent as provided in Article 14 of the Constitution as had been provided in the earlier draft
- Limiting the mandate of the Citizenship and Foreign Nationals Management Service from handling marriage related issues, noting that whereas the Service may need to utilize the registration information relating to marriage, it cannot be said that the service will manage all matters relating marriages.
- The need to address a number of editorial issues.

Some of CIC's recommendations were taken on board. The Kenya Citizenship and Immigration Act 2011 was passed by Parliament and assented to by the President on 27th August 2011. CIC has also audited the Citizenship and Immigration Act against the Constitutional provisions will write to the AG to make case for the amendments that may be necessary.

Kenya Citizenship and Foreign Nationals Management Service Bill 2011

As highlighted above, CIC reviewed the Kenya Citizenship and Foreign National Management Service Bill 2011 in tandem with the Kenya Citizenship and Immigration Bill 2011. While the Kenya

Citizenship and Immigration Bill 2011 was enacted, the Kenya Citizens and Foreign Nationals Management Service Bill 2011 is before the relevant parliamentary committees and is yet to be enacted.

Ratification of Treaties Bill 2011

In the previous quarter, CIC held stakeholder consultations on the Ratification of Treaties Bill. As outlined in the second quarter report, CIC received a copy of the draft Bill on ratification of Treaties from the KLRC and also realized that there was a private members Bill on ratification of treaties prepared by Hon. Millie Odhiambo. The two versions of bills were consolidated and reviewed at two-stakeholder consultations and a number of technical meetings by committees appointed by stakeholders where the KLRC, AG and CIC participated. The bill was subsequently forwarded to the office of the AG for final technical editing before transmission to the Cabinet for its deliberations.

The Bill took an unduly long time at the AG's office with the result that parliament published a bill of a slightly different version on 29th July 2011 as a private members Bill. Due to this development, CIC prepared an advisory to the Speaker of the National Assembly and the Clerk of the National Assembly. A copy was also sent to Hon. Millie Odhiambo identifying the key proposed amendments. The advisory focused on, among other issues, the procedure to be followed in Cabinet, the National Assembly and Senate prior to ratification of any treaty. It also provided clear guidelines on resolution of any disputes arising in the National Assembly and Senate. The advisory also emphasised on the need for public participation and identified key areas for public participation. The AG has also prepared another schedule of proposed amendments to the bill. The two advisories will be discussed in a meeting with AG and KLRC and forwarded to parliament.

Policy Review

CIC, under this Thematic Area, has received a number of sectoral reports on activities by ministries on their review of their sectoral policies, laws and administrative procedures to ensure alignment with the constitution. The ministries in response to CIC's circular forwarded these. The Commission began an audit of the policies aimed at ensuring that all sectoral policies are compliant with the letter and spirit of the Constitution as well as the integration of human rights. CIC will audit the following policies as part of its work during the year ending July 2012:

1. The National Policy and Action Plan on Human Rights
2. The Kenya Vision 2030
3. The Health Sector Policy Paper and Position Paper on Health.
4. The Education Sector Policies

Administrative Procedures

(a) Development of standards for the progressive realization of socio-economic Rights

One of the key activities that the Thematic Area has planned is to work with ministries responsible for implementing the rights provided in Article 43, towards the development of standards for the progressive realization of Socio-Economic Rights. Article 21 of the Constitution, provides that "the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43." In this regard, CIC has advised both principals (the President and the Prime Minister) of the need for the executive to initiate its constitutional obligation in Article 21. This responsibility is urgent in view of the fact that the application of the Bill of Rights was required immediately upon the promulgation of the Constitution. It is therefore important for the executive to embark on this task to avert the necessity of multiple suits on these rights.

As we await the response from the Principals, the Thematic Area has also been meeting with the different Permanent Secretaries and heads of departments in the Ministries charged with the implementation of Socio-Economic rights. The meetings have been aimed at:

- Alerting the ministries on the need to integrate in their policies, strategies and work plans a formula to guide them in complying with the constitutional requirement that the social economic rights be progressively achieved for all.

- Alerting the Ministries on the need for joint planning to develop the relevant policies and determine and the standards required to achieve progressive realization of socio-economic rights.
- Highlighting the inter-related nature of rights and hence the need for joint planning among Ministries to ensure optimum utilization of resources.
- Ensuring appreciation by ministries of the need to undertake the baseline mapping of the country to understand the state of the current situation relating to access to the different services in Article 43 and identify the inequality gaps so as to ensure effective planning and resource allocation.
- Guiding the Ministries on the need for integration of human rights principles including those that are provided in international instruments that now form part of the laws of Kenya.

At the time of preparing this report, the thematic area had met with eight (8) ministries namely

1. Ministry of State for Special Programmes
2. Ministry of Public Health and Sanitation
3. Ministry of Gender, Children and Social Development
4. Ministry of Housing
5. Ministry of State for Planning, National Development and Vision 2030
6. Ministry of Information and Communications
7. Ministry of Agriculture
8. Ministry of Water and Irrigation

CIC has also scheduled to meet the following ministries and other stakeholders:

1. Ministry of Medical Services
2. Kenya Vision 2030 Delivery Secretariat
3. Ministry of Higher Education, Science and Technology
4. Ministry of Education
5. Ministry of Finance
6. National Economic and Social Council
7. Kenya Red Cross

It is evident from the meetings that Ministries are working towards the implementation of the Constitution however, there is need for:

1. A sector wide approach to planning. Ministries within the sector should work together in the formulation of ministerial policies and plans of action to avoid duplication of efforts, ineffective delivery and utilization of budgetary resources as well as to enhance synergy in the implementation process.
2. Capacity building of the technical personnel on human rights based approach and particularly on socio-economic rights and principle of progressive in the realization.
3. Full appreciation among the Ministries, of their role in the implementation of the provisions in international instruments, which now form part of the laws of Kenya subject to Article 2(6) of the Constitution.
4. Enhanced collaboration between the ministries and the CIC. This it was noted can be achieved through submission by the ministries, of their policies and drafts laws for auditing by CIC.
5. Measures to be put in place that will assist in measuring the progressive realization of the socio-economic rights. This will require each of the sectors to carry out a mapping exercise to determine the inequalities in the distribution of resources across the country and to effectively and periodically collect and maintain data that will be used to demonstrate the extent to which the rights are being progressively realized.
6. Proper management of resources that can only be guaranteed by proper leadership and effective planning.
7. Ministerial consultants and taskforces to work jointly to ensure that all the issues affecting the sectors are well captured in the policies and laws that emanate from the assignments of the consultant and taskforces.

(b) Development of a guide for the implementation of human rights

The thematic area discussed and resolved to publish a guide for implementers on how to integrate human rights in policies, laws and

use the rights approach in administrative procedures. The need for this manual is seen as key to the implementation of the Constitution of Kenya 2010, which is anchored on human rights principles. Indeed all implementers in all sectors are under constitutional obligation to implement human rights. The guide will assist implementers at different levels. It is intended to be simple and illustrative working with real situations in some of the sectors.

Planning

The Thematic Area held a one-day stakeholder workshop on 30th August 2011, to develop the roadmap for the review and development of the next bills for the thematic area. The stakeholders agreed on a calendar of events that will guide pre-planning for the different players. It was also agreed that a bill on public participation be developed in a participatory manner with the civil society taking lead after which the bill would be forwarded to government to be processed in the agreed manner.

Donor support/Engagement of consultants

The thematic area received some donor support for some of its activities. The donors who have, so far, indicated willingness to support the thematic area activities include GIZ, IDLO, UNHCR, UN-Women and ICRC.

4.2 Activities planned for the next quarter

The planned activities for the next quarter include:

- i) Finalization of the review of the Freedom of Information Bill 2008 and the Data Protection Bill 2009.
- ii) Finalization of the review of the Births and Deaths Registration 2011; Identification and Registration of Persons 2011; Refugee Bill 2011.
- iii) Finalization of the review of the Marriage Bill 2011; Matrimonial Property Bill 2011; Family Protection Bill 2011.
- iv) Engagement with relevant institutions towards the development of standards on progressive realization of socio-economic rights.
- v) High-level stakeholder forum on the human rights-based approach and socio-economic rights.
- vi) Forums on the development of the Bill on Public Participation and the Bill on Affirmative Action.
- vii) Audit of the National Policy on Human Rights.
- viii) Audit of the Kenya Vision 2030.
- ix) Audit of the National Health Sector Policy and Position Paper.
- x) Working with two sectors and two marginalized population groups to facilitate their effective application of the affirmative action principle.

4.3 Representation of the People and the Legislature Thematic Area

The objective of the Representation and the Legislature Thematic Area is to ensure that the policies, laws, systems, structures and administrative procedures developed or reviewed and applied at all levels of elections, in every political party, in parliamentary affairs, and in other departments are consistent with the letter and the spirit of the Constitution. The anticipated outcome of the Thematic Area is to have all the people of Kenya, including leaders, respect the rule of law, uphold national values and live by the Constitution; with the ultimate aim of enabling all the people of Kenya to live in the new dispensation of a united, peaceful and prosperous nation.

4.3.1 Achievements

Legislation/policies/administrative procedures

During the third quarter the Thematic Area worked on a number of laws. These included:

The Independent Electoral and Boundaries Commission (IEBC) Act, 2011

The IEBC Act, 2011 sets out provisions for the appointment and effective operation of the Independent Electoral and Boundaries

Commission, which will be responsible for conducting and supervising referenda and elections to any elective body or constitutional office.

The IEBC Bill, 2011 that was passed by Parliament on the 31st of May, was assented to by the President on 5th July 2011 and published on 18th July 2011. Upon gazettment, CIC reviewed the Act and wrote an advisory on the unconstitutional provisions in the Bill to the CIO, the Minister of Justice, the Clerk of the National Assembly and the Speaker of the National Assembly. CIC will continue to monitor implementation by the relevant institutions to ensure that any unconstitutional provisions within the Acts of Parliament are amended.

In the implementation of the IEBC Act, 2011, the members of the IEBC Selection Panel were sworn in on the 8th of August 2011. The IEBC Selection Panel is currently overseeing the process of selecting Commissioners for the IEBC. Following the declaration of vacancies, the Selection Panel received a total of 431 applications, with four applications for the position of the Chairperson and 427 for positions of members of the Commission. Out of these, 44 applicants were shortlisted to be interviewed as members of the Commission.

Due to the low number of applications received for the position of Chairperson, the position was re-advertised subject to the provisions of the IEBC Act, 2011, which require the IEBC Selection Panel to select three qualified persons to be appointed as chairperson and forward the names to the President for nomination of one person for appointment. CIC will continue to monitor the process of appointing the new Commissioners to the IEBC to ensure compliance with the law.

The Political Parties Act, 2011

The Political Parties Act, 2011, sets out provisions to guide the registration, regulation and funding of political parties. Having reviewed and submitted the Political Parties Bill, 2011 during the second quarter of the year, CIC continued to monitor it at the various stages of its legislative process. Upon the Bill's publication on 15th July 2011 for tabling in Parliament, CIC reviewed the Bill and wrote an advisory to the Clerk of the National Assembly on some of its unconstitutional provisions. CIC continued to monitor the Bill once it was tabled before the National Assembly by reviewing the Parliamentary proceedings as provided in the Hansard records of the 17th and 23rd of August 2011. Based on this, CIC wrote another advisory to the President and the Prime Minister in a bid to ensure that unconstitutional provisions in the Bill were amended prior to receiving a presidential assent.

The Political Parties Bill was passed by the National Assembly on 23rd August 2012 and subsequently assented to by the President on the 27th of August 2011. CIC has reviewed the Political Parties Act, 2011 and written an advisory to the AG, through the Audit of Acts Report [Annex V], on provisions that are unconstitutional.

The Elections Act, 2011

The Elections Act, 2011 sets out provisions for the electoral system and process for the conduct of elections to the office of the President, the National Assembly, the Senate, County Governor and County Assembly. In addition, the Act provides for the conduct of referenda and mechanisms for the settlement of electoral disputes.

The first version of the Elections Bill, 2011 was received by CIC during the second quarter of the year, on 15th May 2011. However, due to the need to obtain input from the Devolved Government Task force and delay in the AG's office responding to the issues that CIC had raised on the first version of the Bill, an updated version of the Bill was only received on 9th August 2011. The Thematic Area received a number of suggestions from the public, government institutions and civil society organizations then made recommendations for inclusion into the provisions in the Bill. Thereafter, the thematic area conducted a number of meetings with the KLRC and the AG's office to review the Bill.

After Cabinet's approval of the Elections Bill, on 18th August 2011, the AG's office released the Bill to CIC for post-cabinet review. CIC immediately reviewed the Bill and wrote an advisory on the 19th of August 2011 to the AG's office on issues that were unconstitutional. However, it subsequently came to CIC's knowledge that the Bill was published on the 18th of August 2011, i.e. on the same day it was released to CIC for post-cabinet review. The effect of this was that CIC's advisory was not taken into account before the Bill's tabling in

Parliament. The Bill was passed by Parliament on 26th August 2011, and subsequently assented to by the President on the 27th of August 2012. CIC has reviewed the Elections Act, 2011 and written an advisory to the AG, through the Audit of Acts Report [Annex V], on provisions that are unconstitutional.

4.3.2 Interaction with Stakeholders

(a) Implementing agencies

On 4th July 2011, the Thematic Area participated in a workshop to discuss aspects of the Elections Bill, 2011, and in particular, the issue of gender representation in the National Assembly. The main proposal on the table was that seventy-two out of the two hundred and ninety constituencies would be reserved such that only women would vie for office in those constituencies. The choice of the seventy constituencies would be on a rotational basis for every four constituencies, such that by the end of four election cycles, all constituencies would have at one point selected a women candidate. However, CIC found this proposal to be in violation of the fundamental right to vote and choose a representative from the whole possible population of those wishing to seek elective posts.

It is worth noting that the controversy surrounding the constitutional provision, which requires that not more than two-thirds of members of elective public bodies shall be of the same gender, has not been resolved. In seeking to resolve the issue, the Cabinet proposed a constitutional amendment to give effect to the provision. This was formally published in the Constitution of Kenya (Amendment) Bill, 2011 on the 21st of September 2011. Although CIC acknowledges that the Constitution contemplates the possibility of amendment, CIC is also aware that unnecessary amendments made this early would undermine the Constitution. Any amendments to the Constitution must enhance, not claw back on the letter and spirit of the Constitution. It is on this basis that CIC is considering supporting an amendment only aimed at ensuring the application of the gender equity principle. Even then CIC's desire would be to achieve the gender requirement without a constitutional amendment. Indeed CIC is gratified that the newly appointed AG has publicly expressed his displeasure with piecemeal amendments, and looks forward to receiving proposals of other means of achieving gender equity from the AG.

(b) Media

The Thematic Area conducted four courtesy call meetings with chief editors of various media houses between the 12th and 15th of July 2011. The purpose of the meetings was to introduce the media houses to the objectives of the Thematic Area and discuss with the respective editors how each media house could work with CIC to ensure that the implementation of the electoral system and process is efficient and effectively applied in the lead up to the August 2012 elections. The media houses interacted with include: the Capital Group Ltd, MediaMax Network Ltd (specifically K24 TV), the Kenya Broadcasting Corporation (KBC) and the Standard Group. Meetings with other media houses are scheduled to take place in the next quarter of the year.

(c) Parliament

CIC wrote to the Parliamentary Service Commission requesting for a meeting to design a framework for developing policies, laws and administrative procedures for the implementation of the Constitution of Kenya, 2010 when it takes effect as far as the Parliamentary arm of the government and the Public Service Commission are concerned. Meanwhile, at the application level, CIC advised the Parliamentary Service Commission to observe the letter and spirit of the Constitution in their ongoing activities.

4.3.3 Activities for the next quarter

The thematic area has scheduled the following activities for the next quarter.

1. Development of Bills/Policies/Administrative Procedures.
2. Review legislation pertaining to campaign financing.
3. Working with the implementing agencies, especially the IEBC and the Parliamentary service Commission in the development/review and application of administrative procedures, regulations and other relevant systems for elections.

4. Working with the Devolved Governments Thematic Area in the development/review of administrative procedures and systems required for County Assemblies;
5. Follow-up and audit of policies relating to the laws that were enacted in the last quarter;
6. Application of the Monitoring and Evaluation framework, in which a consultant from GIZ has been contracted.

4.4 Public Finance Thematic Area

The Thematic Area on Public Finance has the task of guiding and coordinating the constitutional implementation activities that impact on and relate with public finances in the context of Chapter 12 of the Constitution. This responsibility has so far been exercised in overseeing the development of legislation and administrative procedures whilst also auditing their compliance with the constitution. To this end, CIC's principal partner has been the Ministry of Finance. However, because public finance impacts on devolved government, the CIC has also worked with the Ministry for Local Government through the Task Force on Devolved Government.

In the course of overseeing the implementation of Chapter 12 of the Constitution and the legislation arising thereto, the Thematic Area received two bills from the Ministry of Finance and the Ministry of Local Government via the Task Force on Devolved Government. The two bills received were; the Public Finance Management (PFM) Bill and the County Government Finance Management Bill. The coming up with two bills was the culmination of the policy standoff between the two ministries in terms of policy approach and content of the laws aimed at providing for public finance. Each maintained a view that was disparate from the other and went against the efforts of the CIC in trying to bring the differing parties together for purposes of harmonizing their thoughts and preferences in providing for a law that manages public finance whilst embracing the ideals set forth in Chapter 11 and 12 of the Constitution.

4.4.1 Achievements

In spite of challenges faced in the development of the PFM Bill CIC reported some achievements in this quarter.

Legislation/policies/administrative procedures

Public Finance Management Bill 2011

Pursuant to a meeting between CIC, KLRC, the AG and the CRA on the 5th August 2011, a decision was reached to engage the services of a consultant to consolidate the three divergent bills into two bills, one dealing with public finance management at all levels of government and one dealing with intergovernmental fiscal relations. This was recommended by various stakeholders and reliance on best practices around public finance. A consultant was mandated to develop the PFM bill that was used by CIC to institute stakeholder discussions.

On 18th to 22nd August 2011, CIC conducted an internal retreat to review the consolidate PFM Bill. Having conducted the initial review CIC concluded that the PFM Bill did not fully represent the framework that Chapter 11 and 12 of the Constitution envisage and based on the same, it was necessary to avoid rushing the bill to beat the August 26th deadline. Due to the time limitation occasioned by the late receipt of the PFM Bill on 19th August 2011, CIC resolved to seek an extension from Parliament on the period for enactment of the Bill. In this regard, CIC developed an Advisory to the AG to seek extension of time from Parliament for the passage of the PFM Bill. The request for extension was premised on the need to have effective stakeholder engagement on the consolidated bill.

National Government Loans Guarantee Bill 2011; Contingencies Fund and County Emergency Funds Bill 2011

On 24th August 2011, the CIC engaged stakeholders in the review of the National Government Loans Guarantee Bill 2011; Contingencies Fund and County Emergency Funds Bill 2011. The stakeholders expressed a variety of views on the bills particularly the notion that the two bills failed to meet the minimum constitutional threshold with regard to the process that preceded their publication and tabling for enactment by Parliament. The stakeholders also expressed varied sentiments on the contents of the bills and concerns to with the overall content and layout of the bills as well as their possible lack of efficiency in dealing with the matters around which they were conceptualized.

Subsequent to CIC request for extension of time on the PFM bill, the Executive developed two bills namely; the National Government Loans Guarantee Bill, 2011 and the Contingencies Fund and County Emergency Funds Bill, 2011 which parliament proceeded to pass on 26th August, 2011 into statutes in violation of section 14(2) of the Sixth Schedule and Articles 261(4) of the Constitution. Due to the unconstitutionality of the process leading to the passage of the mentioned statutes, CIC proceeded to court to challenge the constitutionality of the National Government Loans Guarantee Act, 2011 and the Contingencies Fund and County Emergency Funds Act, 2011 (Constitutional Petition No: 145 of 2011). The gist of this constitutional petition is that the process of enacting of the laws flouted of the Constitution and that Cabinet and Parliament disregarded of due process as laid down in the Constitution in the preparation and enactment of the two laws. Whereas the court issued orders restraining the tabling of the Bills, the Bills were in any event tabled, passed and assented to by the President. The court case is still proceeding.

The Commission on Revenue Allocation Act 2011

The Commission of Revenue Allocation Act 2011 was enacted on the 26th August 2011 due to the valiant efforts of the Commission despite having been subject of massive delay at the cabinet level. There were however unconstitutional additions to the Bill, which are set out in the audit report of the Acts (Annex V).

Controller of Budget Bill 2011

The development and critique of the Controller of Budget Bill was undertaken by various stakeholders by way of memoranda which were submitted to CIC. The bill also received a lot of critique at one of the stakeholder meetings that was held on the PFM Bill. The views have been quite instrumental in shaping the content of the bill that is still undergoing internal review by CIC.

4.4.2 Interaction with Stakeholders

(a) Meeting with the Task Force on Devolved Government

Between 6th and 8th July, 2011 the CIC met with officials from the Task Force on Devolved Government with the aim of familiarizing themselves with the mandate of the Task Force whilst also urging the Task Force to expeditiously conclude its work. Subsequent to the meeting, the Task Force released its interim report.

(b) Engagement of consultants

Due to the generous contribution received from GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH) the Commission has been able to enlist the services of a consultant who has been instrumental in providing insight on best practices in the formulation of the public finance landscape from the standpoint of the Constitution.

4.4.3 Challenges

In the period under review, the thematic area encountered the following technical challenges in the course of implementing its activities. A key challenge to highlight is the general lack of coordination and inconsistency in the generation of bills. The Executive and specifically the Ministries of Finance and Local Government continue to work at cross-purposes. The result of this is that they have failed to agree on the general content and landscape of the PFM Bill. This has been ongoing despite several requests from CIC to get the two institutions to work amicably. The impasse is largely responsible for the inability to meet the August 26th deadline for the enactment of the PFM Law.

4.4.4 Activities Projected for the Next Quarter

The following activities are planned for the fourth quarter of 2011:

1. Enactment of the PFM Bill. Whilst the Executive has indicated to CIC that it is still seeking consensus on the draft PFM Bill, CIC shall use the bills received so far from the Executive and any that may be received thereafter as the basis of further review and development of a

constitutionally sound legislation. There will be further stakeholder engagement before submission to parliament. It is the Commission's belief that this exercise shall be expedited and concluded within the shortest possible time and at any rate before the end of the 18th month period.

2. Enactment of the Controller of Budget Bill. With the appointment of the Controller of Budget pursuant to Article 228 of the Constitution, there is need to fast track the enactment of this law for purposes of operationalization of the office of the Controller of Budget.
3. Oversight over preparation of regulations under the PFM Law – this shall come into operation subsequent to the passage of the PFM Act. It is necessary that the regulations are audited to ensure that they conform to the spirit of public finance as enshrined in the Constitution.
4. Review of public procurement laws in line with the Constitution – the Constitution under article 227 (1) and (2) spells out the ideals that should guide public procurement and it is thus important that the current laws relating to procurement are fine-tuned to ensure their compliance with the Constitution in that respect. This means that the current Public Procurement and Disposals Act together with the Regulations thereunder, shall be scrutinized to confirm their compliance with the constitution.
5. Consultations with institutions dealing with Public Finance – there are varied institutions that CIC intends to work with especially those government institutions that have their scope of work impacting on public finance. For instance, a review of the Central Bank Act is one of the activities to be undertaken in this respect.
6. Jointly with other thematic areas embark on a review of Vision 2030 to bring it into consonance with the ideals of the Constitution especially Chapter 12 and all other relevant parts of the constitution.

4.5 Judiciary and Constitutional Commissions Thematic Area

This thematic area is concerned with the constitutional establishment and/or institutional reform of the judiciary and constitutional commissions as respectively provided for Chapters Ten and Fifteen of the Constitution of Kenya 2010. It addresses such matters as the enactment and/or amendment of legislation, policy, development or review, and formulation of administrative procedures required to ensure effective and timely implementation of the Constitution in that regard.

4.5.1 Achievements

Various notable activities that took place during the third quarter of 2011 are highlighted below.

Legislation /policies/administrative procedures

Legislation on the System of Courts was one of the priority laws scheduled for enactment under the Fifth Schedule of the Constitution. The system of courts consists of two levels of courts: superior courts and subordinate courts. Article 162(1) of the Constitution provides that the superior courts are the Supreme Court, the Court of Appeal, High Court and the courts with the status of the High Court established under Article 162(2) of the Constitution. Article 162 (2) requires that Parliament enact legislation to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

Industrial Court Act, 2011

By a letter dated 23rd June 2011, the AG requested CIC to undertake a review of the Labour Court of Kenya Bill, 2011 that was later renamed the Employment and Labour Relations Bill and eventually enacted as the Industrial Court Act.

The Thematic Team subsequently organized a stakeholders' consultative forum on 14th July 2011, which was held at CIC offices, Nairobi. The participants included representatives of the office of the

AG, KLRC, Ministry of Justice, Ministry of Labour, the Industrial Court of Kenya, Federation of Kenya Employers (FKE), Central Organization of Trade Unions (COTU), the KNCHR, Law Society of Kenya (LSK) and various civil society organizations. The purpose of the forum was to facilitate effective public and stakeholder participation in the development of bills in accordance with Article 10 of the Constitution of Kenya, 2010 and collect views on technical and general issues on the Labour Court of Kenya Bill, 2011.

The stakeholders' forum was followed by a technical drafting session on 18th July 2011. The drafting committee formed to work on the bill consisted of representatives of CIC, KLRC, Ministry of Justice, office of the AG and the Registrar of the Industrial Court. On 21st July 2011, the Commission finalized its internal review of the Bill and submitted it with amendments to the AG's office for consideration. The Bill was passed by Parliament and assent to by the President on 25th August 2011.

Environment and Land Court Act, 2011

On 3rd August 2011, the AG submitted the Environment and Land Court Bill 2011, to CIC. A technical committee comprising representatives of CIC, Ministries of Lands, Environment and Mineral Resources, and members of the Task Force appointed by the Minister of Environment and Mineral Resources to draft legislation to implement the provisions on land use, environment and natural resource held a meeting on 6th August 2011 at Kenya Utalii College to deliberate on the draft Bill. On 10th August 2011, CIC held a stakeholders' consultative forum at CIC offices, Nairobi to generate views on the Bill. The Commission submitted the Bill with amendments to the AG on 11th August 2011. The Bill was debated and passed by Parliament on 25th August 2011 and assented to by the President on the following day.

Other legislation falling within this Thematic Area but which are comprehensively reported in the Bill of Rights and Citizenship Thematic Area include the enactment of: the Kenya National Human Rights Commission Act, 2011; the National Gender and Equality Commission Act, 2011; and the Commission on Administrative Justice Act, 2011.

In addition, the Independent Ethics and Anti-Corruption Commission Act, 2011 and the Salaries and Remuneration Commission Act, 2011 which are comprehensively reported in the Public Service and Leadership Thematic Area and Public Finance Thematic Area were enacted.

4.5.2 Interaction with stakeholders and Conferences

Commissioner Laibuta was officially invited by the Committee on the UN Convention on the Rights of Persons with Disabilities to participate as a panelist in the discussions and present a paper on behalf of Kenya. His panel discussion was on "International Cooperation in the Implementation of the UN Convention on the Rights of Persons with Disabilities: The Kenyan Experience". He was also part of the Kenyan delegation to the fourth Session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities that hosted a side event for Kenya that comprised of three items, including his presentation on "Constitutional Guarantees on PWDs in Kenya. The Conference was held at the UN headquarters in New York from 7th to 9th September 2011. The theme of the fourth session was "Enabling Development, Realizing the Convention on the Rights of Persons with Disabilities" are the sub-themes were "Realizing the Convention through International Cooperation", "Political and Civil Participation" and "Work and Employment".

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the UN General Assembly on 13th December 2006 and came into force on 3rd May 2008. The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Article 40 of the Convention stipulates "The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention." Since 2008, three sessions of the Conference of States Parties have been held at United Nations Headquarters, New York. Mr. Laibuta was also a delegate during the third session in September 2010. The 2006 Convention forms part of the laws of Kenya by virtue of Article 2(6) of the 2010 Constitution of which CIC is a critical implementing commission.

4.5.3 Planned Activities For Next Quarter

The following activities are planned for next quarter:

1. Work with the judiciary to identify priority laws for enactment.
2. Work with implementing agencies in the tourism, communication and water sectors to develop/review laws, policies and administrative procedures in line with the letter and spirit of the Constitution.
3. Other planned activities include working together with respective thematic groups on policies, administrative procedures and legislation establishing the following constitutional commissions: The National Land Commission; The Teachers Service Commission; The National Police Commission; The Public Service Commission; and The Parliamentary Service Commission Bill.

4.6 Land and Environment Thematic Area

The Land and Environment thematic area is tasked with coordinating the implementation activities relating to Land and Environment. The area covers activities in the following relevant ministries: the Ministry of Land, the Ministry of Environment and Mineral Resources, the Ministry of Forestry and Wildlife, the Ministry of Water and Irrigation, Ministry Tourism, the Ministry of Northern and Arid Lands, the Ministry of Regional Development, and the Ministry of Livestock Development.

Chapter Five of the Constitution provides framework for this sector and in particular, the principles that apply to land and the obligations of the state with respect to the environment.

4.6.1 Achievements

Legislation/policies/administrative procedures

In the period under review, the Thematic Area recorded various achievements in the legislative and policy arenas. CIC reviewed existing policies and legislation pertaining to the sector with special reference to the aforementioned ministries and parastatals under them. CIC developed comprehensive terms of reference for consultants to consolidate and ensure integration of the various policies, bills and administrative procedures from the various ministries, departments and parastatals within the environment and natural resources sector. The consultancy will entail liaising with the sector actors to effectively map out their planned initiatives and revise them for purposes of bringing about conformity to the Constitution and coherence in the policies and legislation.

4.6.2 Interaction with stakeholders

(a) Stakeholder forum on the Wildlife Bill

The Commission worked with the Ministry of Forestry and Wildlife in engaging with the Stakeholders in the development and refining of the Wildlife Bill. In August 2011, the Commission participated in a stakeholder's forum at Intercontinental Hotel.

(b) Stakeholders Consultation on the National Land Commission Bill

The Thematic Area held a stakeholders' forum on the National Land Commission Bill pursuant to the principle of public participation under Article 10 of the Constitution in the development of implementing legislation. The objective of the forum was to assess the Bill to determine the extent to which it complies with the letter and spirit of the Constitution, and identify any gaps or areas for improvement. CIC also received oral and written memoranda and recommendations from non-state actors that will ensure the objects of the National Land Commission in Article 67 are applied and respected.

(c) Engagement with donors and civil society

WWF Eastern Africa Regional Office continues to support the Commission in providing technical and financial support to make civil society input into the Constitution Implementation process. Through this initiative, WWF has also made it possible for the Commission to support capacity for government and civil society.

4.6.3 Planned Activities for the Next Quarter

The following activities are planned for the next quarter.

1. Finalize the National Land Commission Bill for tabling in Parliament.
2. Establish strategic partnerships with the Ministry of Water & Irrigation.
3. Conduct a stakeholders' forum to review water sector policies and legislation.
4. Work with the Ministry of Lands on the Land Policy.
5. Continuing working with Ministry of Forestry and Wildlife on Wildlife policies and Bill.

4.7 Executive and Security Thematic Area

This Thematic Area derives its mandate from Chapters Nine and Fourteen of the Constitution. Chapter Nine provides for the functions and powers of the offices of the President, the Deputy President, the Cabinet and other offices such as the AG and Director of Public Prosecutions (DPP). Chapter Fourteen of the Constitution provides for national security organs namely; the Kenya Defence Forces (KDF), National Intelligence Service and National Police Service. The Chapter provides for the principles of national security to ensure protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.

The Constitution requires that the national security of Kenya be promoted and guaranteed in accordance with certain principles including that national security is subject to the authority of the Constitution and Parliament; national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms; in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions.

It is the core concern of the Thematic Area that the above principles and other values and principles of the Constitution regarding the executive and security sector, are respected and upheld, both in letter and spirit. The Commission has therefore made great efforts to ensure this is achieved, to the extent possible and in line with the provisions of section 5 of the Sixth Schedule to the Constitution.

The Fifth Schedule to the Constitution obligates the National Assembly to enact the following laws in the area of executive and security:

1. Power of Mercy (Article 132).
2. Legislation on assumption of office of President (Article 141).
3. National security legislation (Article 239).
4. Command of the National Police Service (Article 245).

The Thematic Area has undertaken extensive consultations with key stakeholders in the Executive and Security sector to ensure that the legislation anticipated under Chapters Nine and Fourteen of the Constitution have been formulated and finalized within the period specified in the Constitution.

4.7.1 Achievements

Legislation/policies/administrative procedures

In the period under review, the Thematic Area recorded a number of achievements. The Thematic Area attributes the achievements to the committed team that went the extra mile to ensure that the bills required under the Fifth Schedule and the agreed timeline schedule, were formulated and reviewed within the requisite time. The Thematic Area also recognizes the importance of successful stakeholder and implementing partners' involvement in the entire process of review.

- i) As indicated in the second quarter report, the planned activities for the third quarter included the review of the Power of Mercy Bill, National Security Council Bill, and National Intelligence Bill. The Thematic Area is pleased to report the successful review of the aforesaid Bills. The Thematic Area further reviewed the Police Reform Implementation Committee programme document to verify

its conformity with the letter and spirit of the Constitution. The Power of Mercy Bill was successfully reviewed and submitted to the AG within the stipulated time, despite the delay by the concerned line Ministry in submitting the Bill to the Commission. The Bill was debated and enacted by the National Assembly and subsequently assented to by the President.

- ii) The National Police Service Bill was also finalized in this quarter. Extensive consultations were undertaken to develop a robust law that would ensure reforms in the police service sector. Some of the key aspects of the National Police Service Act are the independence of the Service from the executive, the involvement of the people in policing, devolution of police services, inculcation of human rights, including those of police officers, integration of accountability mechanisms, amongst others.
- iii) The National Police Service Commission Act was also passed by Parliament. The National Police Service Commission Act introduces professionalism and reforms in the National Police Service, including ensuring impartial and independent recruitment, appointments, promotions, and transfers in the police service. The NPSC is also responsible for maintenance of a fair disciplinary system. It will be involved in the recruitment and appointment of the new Inspector-General and Deputy Inspectors-General.
- iv) The Independent Policing Oversight Authority Bill was tabled in Parliament in time and is currently awaiting to be debated when Parliament resumes its sitting.

It worth mentioning that although the National Police Service Act, National Police Service Commission Act, Independent Policing Oversight Authority Bill, were scheduled to be enacted within two years after promulgation of the Constitution, the police Bills were identified as priority Bills and consequently, it was imperative that the Bills be discussed and presented to Parliament within the first twelve months after promulgation. CIC successfully fulfilled its mandate with regard to Chapter 14 legislation one year before the scheduled timeframe.

4.7.2 Interaction with stakeholders

(a) Stakeholder consultations on National Police Service and Independent Policing Oversight Authority Bills

Beyond the stakeholders meetings held in the second quarter on the National Police Service, National Police Service Commission and the Independent Policing Oversight Authority Bills, the Thematic Area held further consultative meetings with the Ministry of State for Provincial Administration and Internal Security, AG, KLRC and PRIC, to clarify issues that arose in the course of the finalization of the Bills. The Bills were then submitted to the KLRC and AG's office for finalization and onward transmission to the Cabinet.

(b) Consultations on power of mercy

Similar meetings were held to discuss the Power of Mercy Bill. The Office of the President, KLRC and the AG were in attendance. CIC also invited the participation of the civil society, relevant constitutional commissions, private sector and the public in general to give in their input in a bid to enrich the said Bill. A CIC team also visited Kamiti Maximum Prison and Lang'ata women's prison on 5th August 2011 to gather the opinion of those incarcerated. The views, comments and suggestions gathered during the visit to the correctional facilities, the input by the various stakeholders were significantly useful in reviewing the Power of Mercy Bill that was debated and passed in the National Assembly without any major amendments.

(c) Donor support/engagement with consultants

During the period under review, the Commission received support from development partners in form of technical support to review the police bills. In this regard, the Commission extends its gratitude to UNODC and DFID, for engaging a consultant for the Commission to review the police Bills. The consultant undertook comparative analysis of the various existing laws on police, related laws from other jurisdictions and international best practices, and came up with reports.

4.7.3 Challenges and recommendations to address them

The CIC faced a number of challenges in undertaking its work under this Thematic Area during the third quarter of 2011. The challenges included the fact that:

- Some of the important recommendations that were made by CIC regarding the National Police Service Bill were not taken on-board before the enactment of the Bill by Parliament.
- The CIC also issued an advisory to the Ministry of State for Defence on the recruitment of cadet officers, and requested that the Ministry put in place administrative measures that guarantee recruitment exercise that meets the Constitutional threshold as provided for under Articles 10, 27, 54, 55, 56 and 232 of the Constitution. The Ministry has not yet responded nor taken any action.

To address these challenges, it is recommended that for the remaining Bills relevant to the Executive and Security sector including the National Intelligence Service Bill, Defence Forces Bill should be availed to CIC by the relevant line ministries in time and as per the agreed timelines. This will give CIC ample time to plan its activities, engage the public and consult with different implementers to avoid a last minute rush when reviewing the Bills. In addition, the Thematic Area also recommends active participation by the different actors by ensuring that the Bills submitted to the Commission, meet the threshold of consultation under the Constitution. In addition, the constitutional requirement of the involvement of the Commission should be taken on board at the drafting stages and subsequently at other stages of policy making, to avoid unnecessary delays. Finally, efforts should be made to ensure cordial working relations among all the actors in the executive and security sector, to ensure quality and robust bills are drafted, that conform to the letter and spirit of the Constitution.

4.7.4 Activities planned for the next quarter

The following activities are planned under this Thematic Area in the fourth quarter of 2011:

1. Audit existing administrative measures including policies and guidelines on their legality/constitutionality and identify issues for stakeholder deliberation.
2. Work with the implementing partners in the formulation of the administrative measures, including regulations required under the National Police Service Act, National Police Service Commission Act, and Power of Mercy Act, amongst others.
3. Meet with the Office of the President, AG, DPP, Ministry of State for Defence, Ministry of Foreign Affairs, Inspector General, amongst other in the executive and security organs to discuss their implementation plans to enable the Commission monitor its progress.
4. Conduct County visits to hold forums with county-based stakeholders on the bills under Chapter Fourteen of the Constitution.
5. Engage stakeholders in the next two quarters on the National Coroners Service Bill, Private Security Industry Regulation Bill, National Security Council Bill and National Intelligence Service Bill.
6. Hold consultative meetings with security organs, namely the Police, Defence Force, Security Council on the training institutions and other administrative measures.
7. Conduct a benchmarking tour on implementation of security and executive reforms.

4.8 Devolved government Thematic Area

The Thematic Area deals with provisions relating to devolution under Chapter 11 of the Constitution. The Thematic Area is therefore charged with the duty of coordinating and harmonizing constitutional implementation process regarding how the two levels of government will work together for effective implementation of devolution as well as the activities relating to county governments. In light of the implication of resource allocation on the sustenance of devolved governance structure as envisaged in the constitution, legislation on finance and fiscal relation should appropriately cater for the two tiers of government. Given the fact that devolution is new, it is also

necessary to ensure that a system of sound foundation even in uncertain and tumultuous time is established and guaranteed. All these must be consistent with the letter and spirit of the Constitution.

The Fifth Schedule lists eight bills to be implemented on devolution. The bills on these laws are to be generated by the ministry of Local Government. The bills have to be enacted between one and three years from the date of the promulgation of the Constitution. On 11th of September, 2011 the CIC received six bills covering different aspects of devolution from the AG's office. The bills are:

1. Devolved Government Bill
2. Inter-governmental Relation Bill
3. Transition to Devolved Governments Bill
4. Inter-governmental Fiscal Relations Bill
5. County Government Financial Management Bill
6. Urban Areas and Cities Bill.

4.8 Achievements

Legislation/policies and administrative procedures

The Inter-governmental Fiscal Relations Bill and the County Government Financial Management Bill could not be processed because of a policy disagreement between the Treasury and the Ministry of Local government on whether the executive should prepare one Public Finance Management bill or separate bills. Progress was realized by the successful development of the Urban Areas and Cities Bill and finally its enactment. This bill is one of the devolution bills, which was identified as requiring priority attention within the scheduled timeframe for enactment as provided by the Constitution of Kenya 2010. The Elections Act was also enacted during this period. The remaining bills have been uploaded on CIC's website to avail stakeholders ample time to engage and analyze the bills extensively prior to stakeholder consultative forums with CIC. Below is a summary of what each bill covers.

Devolved Government Bill

This is a Bill for an Act of Parliament to give effect to Chapter eleven of the Constitution; to provide for county governments powers, functions, and responsibilities to deliver services and to provide for other connected purposes.

Inter-governmental Relations Bill

This is a Bill for an Act of Parliament to establish a framework for intergovernmental consultation and co-operation and to establish mechanisms for dispute resolution and for connected purposes.

Inter-governmental Fiscal Relation Bill

This is a Bill for an Act of Parliament to provide for co-operation and consultation between the national and county levels of government on fiscal, budgetary and financial matters; to prescribe a process for budgeting and the determination of equitable sharing and allocation of revenue raised nationally; to provide for a process for the determination of the control, coordination and management of borrowing; the granting of loan guarantees; the proper management of public debt by both the national and county levels government; the receipt and use by both the national and county levels of government of donor grants; and to provide for connected purposes.

County Government Financial Management Bill

This is a Bill for an Act of Parliament to secure the sound and sustainable management of the financial affairs of county governments, cities and urban areas, and other county public entities and to provide for matters connected thereto

Transition to Devolved Governments Bills

This is a Bill for an act of Parliament to provide for a framework for transitional arrangements and processes for the establishment and operationalization of devolved government; the phased transfer of functions and powers; and for connected purposes

Contingency Fund and County Emergency Fund Bill and the National Government Loan Guarantee Bill

This is one among the priority bills that was scheduled to be enacted within one year of promulgation of the Constitution. CIC received the Bill from the AG on the 24th August 2011. According to Section 14(2) of the Sixth Schedule to the Constitution on operations of provisions relating to devolved government, the CIC and the CRA shall be given at least thirty days to consider legislation on devolved government. Pursuant to this, the time required to pass the bill was unconstitutional. CIC wrote an advisory on this which was, however, not taken into consideration by the implementing agency.

At a stakeholders' consultative meeting convened by the CIC on the 25th August 2011 there was sharp criticism regarding the process and content of the Bill. As already noted in this report, CIC has since proceeded to court to challenge the constitutionality of these laws.

4.8.2 Interaction with stakeholders

CIC held the following consultative meeting with stakeholders:

(a) A consultative meeting between CIC and the Task Force on devolved Government held on 6th to 8th July 2011 at Pangoni Lodge in Mombasa

The objective of the engagement was to discuss status of the devolution bills and work towards delivering the bills within the set timelines and the need for joint planning between CIC and the Task Force to ensure the bills are generated within the deadlines and sufficiently deliberated upon.

(b) Discussion forum with devolution consultant

The Thematic Area received technical support from devolution consultant. The objective of the discussion was to ensure that the critique on the Bills relating to Devolution used the following criteria:

- Extent to which the Bills are consistent with the letter and spirit of constitution
- Relation between each of the bill and other bills or laws
- Extent to which the devolution bills are coherent
- Impact of each of the bills on the two levels of government (National and county)
- Extent to which the bills are technically sound.
- Identify any omissions in the bills that ought to be included.

In view of the fact that the country has chosen to operate a devolved system of government and because its implementation is likely to present many challenges, it was important that the legislation on devolution be carefully thought out and discussed in-depth taking into account the need to ensure that the implementation of the devolved system of government is not undermined.

(c) Consultative meeting with civil society and professional bodies

This meeting was held on 8th August 2011 at the CIC Boardroom to discuss and enhance the devolution bills. The Task Force on Devolved Government had widely consulted and allowed for the participation of stakeholders in the generation of these bills. This helped stakeholders, for example, to appreciate the Urban Areas and Cities bill. Subsequently, there was greater stakeholder participation and consensus during the consultative meeting on most of the provisions of the bill.

(d) Consultative meeting with implementing agencies

The Thematic Area held a consultative meeting with the Task Force on Devolved Government, Ministry of Local Government, KLRC and the AG's office on 11th August 2011. This followed an earlier consultative meeting at Kenya Utalii College on 2nd August 2011 with the AG, KLRC and the Task Force on Devolved Government drafters to check on the sound legal drafting of the provisions in the Bill. In addition to consultations with the stakeholders, implementing agencies and other interested parties, the Thematic area also received written memorandums from those who could not attend the meeting.

4.8.3 Challenges

The Commission in the context of its work under this Thematic Area encountered a number of challenges during the third quarter of 2011. These include:

- i) Receipt of different versions of the devolution bills some of which were handed to CIC formally while others were informally sent in.
- ii) Failure by Ministry of Local Government charged with responsibility of generating bills on devolution to work with treasury on the Public Finance Bill, the Fiscal Relation Bill and the County Finance Bill.
- iii) The manner in which the Finance and Fiscal relation Bills that have implication on devolution have been handled by implementing agency, that is, the Cabinet and Parliament, left a lot to be desired. The process followed raised issues of Constitutionality and therefore the quality of the Bills as well.
- iv) Passing of the Contingency Fund and County Emergency Fund Bill and the National Government Loan Guarantee Bill was a serious challenge faced by the Thematic Area. The two bills were not been subjected to stakeholder participation and input from Taskforce on Devolved Governance and as a result, the CIC was compelled to commence legal proceedings against the enactment of the bills.

4.8.4 Activities planned for the next quarter

The Thematic Area has planned a number of activities for the next quarter. First, it is planned to finalise the following legislation:

1. Devolved Government Bill by November, 2011
2. Inter-governmental Relation Bill by January, 2011
3. Transition to Devolved Governments Bills by January, 2011
4. Inter-governmental Fiscal Relation Bill by February, 2011
5. County Government Financial Management Bill

Secondly, the Thematic Area also plans to undertake the following other activities:

- Review civic education material and monitor implementation on devolved government.
- Develop an implementation guide on devolved government.
- Undertake county visits to sensitize the public on devolved government.
- Undertake consultations with existing authorities on issues relating to the implementation of devolved government.

5. ENGAGEMENT WITH AND THE KEY ACTIVITIES OF IMPLEMENTING PARTNERS

The Constitution will only be fully implemented if the various arms of the government put in place systems in their sectors and prepare their personnel to adapt to a culture of constitutionalism. In this regard, the CIC, working in consultation with implementers and stakeholders in different sectors, has developed modalities for effective implementation and to facilitating key activities to be undertaken at different levels by individuals and institutions. This section summarizes CIC interactions with key implementers of the Constitution and summarises the key activities undertaken by the implementing partners. The majority of the information is based on quarterly reports submitted by ministries.

5.1 Parliament

One of the major roles of Parliament is to debate and enact laws. Parliament receives Bills published by the AG for debate in the house. After Parliament debates and passes the Bill, it is taken back to the AG for preparation of the vellum copy before being handed over to the President for assent. Parliament is therefore a key partner in the implementation process. As stated earlier Parliament has passed 21 Acts of Parliament towards enactment of the Constitution. CIC has so far forwarded 5 other bills which are pending before Parliament for debate. CIC looks forward to continued strong working relations with Parliament to ensure successful implementation of the Constitution.

5.2 Constitutional commissions

CIC has established partnerships with Constitutional Commissions and independent offices to ensure that the implementation process is on track and the letter and spirit of the Constitution is respected. In the spirit of transparency and collaboration CIC shares its schedule of meetings with the CRA to ensure synergy in the implementation

process. CIC has also continuously worked with other Commissions and independent offices established under Chapter 15 of the Constitution such as the JSC, the Kenya National Commission on Human Rights and Equality Commission and is looking forward to a strong partnership with the new Auditor General and Controller of Budget.

Further, to ensure that the quarterly report is comprehensive and covers all arms of government and state offices, CIC requested state offices and Constitutional Commissions to report on progress of implementation. It is only when all state agencies and organs report on their progress that the people of Kenya will have a holistic picture of progress in implementation.

5.3 Judiciary

The important role of the Judiciary in upholding constitutionalism and the rule of law cannot be overstated. With this in mind, CIC has played a key role in the re-structuring and re-organisation of the Judiciary. CIC's interventions have ranged from the work related to the enactment of the Judicial Service Act to monitoring the recruitment of the Chief Justice, Deputy Chief Justice and Supreme Court judges. During the reporting period, CIC Commissioners also paid a courtesy call to the Chief Justice to strengthen working relations between the two institutions and to ensure the implementation process is on track. In addition, in exercise of its mandate, CIC has on a number of issues relating to interpretation of the Constitution instituted cases and sought the judiciary's guidance. In particular, CIC has instituted court proceedings on two occasions. The Commission is also interested in other cases filed by individuals and institutions. The cases in which CIC is currently an interested party are as follows:

Constitutional Petition No. 65 of 2011

In the Matter of the Construction, Interpretation and Determination of the Actual Date of the Next General Elections (Between Milton Mugambi Imanyara & others and the Attorney-General and others)

The Interim Independent Electoral Commission, being the 3rd Respondents, filed a Preliminary Objection contesting the jurisdiction of the High Court on the matter. The basis of the Preliminary Objection is the argument that the petitioners can only obtain an advisory opinion from the Supreme Court and in its absence, the Court of Appeal.

Constitutional Petition No. 102 of 2011

In the matter of the Recommendation by the Judicial Service Commission of Persons for Appointment to the Offices of Judges of the Supreme Court under the Constitution of the Republic of Kenya (Between Federation of Women Lawyers of Kenya (FIDA-K) & others and the Attorney-General and others)

The Federation of Women Lawyers-Kenya (FIDA-Kenya), being the 1st Petitioner and others filed before the High Court a petition to seek the correct interpretation, full tenure, meaning and effect of Article 27 of the Constitution of Kenya 2010 and the proper approach to the interpretation of the Constitution. The factual basis of this petition is that on 15th June 2011, the JSC recommended to the President for appointment of five persons as Judges of the Supreme Court. Of the five recommended for appointment one was a woman and four were men. The JSC had earlier recommended to the President for Parliamentary approval persons to the offices of Chief Justice and Deputy Chief Justice out of whom one was a man and the other a woman. The petitioners allege that JSC in making its recommendations to the President violated the Constitution and Fundamental Rights and freedoms of women in not taking into consideration the correct arithmetic/mathematics of the Constitutional requirements on gender equity. As a result the recommendations fell below the Constitutional mandatory minimum and maximum on gender equality.

In short, at issue is whether the JSC violated the provisions of Article 27 of the Constitution in making recommendation of five judges to the President for appointment as Judges of Supreme court and secondly whether the High Court has jurisdiction to issue orders as sought by the Petitioners without contravening the provisions of Article 168 of the Constitution. It is the contention of the Petitioners that in the process of recommendation for appointment of the five judges, JSC did not meet the mandatory requirement and threshold set by the

Constitution. In order to comply with the Constitutional requirements, it is alleged JSC was under a duty to ensure that in the final analysis of its recommendation no gender fell below 33.3% and no gender exceeded 66.7%. It is contended that in the line of mathematical reality, 1/3 of 7 is 2.3 and 2/3 of 7 is 4.7 therefore JSC should have considered that to avoid reducing the numbers below the constitutional minimum and avoid exceeding the constitutional maximum, the 2.3 ought to have been rounded off to 3 and 4.7 ought to have been rounded off to 4 which would have resulted in a Constitutionally compliant ratio. Judgment was issued in the case and although it was not in favour of the Petitioners, FIDA-Kenya filed an appeal contesting the Court decision.

Constitutional Petition No. 145 of 2011

In the matter of Article 2(1), (2) and (4) of the Constitution and in the matter of Article 22, 23, 27(1) and (2), 47(1) and 258 of the Constitution and in the matter of Article 261(4) of the Constitution and in the matter of Section 2(3)(b), 14(1) and (2) and 15 of the Sixth Schedule to the Constitution (between the Commission for the Implementation of the Constitution and the Attorney-General and others)

CIC being the Petitioner filed on urgent basis a Constitutional reference objecting to the AG's unconstitutional conduct in the preparation of two Bills, namely the Contingencies Fund and County Emergency Funds Bill, 2011 and the National Government Loans Guarantee Bill 2011. The Commission is seeking to restrain the Speaker of the National Assembly (named as the 2nd Respondent from dealing with the two Bills in any way connected with debate on and enactment of the Bills). Lady Justice Karanja certified the application as urgent and issued conservatory orders to preserve the subject matter of the Petition and to stop the unconstitutional acts being enacted. The interim orders restraining the 1st and 2nd Respondents from taking further steps in connection with the enactment of the two bills were granted until the hearing of the application. However the court order was ignored and the two Bills enacted into law and assented to. The matter is still pending.

Constitution Petition No. 137 of 2011

In the matter of Payment/Variation/Waiver/Variation of Taxation by Members of Parliament and State/Public Officers and in the matter of the Principles of Public Finance: Openness, Equality, Fairness, prudence and Responsibility in the Application and imposition of Taxation (between Rev. Dr. Timothy Njoya & others and the Attorney-General and others)

Rev. Timothy Njoya, being the 1st Petitioner sought interpretation of the Constitution to determine: whether under the Constitution all State Officers, including Members of Parliament, are under an obligation to pay tax as per Article 210 as read with 201 and 230 of the Constitution; whether the Executive has the powers or authority to exempt any 'State Officer' from payment of tax; whether the Constitution or the transitional clauses saves or exempts the Members of Parliament from payment of tax; whether it would be illegal and unconstitutional for the Government to settle the tax burden of Members of Parliament using public resources or tax payer's money; and whether it would be illegal and unconstitutional for the Members of Parliament to derail or frustrate the debate or passage of bills for full implementation of the Constitution on account of the demand by the Kenya Revenue Authority (KRA) to pay taxes.

The matter came up for hearing on 8th September 2011 where the 1st Petitioner requested leave of the Court to amend the Petition to withdraw names of Members of Parliament who have since settled their tax arrears and to join in the suit Members who had been left out but had not settled their tax obligations. The matter has been forwarded to the Chief Justice to appoint a three Judge bench and for directions.

4.4 The Executive

Working with the executive as the primary implementing arm of the government, CIC released a circular that gives a clear roadmap to implementers to guide them on what needs to be done to ensure that the Constitution is fully implemented. The Circular was issued to all ministries and public institutions. The circular calls upon implementing agencies to:

- Internalise the provisions of the Constitution in general and, in particular, with respect to the provisions relevant to the sector or institution in question.
- Review or audit existing sessional papers, policies, laws, and administrative procedures against the Constitution to identify any gaps or review needs or both.
- Develop any new laws, new policies and administrative procedures required to implement the Constitution.
- Mainstream the Constitution implementation process in the strategic plans.
- Submit quarterly reports for purposes inclusion in the CIC's quarterly report.

Accordingly, CIC requested ministries, state agencies and constitutional commission to submit quarterly reports by 14th September 2011 for inclusion in quarterly reports. In the first reporting period of April-June 2011 following the Circular, CIC received reports from more than half the ministries in the executive. Some reports were however received out of time and could not be captured in the Second Quarterly Report. The reports were however analyzed. In this quarter, CIC has only received a total of 18 reports. A list of ministries that did report as at the date of going to press is attached (*see list of ministries that have submitted status of Implementation reports in Annex IV*).

It is a matter of grave concern to the CIC that the relevant Ministries are not submitting their status reports at the prescribed time as required under Section 27(1) of the Commission for the Implementation of the Constitution Act. Failure to submit reports goes against the principles of accountability and transparency in line with the letter and spirit of the Constitution; and national values and principles of governance as set out in Article 10 of the Constitution. To curb this trend CIC is considering taking appropriate legal action against accounting officers of ministries in violation of the Constitution and Article 27 of the CIC Act.

Box 3 **Section 27 of the CIC Act** **Duty to co-operate**

Section 27 of the CIC Act underscores the duty of all public bodies to cooperate with CIC in the implementation process, it states:

27 (1) A Public officer, State Organ or State office shall at all times co-operate with the Commission in the ensuring the successful implementation of the Constitution and shall in particular:

- respond to any inquiry made by the Commission;*
- furnish the Commission with periodic reports as to the status of implementation of the Constitution in respect of the question raised;*
- provide any other information that the Commission may require in the performance of its functions under the Constitution and any other written law;*

(2) Any public officer who breaches any the provisions of this Act shall be deemed to be in contempt of parliament and shall be liable, on conviction, to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding one year, or to both.

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Following an analysis of reports submitted to CIC, the following is a summary of the activities undertaken by the executive towards the implementation of the Constitution.

Familiarization with the Constitution

Most of the ministries reported having availed copies of the Constitution to staff members as well as soft copy versions on their websites. Eight Ministries undertook sensitization workshops for their staff.

Identification and audit of laws, policies and administrative procedures

A majority of the ministries have identified various laws, draft policies and administrative procedures that have been enacted and those that should be enacted to ensure successful implementation of the Constitution.

Extent of integration of implementation of the Constitution in performance contracts

Six Ministries have highlighted the targets in the performance contracts with specific regard to the Constitution by:

- Introducing Performance Assessment Reports of individual staff.
- Developing training manuals
- Setting up constitutional implementation units and task forces to facilitate and expedite the implementation process.

Status of Development of Change Management Strategy

Five ministries reported having taken steps to put in place a change management strategy, the steps include:

- Establishment of teams/units to focus on change strategy management.
- Development of a five year staffing plan.
- Conducting a detailed scan of the capacity of Ministries for implementation of results based management

6. OVERVIEW OF KEY ACHIEVEMENTS AND SUMMARY OF CHALLENGES ENCOUNTERED IN THE CONSTITUTION IMPLEMENTATION PROCESS

The third quarter coincided with the first anniversary of promulgation of the Constitution. It was therefore necessary to have met the legislation timelines of enactment of legislation provided in the Fifth Schedule to the Constitution. As stated earlier among the key achievements realized during the third quarter is the enactment of all the priority legislation. CIC also attained various other significant achievements outside enactment of legislation. The implementation process was not without challenges, however. CIC has also identified a number of impediments, which may hinder the implementation process if they are not addressed timely.

6.1 Achievements

The Commission recorded significant achievements with its work the details of which have been provided already under the Thematic Area reports in part 4 of this report. In summary, the key achievements during the quarter can be summarized in three broad areas, namely:

- Enactment of priority legislation in line with the Fifth Schedule and Agreed Schedule of priorities.
- Timely review and passage of Bills.
- Successful engagement with stakeholders including relevant task forces.

6.2 Challenges

Similar to previous quarters of 2011, the Commission's work was hampered and affected due to a range of challenges. These ranged from a few internal challenges to a large number of external challenges. The key challenges for the third quarter can be summarized into the following:

- i) **Lack of capacity:** Apparent lack of capacity of originating ministries to prepare draft bills in good time and with soundness of content before submission to CIC.
- ii) **Poor drafting of bills:** The growing trend to constitute CIC into a drafting house for a majority number of Bills submitted in raw draft.
- iii) **Fatigue:** There seems to be some Constitution fatigue among the public. Their enthusiasm in August 2010 seems to be slowly fading, giving room and space to the cabinet and parliament to start mutilating the Constitution.
- iv) **Impunity by the Executive:** The AG forwarded two draft bills to the Cabinet and onward to Parliament for enactment and to the President for Assent without CIC review or input thereby

violating the Constitutional process of preparation of Bills.

- v) **Reluctance to implement devolution:** Devolution is emerging as the tool and instrument to tame and slow and, probably, ultimately kill the Constitution. Kenyans now need to seriously monitor devolution if they have to reap the benefits of the Constitution fully.
- vi) **Parliament:** Parliament in exercise of their Constitutional mandate introduced amendments, which negated the Constitutionality of bills.
- vii) **Reluctance by some key stakeholders to cooperate with CIC in the development of Bills:** CIC relies heavily on the cooperation implementing partners, state organs, departments and line Ministries to ensure success in the implementation process. Any reluctance on either of the actors, significantly affects the end product. While acknowledging the immense cooperation granted by most of the partners in the process of formulation of the Bills, CIC notes that reluctance to cooperate by some stakeholders, for example, lack of response from various implementing partners to CIC's letters lead to disorganisation of planned timelines and consequently a delay in the finalization of Bills.
- viii) **Late Submission of Bills:** Some draft bills were prepared late in view of the timelines provided in the Fifth Schedule. This compromised CIC's internal arrangement to consult and provide intended in-depth review and consultations with the stakeholders prior to its review.
- ix) **Disagreement among key Stakeholders:** Internal and external differences amongst the key actors in the ministries were a challenge to the process of preparation of bills. The differences between the ministries and departments caused unnecessary delay and consumed the Commission's time in its effort to get the actors agree to a common position, especially where the disagreements were on policy.
- x) **Multiple versions of draft bills:** CIC received more than one version of various bills it reviewed. It was not clear which version of the bills was authentic especially where the versions were coming from the respective departments or Ministries. The lack of a clear mode for submission of the bills caused the CIC to resort to writing to the AG seeking confirmation on the veracity of the bills submitted.
- xi) **Irregular amendment of bills by the executive and ignoring CIOC advisories:** Some Bills, which had been approved by the CIC and the implementing partners (the office of the AG, the KLRRC and the line Ministry) at final roundtable meeting and forwarded for publication, were amended without reference to CIC. CIC resorted to issuing Advisories to the AG and National Assembly in a bid to rectify the anomalies created by the amendments. Despite CIC's relentless efforts, some unconstitutional provisions found their way in the enacted laws and some provisions required by the Constitution were omitted from the Acts of Parliament. In cases where CIC has issued advisories these have also been ignored. This trend is disconcerting. Implementing partners, at all levels, need to respect and uphold the letter and spirit of the Constitution, including the process of formulation of Bills in line with Article 249(1) and (4), Article 261(4) and section 5 of the Sixth Schedule to the Constitution.
- xii) **Delay on publication of bills and gazette of acts:** Delay in publication of legislations by the Government Printer, in turn caused delays in the implementation process. Delays have also been experienced with respect to publication of acts. For example, despite the IEBC Bill, 2011 being published on the 7th of April 2011, it was only tabled for debate and passed by the National Assembly on the 31st of May 2011. The Bill was assented to by the President over a month later on the 5th of July 2011 and only gazetted almost two weeks later, on the 18th of July

2011. There was further delay in naming the members of the IEBC Selection Panel, who were finally sworn in on the 8th of August 2011. Although the process of appointing the IEBC Commissioners is currently on going, these delays mean that the delimitation of boundaries for the election of members of the national and county assemblies is also delayed.
- xiii) **Staffing levels:** The relevant bodies have not approved CIC's Staff establishment, which is delaying the recruitment process.
- xiv) **Disregard for public participation:** Failure by the Cabinet and the National Assembly to incorporate into the bills and subsequently the acts, the proposals and recommendations of the CIC to ensure that the legislation is in line with the Constitution resulted in dissatisfaction among the public. Such as in the case of restructuring the KNCHR where after a lot of consultation to bridge divergent view on the number of Commissions it was agreed that Article 59 be restructured into two Commissions.
- xv) **Political interests:** The individual and collective interest of the political class has manifested itself in various ways including the proposed amendment of the election date by the Cabinet for political expediency. Although CIC acknowledges that the Constitution contemplates the possibility of amendment, CIC is also aware that unnecessary amendments made this early would undermine the Constitution. Any amendments to the Constitution must enhance, not claw back on the letter and spirit of the Constitution. CIC is therefore alarmed by the Cabinet decision to propose an amendment to the Constitution to alter the elections date from August to December on the justification to align the Constitution with an administrative process.

7. RECOMMENDATIONS

To ensure effective implementation of the Constitution, the CIC makes the following recommendations aimed at providing a remedy for the challenges and impediments outlined above. All implementing agencies and stakeholders, including members of the National Assembly, should work harmoniously, to guard the sovereign power of the people of Kenya, which is exercised through the Constitution. This requires that:

- i) **Observance of Constitutionalism:** Recommendations on legislations from all stakeholders, especially those of a constitutional nature, should be taken on board by the executive and Parliament.
- ii) **Eliminating unnecessary delays:** As far as possible, delays in the implementation process, including formation of various commissions and appointments to various public offices, should be avoided to ensure the implementation process remains on track.
- iii) **Adherence to agreed timelines:** All the implementers should adhere to the agreed upon timelines to ensure that every implementer has an opportunity to give input on various proposed laws. In this regard, CIC recommends that for the remaining police bills, the relevant line ministries should avail to CIC the drafts bills in time and per the agreed timelines, which will give CIC ample time to plan workshops, engage the public, consult with different implementers to avoid last minute rush when preparing bills.
- iv) **Public participation:** It is important that in line with the letter and the spirit of the Constitution the concerned department or ministry undertake sufficient consultation and stakeholder involvement pre, during and post formulation stages of bills. It is critical to facilitate active participation by the different actors to ensure that the bills submitted to CIC meet the threshold of consultation required under the Constitution. In addition, the constitutional and administrative views of the CIC should be taken on

- board at the drafting stages and subsequently at other stages of policy making, to avoid unnecessary delays.
- v) **Developing policies before legislation:** Line ministries, departments or the state organs concerned, should take the crucial step of developing a policy that would inform the formulation of every bill. This will help the ministry, department or state organ to think through the legal problem, understand the needs analysis and propose the necessary amendment to existing legal and administrative measure
 - vi) **Consultation among implementing agencies:** CIC would like to encourage agencies responsible for generation of bills to consult each other during the development of the bills especially where the bills are interrelated.
 - vii) **Guarding the sovereign power of the people of Kenya:** All implementing agencies and stakeholders, including members of the National Assembly, should work harmoniously, governed by the principle of guarding the sovereign power of the people of Kenya, which is exercised through the Constitution.
 - viii) **Duty to cooperate:** Implementing agencies are advised to take cognizance of the provisions of Section 27 of the CIC Act. They are required at all times co-operate with the CIC in the ensuring the successful implementation of the Constitution. This means that they must respond to any inquiry made by the CIC; furnish CIC with periodic reports as to the status of implementation of the Constitution; and provide any other information that the CIC may require in the performance of its functions.

ANNEXES

Annex I

THE ROLE OF GOVERNMENT INSTITUTIONS AND COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC) IN THE PROCESS OF IMPLEMENTING THE CONSTITUTION OF KENYA

The objective of this communication is to advise all Government Ministries, Parastatals, Regulatory Boards and all Constitutional Commissions and other institutions that have the primary responsibility for generating policies, proposed legislation and administrative procedures required for the implementation of the Constitution of Kenya 2010, on the process to be followed in undertaking the exercise.

The procedures outlined in this communication take cognizance of the values enshrined in Article 10 of the Constitution and which are deemed necessary for the furtherance of the mandate of the Commission for the Implementation of the Constitution (CIC) as spelt out below.

The Commission for the Implementation of the Constitution (CIC) is established under Section 5(1) of the Sixth schedule to the Constitution. The mandate of CIC is stipulated in Section 5(6) of the same schedule and Section 4 of the Commission for the Implementation of the Constitution Act 2010.

The functions of CIC are to: -

- (f) Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;
- (g) Co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement this Constitution;
- (h) Report every three (3) months to the Constitutional Implementation Oversight Committee on:-
 - (i) progress in the implementation of this Constitution; and
 - (ii) any impediments to its implementation; and
- (i) work with each Constitutional Commission to ensure that the letter and spirit of this Constitution is respected; and

- (j) exercise such other functions as are provided for by the Constitution or any other written law.

The mandate of CIC is further amplified by **Article 249 (1)** which sets out the objects of the Constitutional Commissions and the independent offices to include:-

- d) protecting the sovereignty of the people;
e) securing the observance by all State organs of democratic values and principles; and
f) promoting constitutionalism.

Further Article 261 extends the mandate of the CIC as follows:

Article 261 (1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

Article 261 (4) For the purposes of Clause (1), the Attorney-General, in consultation with the Commission for the Implementation of the Constitution, shall prepare the relevant Bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact the legislation within the period specified.

Section 15 (d) of the Sixth schedule requires CIC to ensure that the system of devolved government is implemented effectively.

PROCESS

To enable it carry out its constitutional mandate effectively, CIC advises that the following procedure be followed by the Public Service:-

- (f) Each of the Institutions listed above should familiarize itself with the entire Constitution and its implications and ensure that:-
- a) In the course of performing its duties the constitution is not violated;
 - b) In performing its duties all new and existing policies, laws and administrative procedures that are being applied are consistent with the letter and spirit of the constitution; and
 - c) Implementation of the Constitution is integrated in performance contracts. In this regard, implementing institutions should provide for implementation in its goals, set targets for measuring performance and provide incentives for achieving these targets. The performance contract should incorporate an evaluation model that shall provide feedback on performance and best practice in the implementation process.
- 3) The aforementioned familiarization with the Constitution will enable the institutions to undertake a comprehensive audit of all existing Sessional papers; laws, by-laws and regulations; policies; administrative procedures; government guidelines and circulars relating to its functions and to the sector in which the Institution operates.
 - 3) The intention of the audit is to determine the compliance of such sessional papers; laws, by-laws and regulations; policies; government guidelines; circulars and administrative procedures with the letter and spirit of the Constitution.
 - 11) Upon audit of all such existing sessional papers; laws, by-laws and regulations; policies; government guidelines; circulars and administrative procedures, any language that is inconsistent with the Constitution be identified and a plan for its review developed and the necessary review subsequently undertaken.
 - 12) Each Institution, in consultation with the Attorney General (AG) should also identify any new laws that are required for the implementation of the Constitution. The legislation in question will include but not be limited to those listed in the Fifth Schedule of the constitution. In undertaking this activity the Institutions are also free to consult CIC.
 - 13) Each Institution should identify any new administrative procedures that may be required to implement the constitution.
 - 14) Each Ministry should, within the shortest time possible after issuance of this circular, submit its comprehensive plan for the development and review of Sessional papers; laws, by-laws and regulations; policies and administrative

procedures required to implement the constitution to the following:

- a) The Commission for the Implementation of the Constitution;
- b) The Ministry of Justice, Constitutional Affairs and National Cohesion being the Ministry coordinating the implementation of the constitution within Government;
- c) The Attorney General, and
- d) The Kenya Law Reform Commission,

i) The plans submitted by Ministries should indicate:

- The sessional papers; laws, by-laws and regulations to be reviewed;
- The policies and administrative procedures to be developed or reviewed; and
- Nature of the reviews to be undertaken.

iii. The steps in reviewing the by-laws, laws, sessional papers, policies and administrative procedures already taken and the expected timeframes for outstanding activities,

- 15) In reviewing existing policies, administrative procedures and legislation, and determining the necessity of new laws, institutional policies, administrative procedures and legislation, each Ministry or other institutions participating in such processes should in particular take into account the following:-

- d) The existence of any international treaty ratified by Kenya relating to any matter concerning the sector and which has not been domesticated
- e) The provisions relating to the Bill of Rights in the Constitution and in particular the need to incorporate the requirement for progressive implementation of the socio-economic rights under Article 43 of the Constitution in appropriate legislation
- f) The values and principles articulated in Article 10, Chapter 6 (Leadership and integrity) and Chapter 13 Part I (values and principles of public service) of the Constitution including:-
 - x. Participation of the people;
 - xi. Equity, inclusiveness, human rights, social justice, equality, non-discrimination and protection of the marginalized;
 - xii. The principle of gender equity and regional balance in the consideration of opportunities;
 - xiii. Sharing and devolution of power;
 - xiv. Good governance, integrity, transparency and accountability
 - xv. Sustainable development;
 - xvi. The principles on leadership and integrity in Chapter 6 of the Constitution;
 - xvii. The principles of fairness, prudence, clarity and the need for fiscal responsibility in the management of public resources in Chapter 12 of the constitution; and
 - xviii. Any other principle within the Constitution.

- 16) In determining new policy and administrative procedures, and generating new legislation, every Ministry and every Institution involved in implementing the Constitution should ensure that the process leading to the determination of policy and generation of legislation and administrative procedures is undertaken in a participatory and transparent manner. In this respect, the public and in particular sectoral stakeholders including members of Civil Society Organisations and Community Based Organisations should be given reasonable opportunity to **effectively** participate in the process taking into account all relevant factors, including the nature of the policy, administrative

procedures and legislation, its implications and the applicable time constraints.

Public participation includes any or all of the following:-

- i. Structured process of gathering views of the public during policy formulation or Bill preparation;
 - ii. Stakeholder input via workshops, seminars or other fora;
 - iii. Dissemination of draft Bill to the public for discussion through various media outlets;
 - iv. Focused media debate on policy or draft Bill;
 - v. Credible process of considering public views; and
 - vi. Validation workshops.
- 17) In determining whether any draft legislation forwarded to CIC for review is consistent with the letter and spirit of the constitution, CIC will take the following criteria into account:-
- a) The extent to which the public participated effectively in generating the policy or legislation;
 - b) The consistency of any sessional papers; laws, by-laws and regulations; policies and administrative procedures within the letter and spirit of the constitution;
 - c) The adequacy and sufficiency of the sessional papers; laws, by-laws and regulations; policies and administrative procedures in enabling implementation of the constitution; and
 - d) The impact of the sessional papers; laws, by-laws and regulations; policies and administrative procedures on other laws, institutions and the two levels of government i.e. national and county governments.

Change Management

CIC recommends:-

- 11) That each Institution in consultation with the Government Department coordinating the implementation of the Constitution within government and CIC develops a change management strategy and applies it in all the activities of the Institution.
- 12) The change management strategy should outline how each Institution plans to effect the change necessary for the realisation of the requirements of the Constitution.
- 13) That within the next three (3) months each Institution submits to CIC and to the Government Department coordinating the activities relating to the implementation of the Constitution its change management strategy to enable efficient monitoring of the process of the implementation of the Constitution.
- 14) For the purposes of this Circular change management is a structured and systematic approach to transforming individuals, groups of people or institutions usually after a situational analysis. In the Kenyan case the change anticipated was triggered by the promulgation and coming into effect of a new constitution, **The Constitution of Kenya, 2010**. The goal of change management shall be to entrench the culture of constitutionalism within the institution and in service delivery.

MODE OF COLLABORATION AND WORKING WITH THE CIC

- 15) Each implementing institution should establish an implementation unit that shall oversee the implementation of the work plan and report on the progress and impediments to implementation of the Constitution. The implementation unit shall work with CIC in ensuring that progress is on track.

- 16) The implementation institution shall ensure that it trains its staff to internalize the objectives of implementation of the Constitution. This will ensure that all actors share the same vision and avoid the risk of discordant or conflicting implementation initiatives. Upon request, CIC shall provide advice on the training guidelines to ensure that it reflects the letter and spirit of the Constitution.
- 17) To enable CIC report on the progress of implementation as required by the Constitution, each ministry should submit its implementation report to CIC three weeks before the end of each quarter. For the purposes of this circular, the **first quarter ends on the 30th of June 2011**. The report should be provided in a format to be provided by CIC after consultation with the ministries.
- 18) CIC, in pursuance of its mandate to monitor the implementation of the Constitution, will from time to time undertake an audit of the different sectoral policies, laws, and administrative processes and structures to determine compliance with the letter and spirit of the Constitution.

FRANCIS K. MUTHAURA, EGH
PERMANENT SECRETARY, SECRETARY TO
THE CABINET AND HEAD OF THE PUBLIC SERVICE

Copy to:-

The Rt. Hon. Prime Minister
 H.E. the Vice-President and Minister for Home Affairs
 The Hon. Deputy Prime Minister and Minister for Finance
 The Hon. Deputy Prime Minister and Minister for Local Government
 All Hon. Ministers
 All Hon. Assistant Ministers

Annex II

ADVISORY ON IMPLEMENTING THE CONSTITUTIONAL PRINCIPLES ON AFFIRMATIVE ACTION BACKGROUND

The Commission for the Implementation of the Constitution's (CIC) attention has been drawn to the ongoing debate on the principle of affirmative action in respect of gender representation in elective and appointive bodies as prescribed in **Article 81(b)** of the Constitution. The implementation of this principle in respect of the National Assembly, poses a challenge in light of the provisions of Article 97 of the Constitution. **Article 81 (b)** of the Constitution provides that—

“the electoral system shall comply with the following principles—
(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;”

Article 81 reiterates and reinforces the principle of affirmative action as prescribed in **Article 27(8)** of the Constitution, which provides:

“In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that **not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**”

The two thirds gender ratio is also a requirement at the county level and is adequately provided for in the constitution. **Article 175(c)** states that County governments established under this Constitution shall reflect the principle that “**no more than two-thirds of the members of representative bodies in each county government shall be of the same gender**”. According to **Article 177(1)**, a county assembly consists of, among other members,

- (b) “the number of special seat members necessary to ensure that **no more than two-thirds of the membership of the assembly are of the same gender**”
- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;”

Article 197 (1) also reiterates this principle and states that “*Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender*”.

There are many other provisions in the Constitution that address the principle of affirmative action. Nevertheless, Article 97 of the Constitution does not provide for the methodology to be used to ensure implementation of Article 81 (b) in the event that results of an election for the National Assembly does not achieve the required constitutional gender ratio prescribed by Article 81(b). Unfortunately, none of the State organs charged with the responsibility of implementing the Constitution has a practical solution to this difficulty. Consequently, the Elections Bill cannot be finalized to give effect to the contingency likely to be faced in light of Article 81(b) of the Constitution.

CIC has considered differing interpretations to the effect that :

- (a) the two-thirds principle expressed in **Article 81(b)** is progressive and does not require immediate realisation;
- (b) the principles of affirmative action and the two-thirds gender ratio demand realisation in the forthcoming elections as well as in all future elections to the National Assembly.

CIC is of the view that:

- (1) The principles of affirmative action and gender ratio prescribed in Articles 27(8) and 81(b) of the Constitution are not progressive. They demand immediate realization if the letter and spirit of the Constitution are to be respected.
- (2) The use of the word “progressive” in the Constitution is specific to those provisions to which the principle of progressive realization applies.
- (3) The Elections Bill cannot be finalized without providing an effective mechanism for the implementation of Article 81(b) of the Constitution, which clearly requires that electoral system provides a mechanism for achieving the two-thirds gender ratio.

CIC and other stakeholders have explored various options, but none would effectively address the requirements of Articles 27(8) and 81(b) of the Constitution. Consequently, CIC is of the opinion that the most prudent option would be to import the provisions of Article 177(1) (b) of the Constitution to the provisions of Article 97 of the Constitution (with necessary modifications). The effect of the proposed amendment would be that, if the required gender ratio is not achieved through the elections, political parties would be required to nominate additional Members of Parliament to meet the gender requirement in the Constitution.

Whereas it is proposed to amend Article 97 of the Constitution, it is imperative that the proposed amendment only serves the purpose of realizing the provisions of Article 81(b) of the Constitution. The proposed amendment would greatly benefit from the constitutional formula provided for the composition of County Assembly in Article 177(1) (b). Importing the provisions of Article 177(1) (b) into Article 97 would also require amendment of Article 90 (1) to include the new provision in Article 97.

If amended, Article 97 would now read as follows:

Membership of the National Assembly

“97(1) The National Assembly consists of—

- (a) two hundred and ninety members elected by the registered voters of single member constituencies;
- (b) forty-seven women each elected by the registered voters of the counties, each county constituting a single member constituency;
- (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and
- (d) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the Assembly are of the same gender;

- (e) The Speaker, who is an *ex officio* member.
- (2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a)”

In addition to the foregoing, **Article 90(1)** would require amendment to provide that any extra seats arising out of the application of **Article 97(1) (d)** would be on the basis of party lists.

ADVANTAGES OF THE PROPOSED AMENDMENTS

- (i) The proposed amendment does not require a referendum. It can be carried out in Parliament in accordance with Article 256 of the Constitution.
- (ii) The amendment would save the country from repeat election in the event that the gender ratio prescribed in Article 81(b) of the Constitution in relation to the National Assembly is not realised.
- (iii) The amendment will prevent the possibility of a constitutional challenge on the composition of the National Assembly where the mandatory provisions of Article 81(b) of the Constitution are not met.
- (iv) The clause brings uniformity in addressing the gender quotas in the elective offices at National and County Assemblies.

ANTICIPATED CHALLENGES

The proposed amendment only one year after promulgation of the Constitution raises fears that this might open the floodgates of amendment, which would undermine the sanctity of the Constitution. Whereas this fear is legitimate, the proposed amendment, nonetheless, necessary to facilitate the effective realization of the gender ratio stipulated in Article 81(b).

CONCLUSION

CIC wishes to underscore the following :

- (a) the provision introduced by the amendment will only be invoked if the elections fail to raise the number of men and women to meet the recommended constitutional gender ratio prescribed in Article 81(b) of the Constitution.
- (b) failure to constitute a National Assembly that meets the prescription of Article 81(b) of the Constitution;
- (c) in turn, failure to constitute a legally elected National Assembly means that the Assembly (as elected) would have no power to effect any constitutional amendments (or pass any legislation) to cure the anomaly; and
- (d) consequently, this would present Kenya with a crisis of such magnitude as cannot be wished away.

CIC would like to bring to the attention of Cabinet and Parliament the fact that the full implementation of the Constitution requires the full application of the values and principles of the Constitution, and that this is the only way that we can achieve constitutionalism as envisaged in Article 249 of the Constitution.

At the core of democratic governance, is the principle of equality and inclusion where affirmative action lies. This principle is part of what will ensure social justice. Indeed, the inclusion of the principle of affirmative action in the Constitution takes into account the fact that this country has historically made it difficult for women and other minority groups to be elected.

It's our opinion that any action taken to address the two-thirds principle should be designed to only reinforce implementation. Otherwise, any action purporting to claw back on this principle is outrightly unconstitutional.

Annex III

PRESS RELEASE: PROPOSED AMENDMENTS ON ELECTIONS DATE

CIC wishes to join other Kenyans in condoling with the families and relatives who lost their loved ones at the Sinai fire tragedy. CIC regrets the unfortunate loss of life and property that has now become a regular part of the Kenyan experience. CIC calls on the Government to fulfill its responsibility of ensuring that the rights of citizens to decent housing and sanitation as provided for in Article 43 of the Constitution is realized.

However, while it is the responsibility of government to ensure that the conditions under which the Sinai disaster occurred are eliminated, CIC

calls on Kenyans to also exercise individual and collective responsibility to avoid situations which put their lives at avoidable risk. CIC also appeals to the country's leadership to avoid putting political expediency before the interests and rights of the people of Kenya.

It is such political expediency manifested in the proposed amendment of the election date by the Cabinet which CIC wishes to address. CIC is alarmed by the Cabinet decision to propose an amendment to the Constitution to alter the elections date from August to December.

Although CIC acknowledges that the Constitution contemplates the possibility of amendment, CIC is also aware that unnecessary amendments made this early would undermine the Constitution. Any amendments to the Constitution must enhance, not claw back on the letter and spirit of the Constitution. It is on this basis that CIC would consider supporting an amendment aimed at ensuring the application of the gender equity principle. Even then CIC's desire would be to achieve the gender requirement without a constitutional amendment. Indeed CIC is gratified that the newly appointed Attorney General has publicly expressed his displeasure with piece meal amendments, and looks forward to receiving proposals of other means of achieving gender equity from the Attorney General.

CIC's concern about the proposed amendment of the election date is informed by several facts. First, the issue of an August election date has never been contentious. The date was determined after consideration of the wishes of the people of Kenya which included submissions that a December date interfered with the festive season when Kenyans travel to places where they may not have registered to vote; coincides with religious festivities and the prevailing weather conditions complicate the logistics of ferrying election materials. These reasons remain valid.

Kenyans voted overwhelmingly for an August date while aware of the challenges of preparing for the elections in August 2012. Indeed, it is on this basis that the legislation relating to the IEBC and the elections was scheduled to be completed within the first year to ensure compliance with an August date.

CIC is alarmed by the purported justification to amend the constitution on the basis of the budget cycle. If the budget cycle does not fit into the constitutional framework, what requires alignment with the constitution is the budget cycle, not the Constitution. The people of Kenya should know that if they accept that the constitution be

amended to fit into what are essentially administrative issues, there is likely to be no end to the changes that will need to be made to the constitution to fit into administrative processes.

The contention that the review of boundaries cannot be completed in time for the elections cannot not be a basis for the constitutional amendment. The Cabinet in their capacity as members of Parliament gave IEBC through the IEBC Act, a maximum of four months to

delimit boundaries and must be stopped from claiming that the period is inadequate.

The proposed amendments will have implications for the implementation of the Constitution including devolution. The wish of Kenyans to participate in their own governance through the devolved system of government shall, by this proposal, be delayed in violation of the Constitution.

Equally worrying is the fact that the proposed amendment will lead to uncertainty in the electoral process. The Constitution requires a minimum of 90 days before passage of a constitutional amendment Bill by Parliament. Further, since the bill relates to devolution, the constitution requires that the Bill must be with CIC for at least 30 days before tabling in Parliament. Consequently for the next 4 months, the country will remain uncertain as to the election date and all consequential matters. This uncertainty is unacceptable.

CIC wishes to remind Kenyans that what killed reform in this country were "convenience" amendments of the constitution soon after independence. Kenyans must be vigilant to ensure that we do not replay the 1963 scenario again where due to numerous piece meal amendments, the constitution became a pale shadow of its original self. It is such amendments that Kenyans wanted the Constitution to be insulated against.

If Kenyans accept amendments such as the one on the election date proposed by the Cabinet whose effect is clearly to claw back and undermine the constitution, the Nation will have started on a slippery slope which could well sign the death knell of the new Constitutional dispensation. All progressive members of parliament and the people of Kenya must say NO, to the proposed amendment to the election date or forever remain liable to future generations for starting the mutilation of the Constitution-just as was done to the 1963 Constitution, thereby killing the reform dream.

Commission for Implementation of the Constitution (CIC)
Delta House, Waiyaki Way
P.O. Box 48041-00100
Tel: 0202323510, 0204443216, 0732000313
Email: info@cickenya.org, cickenya2010@gmail.com
Website: www.cickenya.org

Annex IV

REPORT ON AUDIT OF ACTS

The Commission for the Implementation of the Constitution is mandated to (i) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution and (ii) Co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement this Constitution; and in so doing, follows procedures to ensure that bills that are passed are Constitutional. The audit report contained in this annex highlights the Constitutional issues in the laws passed and assented to by the President during this period. The report highlights the integrity issues, which in CIC's opinion are in conflict with the letter and spirit of the Constitution.

Kenya National Commission on Human Rights Act 2011			
Section No.	Provision in the Act	CIC proposal.	Justification.
8(c)	The Functions of the Commission shall be to- “(c) monitor, investigate and report on the observance of human rights in all spheres of life in the Republic”	Amend by inserting the following words at the end of the sub-section: “including observance by the national security organs”	As currently drafted, the section has limited the constitutional powers of the Commission as provided for by Article 59(2)d of the Constitution and may be seen as limiting the Commission’s mandate with respect to security organs.
8	None.	Amend the section to include clause 8(l) that provides KNCHR with the mandate to “work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the constitution and other written laws.”	The KNCHR is mandated to monitor implementation of the UN Convention on Economic, Social and Cultural Rights. By including this provision in the National Commission on Gender and Equality and not in the KNCHR, it suggests that KNCHR does not have the mandate. In addition, although the mandate of setting standards to achieve progressive realization of socio-economic rights is vested in the executive, the KNCHR is further mandated to monitor the implementation of these rights.
30	“The Commission shall not investigate (b) a criminal offence;”	Amend the Act by deleting section 30 (b) which provides that the Commission shall not investigate “(b) a criminal offence”	The mandate of Article 59 commissions includes investigation of human rights violations whether of a criminal or civil nature. For instance the Commission has jurisdiction to monitor implementation of the UN Covenant on Civil and Political Rights (ICCPR) which includes matters of a criminal nature and the UN Convention against Torture and Other Cruel Inhuman Degrading Treatment (CAT), whose entire jurisdiction is about criminal offences. Limitation provided in (b) purports to limit the commission’s investigation mandate of such matters which is unconstitutional
Kenya Citizenship and Immigration Act 2011			
Section No.	Provision in the Act	CIC proposal.	Justification.
7	“A person born outside Kenya shall be a citizen by birth if on the date of birth, that person’s mother or father was or is a citizen <i>by birth</i> .”	Amend by either deleting the entire Section 7 Or and preferably reverting to the earlier provision as was agreed during the roundtable which was: “A person born outside Kenya shall be a citizen by birth if on the date of the birth that person’s parent, grandparent or great grandparent was or is a citizen.”	As it currently reads, section 7 merely reiterates the provision of section 6. In any case, if Section 7 purports to provide for such limitation, it would still be unconstitutional for limiting the rights of persons born out of Kenya as it restricts their parents’ status to that of <i>citizens by birth</i> (as italicized and underlined) contrary to the provisions of the constitution. The clause agreed upon during the roundtable was intended to give effect to Article 14(3) of the Constitution on limitation to descent. It provides a reasonable limitation that extends to the great grandparents which is reasonable and comparable to other jurisdictions.
Commission on Revenue Allocation Act, 2011:			
Section	Provisions of the Act	CIC proposal	Justification
2	Definition of revenue: “Revenue” means all taxes imposed by the national government under Article 209 of the Constitution and any other revenue (including investment income) that may be authorized by an Act of Parliament, but excludes revenues referred to under Articles 209(4) and 206(1)(a)(b) of the Constitution	The definition of the phrase “revenue” be amended by deleting the word “means” and substituting therefor with the word “include”	The definition of revenue is a fundamental issue and forms the backbone of Chapter 11 and 12 of the Constitution in the Context of devolution and revenue sharing. The survival of the county governments shall for the most part be hinged on revenue received from the nationally raised revenue hence the need to apply a liberal meaning to revenue.
5(2)	The chairperson and members of the Commission shall, pursuant to Article 250(5) of the Constitution, serve on a part-time basis.	CIC proposes that the subsection be deleted and substituted for. “Any of the members of the Commission may serve on a part time basis”	To avoid any conflict with Article 250(5) of the Constitution, it is imperative that the Act does not limit the discretion already guaranteed by the Constitution.
5(3)	The chairperson and members of the Commission shall be non-executive and shall perform their functions in	CIC proposes that the subsection be deleted.	The concept of non-executive membership can undermine the spirit of the Constitution as envisaged under Chapter 15 and may

Commission on Revenue Allocation Act, 2011:			
Section	Provisions of the Act	CIC proposal	Justification
	accordance with Article 216 of the Constitution		incapacitate the Commission's ability to carry out its mandate.
6(1)(3)	(1) A person shall be qualified for appointment as the chairperson or a member if the person— (a) holds a degree from a university or an equivalent professional qualification recognized in Kenya;	The words "an equivalent professional qualification" should be done away with from the statute.	The imprecision in the term equivalent can be abused as it lacks necessary certainty. It is also not consistent with qualifications of members of other commissions
27	For the avoidance of doubt and notwithstanding any other provision of this Act, the provisions of this Act shall apply without prejudice to the appointment and terms and conditions of service of the chairperson and members of the Commission in office at the commencement of this Act.	It is important that this section be recast to read as follows: "For the avoidance of doubt, the appointment and terms and conditions of service of the chairperson and members of the Commission, shall continue to apply without prejudice of this Act."	A plain reading of this section shows ambiguity hence the need to reword the same.
The Independent Offices (Appointment) Act, 2011			
Section	Provision in the Act	CIC proposal	Justification
4 (1)(e)	A person shall be qualified for appointment as Auditor General or the Controller of the Budget if such persons (among other things)... is a member in good standing of a professional body for accountants recognized by law"	The requirements in Section should be deleted	The Act, through this section, expands the qualification of the Auditor General and the Controller of Budget which have no constitutional backing. The requirement that the nominees be members of good standing of the professional bodies is ambiguous and gives these bodies the discretion of determining the qualification of who would be appointed members to constitutional offices.
The Elections Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
1	This Act may be cited as the Elections Act, 2011 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint	Delete the words "shall come into operation on such date as the Minister may, by notice in the Gazette, appoint" so that it reads: "This Act may be cited as the Elections Act, 2011 and shall come into operation on gazettment"	Section 9 of the Interpretation and General Provisions Act (Cap 2) provides that an Act shall come into operation either on the day on which it is published in the Gazette or on a day or time specified in the Act. Therefore, the date of enactment of this Act should not be subject to ministerial direction.
2	"nomination" means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act	Amend to read: "nomination" means the nomination by a political party and the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act."	The word nomination is used in three different ways in the Constitution and in the Act. The definition in the preliminary should not reduce it into only one of the three meanings. As such, the definition should show clarity in three different types of nominations as follows: (a) nomination of a candidate by a political party to vie for elective seats (b) nomination of candidates into a party list as provided for in Article 90 (c) Presentation of papers to the Commission from the nominations under (a) & (b) above.
2	"party list" means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 29, 34, 35, 36 and 37;	Amend to read: "party list" means a party list of candidates nominated by a political party through an election conducted and supervised by the Commission and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 29, 34, 35, 36 and 37	Article 90 does not ask a political party to prepare a party list. They are required to nominate and the nominations shall be conducted and supervised by the Commission
(5) (1) (a)	(5) (1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except— (a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the ninety day period immediately before the election and the date of such election;	Insert the words, 'thirty day' in order to capture the election under Article 138 (5), so that it reads: "(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except— (a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the ninety day or thirty day period immediately before the election and the date of such election."	The provision as it currently stands is not practicable given that the election under article 138 (5) is within 30 days
13 (2)	A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission:	A) Delete the words "or of the violation of the electoral code of conduct by the nominated candidate"; B) Also amend to read:	The provision contradicts and makes some penalties ineffective – specifically, the punishment for violation of elections code of conduct and Articles 81, 84 and 91,

The Elections Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
	Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable its candidate before the date of presentation of nomination papers to the Commission.	<p>"A political party shall not change the candidate nominated:</p> <p>2) Provided that in the event of the death, resignation or incapacity of the nominated candidate,</p> <p>(a) before the date of presentation of nomination papers to the Commission, the political party may after notifying the candidate that the party seeks to substitute where applicable, nominate an alternative candidate subject to the Constitution, regulations set out by the Commission and the party rules;</p> <p>(b) after the nomination by the political party of the person has been received by the Commission, the political party may after notifying the candidate that the party seeks to substitute where applicable, nominate an alternative candidate, subject to the Constitution, regulations set out by the Commission and the party rules"</p> <p>C) Add a new subsection 3 to read: "Subject to Article 138 (8) of the Constitution, sub-section (2) (b) shall not apply to the nomination of a presidential candidate."</p>	<p>1) The provision contradicts itself in that it gives provisions for both before and after the submission of papers to the Commission. The provision should only allow for substitution of candidates before the submission of papers to the Commission;</p> <p>2) The provision makes some penalties ineffective, specifically: (i) the punishment for violation of elections code of conduct (see 15, 18, 57, 68, 72 and 110 of this Act) (ii) consequences of deregistration under the Political Parties Act (Sections 8, 21, 30 & 45) (iii) Articles 81, 84, 91 and 138 of the Constitution. (iv) Article 138 (8) (b) specifies that in the event of death of a presidential or deputy presidential candidate, an election shall be cancelled and a new election held.</p>
13 (3)	Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall not be more than twenty-one days after the date of publication of such notice.	<p>1) Substitute 'county election' for governor & county assembly elections;</p> <p>2) Redraft to capture the three levels of nomination at the party level, to the commission and for party lists;</p> <p>3) Delete the word 'or' between the words 'constitution' and 'rules' and substitute with the word 'and'; So that the sub-section should now read: "Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall</p> <p>(a) nominate and submit to the Commission the names of candidates to contest in a presidential, parliamentary or county governor or county assembly election;</p> <p>(b) nominate candidates into party lists in accordance with Article 90 of the Constitution and submit to the Commission the names of the nominated candidates; in accordance with its constitution and rules, which shall not be more than twenty-one days after the date of publication of such notice."</p>	<p>1) The constitution does not recognize the term 'county election'</p> <p>2) The process relating to political parties nomination is not well articulated. The role of the Commission as stipulated in Article 88 (4) of the Constitution is not defined in the Act.</p> <p>3) The provisions of the Constitution are not optional. As it reads, the word 'or' may be interpreted to mean either the Constitution or the rules of the political party can be followed, while in fact, the rules of the political party must conform with the Constitution.</p>
14 (2) (a)	The notice referred to in subsection (1) shall be in the prescribed form and shall specify— the nomination day for the presidential election;	<p>Capture the two levels of nomination required for a presidential candidate, i.e. nomination through elections at the party level and the submission of papers to the Commission, so that it reads: "The notice referred to in subsection (1) shall be in the prescribed form and shall specify— the days for nomination and submission to the Commission the names of candidates for the presidential election:"</p>	<p>Given that there are two levels of nominations used within Constitution (Articles 82, 88) in reference to a presidential nominee, it is unclear which nomination is being referred to. The proposed change would provide clarity.</p>
15 (1)	Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate, before the date of presentation of nomination papers to the Commission.	<p>1) Delete the words "or of the violation of the electoral code of conduct by the nominated candidate";</p> <p>2) Amend the subsection to capture the events to occur before and after presentation of papers to the commission as follows: "(a) A presidential candidate or a political party shall not at any time change the person nominated as a deputy presidential candidate after the nomination of that person has been received by the Commission. (b) In the event of death, resignation or incapacity of the nominated candidate before the date of presentation of nomination papers to the Commission, the presidential candidate or political party may after notifying the candidate that the party seeks to substitute where applicable, substitute its deputy</p>	<p>The provision contradicts and makes some penalties ineffective – specifically, the punishment for violation of elections code of conduct and Articles 81, 84, 91. Article 138 (8) (b) specifies that in the event of death of a presidential or deputy presidential candidate, an election shall be cancelled and a new election held.</p>

The Elections Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
16 (2)	The notice referred to under subsection (1) shall be in the prescribed form and shall specify— (a) the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution; (b) the day for the nomination of candidates for the parliamentary election;	presidential nominee” Capture the three levels of nomination required for a parliamentary election candidate, i.e. nomination through elections at the party level, party list and the submission of papers to the Commission, so that it reads: “The notice referred to under subsection (1) shall be in the prescribed form and shall specify— (a) the days upon which political parties shall nominate candidates and submit a party list in accordance with Article 90 of the Constitution; (b) the days for the nomination and submission of names of candidates for the parliamentary election;	There are three levels of nomination of candidates to vie for seats in a parliamentary election. As such, this should be well captured to be in line with the Constitution.
17 (2)	(2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify— (a) the day for the nomination of candidate for the county governor election;	Capture the two levels of nomination required for a candidate to vie for governorship, i.e. nomination through elections at the party level and the submission of papers to the Commission so that it reads: “The notice referred to in subsection (1) shall be in the prescribed form and shall specify— “the days for the nomination and submission to the commission the name of candidates nominated for the county governor election;”	Given that there are two levels of nominations used within Constitution (Articles 82 and 88) in reference to a county governor nominee, it is unclear which nomination is being referred to. The proposed change would provide clarity.
18	Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate before the date of presentation of nomination papers to the Commission.	Delete the phrase “or of the violation of the electoral code of conduct by the nominated candidate” Amend the to read: (a) before the date of presentation of nomination papers to the Commission, the political party may after notifying the candidate that the party seeks, where applicable, to substitute its candidate subject to the Constitution, regulations set out by the Commission and the party rules (b) after the nomination of the person has been received by the Commission, the political party may after notifying the candidate that the party seeks where applicable, substitute its candidate, subject to the Constitution, regulations set out by the Commission and the party rules.”	The provision contradicts and makes some penalties ineffective – specifically, the punishment for violation of elections code of conduct and Articles 81 and 84 of the constitution While recognizing the provisions of Article 6 of the Constitution, which would require that this provision should be similar to the provisions proposed for amendment to section 15 of this Act, i.e. for the change of a deputy presidential nominee candidate, there may be too many repeat elections in case of multiple deaths, resignations or incapacity after the presentation of papers to the Commission and hence turn out to be costly.
New Section Removal of County Governor	The Act does not provide the procedure for removal of a county governor.	Insert the provision for removal of county governor as previously provided for as follows: “(1) A member of a county assembly, supported by at least one third of the members of the Assembly, may move a motion for the removal of the county governor from office on any of the grounds specified in Article 181 of the Constitution. (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly, the speaker of the county assembly shall, within seven days of a resolution by the county assembly, convene a meeting of the county assembly to hear charges against the county governor. (3) The county governor shall continue to perform the functions of the office of governor pending the outcome of the proceedings required by this section. (4) The county assembly may, by resolution, appoint a special committee comprising eleven of its members to investigate the matter. (5) A special committee appointed under subsection (4) shall- (a) investigate the matter; and (b) report to the county assembly within ten days whether it finds the particulars of the allegations against the county governor to have been substantiated. (6) The county governor shall have the right to appear and be represented before the special committee during its investigations. (7) If the special committee reports that the particulars of any allegation against the county	This is a constitutional requirement to give effect to Article 181 (2) of the Constitution. The people of Kenya have a constitutional right to remove their representatives at both levels of government and there should be a similar provision for removal of a county governor as there is for the impeachment of the President.

The Elections Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
		governor – (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or (b) have been substantiated, the county assembly shall, after according the county governor an opportunity to be heard, vote on the charges. (8) If at least two-thirds of the members of the county assembly vote to uphold any charge, the county governor shall cease to hold office.	
19(2)	The notice referred to under subsection (1) shall be in the prescribed form and shall specify— (a) the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution; (b) the day for the nomination of candidates for county elections; and	Capture the three levels of nomination required for county assembly election candidates, i.e. nomination through elections at the party level, party list and the submission of papers to the Commission, so that it reads: "The notice referred to under subsection (1) shall be in the prescribed form and shall specify— (a) the days upon which political parties shall nominate candidates and submit a party list in accordance with Article 90 of the Constitution; (b) the days for the nomination and submission to the Commission the names of candidates for county assembly elections; and	There are three levels of nomination of candidates to vie for seats in county election. As such, this should be well captured to be in line with the Constitution.
22	(1) A person may be nominated as a candidate for an election under this Act only if that person— (a) is qualified to be elected to that office under the Constitution and this Act; and (b) holds a post secondary school qualification recognised in Kenya.	1) Clarify the exact meaning of 'post-secondary school' qualification 2) Add two subsections to capture the vetting and clearance aspect for candidates as follows: "(c) has been issued with a certificate of clearance by the Ethics and Anti-Corruption Commission; (d) has been vetted by a body authorised to do so."	(1) A post-secondary school qualification could be a certificate for any training received after secondary school, from as short a duration as a three day training course to a certificate in a professional study, to a diploma or a university degree. Clarity is necessary on the exact level of qualification required here. (2) Given that candidates vying for elective seats in this Act are going to be state officers, compliance with the ethical values and principles articulated in Chapter 6 of the Constitution must be a prerequisite for nomination as a candidate. Vetting should be done by a relevant body and a certificate of clearance issued by the Ethics and Anti-corruption Commission.
24(1) (b)	Unless disqualified under subsection (2), a person qualifies for nomination as a member of Parliament if the person— (b) satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act	Delete the words 'this Act' and replace with 'an Act of Parliament' so that subsection (b) it reads "satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament"	Other Acts of Parliament may prescribe moral and ethical requirements. As this is a direct copy of Article 99 (b) of the Constitution, there is need to use the exact wording of the Constitution. The use of 'this Act' may negate the provisions of other relevant Acts of Parliament in the vetting process for candidates who wish to vie for seats in parliament.
25 (1)(b)	Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person— satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act.	Delete the words 'this Act' and replace with 'an Act of Parliament' so that subsection (b) it reads "Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person— satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament"	Other Acts of Parliament may prescribe moral and ethical requirements. As this is a direct copy of Article 193 (b) of the Constitution, there is need to use the exact wording of the Constitution. The use of 'this Act' may negate the provisions of other relevant Acts of Parliament in the vetting process for candidates who wish to vie for seats in parliament.
32(2)	The Commission shall, upon receipt of the symbol submitted to it under subsection (1) approve or reject the symbol	Clearly define the period of time within which the Commission can approve or reject the symbol for independent candidates This could be captured in regulations.	It is not clear in what timeframe after submission of papers the Commission approves or rejects the symbols. In the interest of fairness so as to protect the rights of independent candidates, and to avoid delays, which may be caused due to re-submissions, the period referred to should be clearly defined.
34	The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.	1) Delete subsections (34) (2), (3) and (4) 2) Add a new provision: "The Commission shall be responsible for the conduct and supervision of elections of candidates for seats specified under subsection (1)" 3) Amend subsection 5 to read: "A political party which nominates a candidate for election for the seats specified in subsection (1) shall submit to the Commission a party list in order of the priority in which	The proposed amendments are to ensure conformity with Article 90 of the Constitution.

The Elections Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
		they are listed.” 4) Amend subsection (6) to include the provisions of sub-section (2), (3), and (4) as follows: “The party lists submitted to the Commission under this section shall be in accordance with the constitution, the regulations prepared by the Commission in line with section 109 (d) and nomination rules of the political party concerned” 5) Add a new subsection: “The Commission and an authorized officer of the political party shall sign off the names listed in the party list”	
34 (6)	The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.	Delete the word 'or' and replace with 'and', so that it reads: “The party lists submitted to the Commission under this section shall be in accordance with the constitution and nomination rules of the political party concerned.”	The rules of a political party relating to the nomination of candidates must be in line with the Constitution. The “or” suggests that even if the party list violates the Constitution but conforms to the nominations rules it would be acceptable.
34 (9)	The party list may not contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.	Delete the word 'may' and substitute with 'shall' and amend the provision to read: The party list shall not contain a name of any candidate nominated to vie for a seat under Articles 97 (1)(a) and (b), 98 (1)(a), 137, 177 (1)(a) and 180 (1) of the Constitution	The party list is only for nomination of candidates in line with Article 97 (1) (c), 98 (1) (b), (c), (d) and 177 (1) (b), (c). This is an affirmative action principle to promote the representation in parliament of women, persons with disability, youth, and marginalised communities. As such, persons already nominated to vie for competitive elections cannot also be nominated into the party lists for special seats under Article 90 of the Constitution. Moreover, to provide for only the presidential and the deputy presidential candidates not to appear in the party list is discriminatory against candidates and hence violating the values of Articles 10, 91 (1) (d) to (h) and 92 (i). The provision will violate the national values and principles of fairness, equality before the law, democracy and social justice.
39 (2)	Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.	Delete the word 'may' and substitute it with 'shall' so that the provision reads: Before determining and declaring the final results of an election under subsection (1), the Commission shall announce the provisional results of an election.	This violates Article 86 (b) & (c) of the Constitution. At every election, the Independent Electoral and Boundaries Commission shall ensure that— (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; The above two constitutional provisions suggest that the announcement of provisional results by the Commission is not optional.
43 (6)	This section shall not apply to- (a) the President; (b) the Prime Minister; (c) the Deputy President; (d) a member of Parliament; (e) a county governor; (f) a deputy county governor; (g) a member of a county assembly.	1) Amend to read: “Except for sub-section 43 (1) (d), this section shall not apply to- (a) the President; (b) the Prime Minister; (c) the Deputy President; (d) a member of Parliament; (e) a county governor; (f) a deputy county governor; (g) a member of a county assembly.	Only sub-section 43 (1) (d) should not apply to the named persons. State resources should not be used by any person to initiate development projects at least three months before a general election.
45 (3)	A recall of a member of Parliament under subsection (1) shall only be initiated upon a judgment or finding by the High Court confirming the grounds specified in subsection (2).	Delete this provision.	The provision violates the sovereign power of the people as stipulated in Article 1 of the Constitution and limits the constitutional right under Article 104 of the electorate to recall. It is the right of the people to initiate a recall election, and if all requirements are met, a recall election should be held.
45 (4)	A recall under subsection (1) shall only be initiated twenty-four months after the election of the member of Parliament and not later than twelve months immediately preceding the next general election.	i) Delete the phrases: “twenty-four months” and replace with “at any time ii) Delete the phrase: “not later than twelve months immediately preceding the next general election”, so that the sub-section reads: “Subject to Article 104 of the Constitution, a recall under subsection (1) shall be initiated at any time after the election of the member of	The provision violates the sovereign power of the people as stipulated in Article 1 of the Constitution and limits the constitutional right under Article 104 of the electorate to recall. The Constitution gives power to the electorate to be able to initiate a recall election any time after the election of a member of parliament. As such, a recall election cannot be limited to only two out

The Elections Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
		Parliament"	of five years of the life of an MP in parliament.
45 (5)	A recall petition shall not be filed against a member of Parliament more than once during the term of that member in Parliament	Delete this provision	The sovereign power of the people as stipulated in Article 1 and of the Constitution and limits the constitutional right under Article 104 of the electorate to recall. If an MP is in breach of subsection 45 (2) the member should be recalled immediately, notwithstanding any previous petitions of a recall for the MP.
45 (6)	A person who unsuccessfully contested an election under this Act shall not be eligible, directly or indirectly, to initiate a petition under this section	Delete this provision	This limits the constitutional right of a citizen to file for a petition to recall an MP. An unsuccessful contestant of an election will be a member of the electorate like any other citizen, and as such should be able to file a petition.
46 (1) (c)	A recall under section 45 shall be initiated by a petition which shall be filed with the Commission and which shall be— (c) accompanied by an order of the High Court issued in terms of section 45(3).	Delete this provision	As it currently stands, this provision violates the sovereign power of the people as stipulated in Article 1 of the Constitution. It is the right of the people to initiate a recall election, and if all requirements are met, a recall election should be held.
46 (2) (c)	The petition referred to in subsection (1) shall— be accompanied by the fee prescribed for an election petition.	Delete this provision	As the electorate has a constitutional right to initiate a petition for the recall of a member of parliament, this right should not be pegged to a fee
57 (2)	(2) Any person who commits an offence under subsection (1) shall, in addition to the penalty provided in subsection (1), not be eligible to vote in that election or in the next election.	In line with Article 83 (1) (c) of the Constitution, delete the phrase "in that election or in the next election" and insert "in any election in the proceeding five years" so that it reads: "(2) Any person who commits an offence under subsection (1) shall, in addition to the penalty provided in subsection (1), not be eligible to vote in any election in the proceeding five years"	As it stands, the provision could lead to a violation of Article 83 (1) (c) as: (i) if there are no by-elections, a person may be barred from voting for a longer period than five years. (ii) if there are by-elections, a person may be barred from voting for a shorter period of time than five years.
78 (2)	A person who presents a petition to challenge an election shall deposit— (a) one million shillings, in the case of a petition against a presidential candidate; (b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor; or (c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.	Delete the stipulated fees and amend the subsection to read: "A petitioner who presents a petition to challenge an election shall deposit a fee as may be prescribed by the Court"	If stipulated in law, such fees could be too prohibitive to the ordinary Kenyan citizen and could be a violation of access to Justice under Article 48 of the Constitution,
109 (d)	(d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;	Add a new subsection as follows: (i) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation; (ii) to provide for the manner of nomination for the seats under 82 (1) (d) and the manner of compliance with Articles 84, 88 (4) (d) and (k) and 91 (h) of the Constitution	This is to ensure that the mentioned Articles are captured in legislation as required by the Constitution

The Political Parties Act 2011			
Section	Provision in the Act	CIC Proposal	Justification
I	This Act may be cited as the Political Parties Act, 2011 and shall come into operation on such date as the Cabinet Secretary may by notice in the Gazette, appoint.	Delete the phrase "and shall come into operation on such date as the Cabinet Secretary may by notice in the Gazette, appoint."	Section 9 of the Interpretation and General Provisions Act (Cap 2) provides as follows: An Act shall come into effect either on the day on which it is published in the Gazette or on a day or time specified in the Act. Therefore, the day of commencement of this Act should not be subject to ministerial direction.
11 (7)	Where a political party merges with another political party, a member of the political party that has merged with another political party who is a member of Parliament or of a county assembly, and who does not desire to be a member of the political party formed after the merger shall continue to serve as a	Delete the phrase "shall continue to serve as a member of Parliament or of the county assembly, and may join another political party or choose to be an independent member for the remainder of the term of the member;" and amend the provision to read: "Where a political party merges with	This provision is unconstitutional in terms of Articles 10, 38, 85, 91, 99, 101, 103, 193, 194 because: ▪ A member of parliament or a county assembly who does not desire to be a member of the political party formed after a merger shall be deemed to have resigned from the party within the meaning contemplated under

The Political Parties Act 2011			
Section	Provision in the Act	CIC Proposal	Justification
	member of Parliament or of the county assembly, and may join another political party or choose to be an independent member for the remainder of the term of the member.	another political party, a member of the political party that has merged with another political party who is a member of Parliament or of a County Assembly, and who does not desire to be a member of the political party formed after the merger shall be deemed to have resigned from the political party and may seek a fresh mandate from the electorate through a by-election either as an independent candidate or as a member of another political party."	<p>Article 103 (1) (e) and (3) and 194 (1) (e) and the office declared vacant;</p> <ul style="list-style-type: none"> ▪ Section 14 (5) of the Political Parties Act provides for the circumstances under which a member of a political party shall be deemed to have resigned from the party, specifically paragraph (c), which provides "joins another political party" and paragraph (e) which provides, "promotes the ideology, interests or policies of another political party." ▪ Section 11 (7) of this Act is inconsistent with Article 101(4) of the Constitution which provides that whenever a vacancy occurs in the office of a member of parliament, a by-election shall within ninety days of the vacancy. ▪ One of the basic requirements of a political party under Article 91 (1) (e) of the Constitution is that it should abide by democratic principles of good governance; hence political party decisions must be subscribed to fully by all its members; ▪ The spirit of Articles 10 (2) (a) and 38 (2) of the Constitution is that the will expressed by the electorate, by voting for a candidate belonging to a particular party, should be respected. ▪ Articles 99 (1) (c) and 193 (1) (c) provide that a person is elected into parliament or a county assembly either through a political party or as an independent candidate; hence, a sitting member cannot simply join another party or declare oneself an independent member without being subjected to an election. ▪ Articles 85 provides for the grounds under which a person is eligible to be elected into parliament and a County Assembly as an independent candidate.
14 (2)	(1) A member of a political party who intends to resign from the political party shall give a thirty-days written notice prior to his resignation to— (a) the political party; (b) the Clerk of the relevant House of Parliament, if the member is a member of Parliament; or (c) the clerk of a county assembly, if the member is a member of a county assembly. (2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.	Harmonize sub-section 14 (2) to 14 (1) by deleting the phrase, "receipt of such notice by the political party or clerk of the relevant House or County Assembly" and amend as follows: "The resignation of the member of the political party shall take effect from the date of communication of its acceptance by the Political Party or the Clerk of the relevant House of Parliament or County Assembly or on the expiry of the notice period, whichever is earlier."	The provision of section 14 (2) contradicts and nullifies the thirty day notice prescribed in section 14 (1). Sub-section (1) is a mandatory requirement that any member of a political party who intends to resign shall give a thirty days' notice. The thirty day notice is necessary in any setup, for example, for purposes of handing over office.
17 (3)	A member of a political party may, during working hours and on payment of the prescribed fee, inspect and obtain copies of the records of a political party maintained at its head office or county office.	Delete the requirement for members to pay a fee to inspect the party's records, so that the provision reads, "A member of a political party may, during working hours, inspect the records of the political party maintained at its head office or county office and upon payment of a prescribed fee, obtain copies of the records."	This provision violates Article 35 on access to information as relates to achieving the political rights provided in section 38 (1) (b). A fee should only be payable if a member wants to make copies of records.
22 (2)	Where a political party that has been deregistered under section 21 had representatives elected to Parliament, or County Assembly, such representatives shall continue to serve for the remainder of their term as independents or as members of other political parties.	Delete the phrase "such representatives shall continue to serve for the remainder of their term as independents or as members of other political parties," and amend the provision to read: "Where a political party that has been deregistered under section 21 had representatives elected to Parliament, or County Assembly, the office of such representatives shall be deemed to be vacant and the representatives may seek a fresh mandate from the electorate through a by- election either as an independent candidate or as a member	This provision is unconstitutional as per Articles 10, 85, 91, 99, 103, 193, 194 <ul style="list-style-type: none"> ▪ Article 91 of the constitution provides that political parties are a platform through which democratic values shall be practiced. Allowing elected members whose party has been deregistered to continue being in office is a violation of this provision and may negate the national values and principles of Article 10 ▪ By virtue of Articles 99 (1) (c) and 193 (1) (c) of the Constitution, a person is disqualified from being a member of parliament or county assembly;

The Political Parties Act 2011			
Section	Provision in the Act	CIC Proposal	Justification
		of another political party.”	<ul style="list-style-type: none"> ▪ If a political party is deregistered, a member of the political party should seek fresh mandate from the electorate through a by-election either as an independent candidate or as a member of another political party; ▪ In the interest of fairness and democracy, it is important that once a party is deregistered, its members should not be allowed to continue enjoying the benefits of party membership.
24 (1) (a)	The sources of the Fund are— (a) such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament	Delete the phrase “not being less than” and in instead insert “not exceeding”: (a) The sources of the Fund are— “such funds not exceeding zero point three per cent of the revenue collected by the national government as may be provided by Parliament”	Articles 217 and 218 provide for how funds should be allocated on a yearly basis. The current provision is unconstitutional to the extent that it allocates specific percentage of national revenue to political parties. The provision of the Act may result in a situation that means that political parties are entitled to a limitless fraction of the national government revenue.
(25) (1)	(1) The Fund shall be distributed as follows— (a) ninety five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election; and (b) five percent for the administration expenses of the Fund.	Insert criteria that provides for the determination of party entitlements to the Political Parties Fund on the basis of affirmative action and the promotion of participation of marginalised groups. For example: (a) twenty percent shall be distributed equally among all political parties; (b) seventy five percent shall be distributed proportionately based on the votes secured in the preceding general election as follows— (i) ten percent to political parties which secured at least one senate, national assembly or governor seat; (ii) ten percent to political parties which secured at least two percent of the total parliamentary votes cast; (iii) ten percent to political parties which secured at least four percent of the total county votes cast; (iv) ten percent to political parties whose women candidates secured at least four seats in the National Assembly, excluding the women nominated under Article 90 and the women elected under Article 97(1) (b) of the Constitution; (v) ten percent to political parties whose women candidates secured at least two seats in the Senate, not being the seats referred to under Article 90 and the women elected under Article 98 (1) (b), (c) and (d) of the Constitution; (vi) ten percent to political parties whose women candidates secured at least twelve seats in the county assembly, excluding the women nominated under Article 90 and Article 177 (1) (b) of the Constitution; (vii) ten percent to political parties whose women candidates secured at least twelve seats in the National Assembly, excluding the women nominated under Article 90 and the women elected under Article 97 (1) (b) of the Constitution; (viii) three percent to political parties whose women candidates secured at least six seats in the Senate, excluding the women nominated under Article 90 and the women elected under Article 98(1) (b), (c) and (d) of the Constitution; (ix) two percent to support parties which are provisionally registered; (c) five percent for the administration expenses of the Fund	The provision lacks any incentive to political parties through funding to uphold the letter and spirit of the Constitution with respect to promoting affirmative action in as far as minorities and marginalized groups are concerned, as required by Articles 27, 54 (2), 55 (b), 56 (a) and 100 which contemplate affirmative action to enable disadvantaged groups take part in national affairs. In the case of women, this will also help to administratively solve part of the challenge of how Article 81 (b) shall be complied with in as far as Article 97) is concerned. Moreover Article 91 (e) and (g) and Article 100 require parliament to enact legislation to promote the representation in parliament of women, persons with disability, youth, ethnic and other minorities and marginalized communities. The Political Parties Act, 2011 is one such legislation and the Political Parties Fund is one way through which parties are obligated to comply with the Constitution. Each and every entity is required to meet the requirements, especially those relating to values and the bill of rights, of the Constitution

The Political Parties Act 2011			
Section	Provision in the Act	CIC Proposal	Justification
New subsection 25 (4)	Not provided	Insert a new subsection (4) to read: "The distribution of funds under subsection (1) (b) shall be revised annually"	Each political party's elected members in the elective bodies may change from year to year depending on successful election petitions, recalls, and by-elections. It is therefore important that these changes be reflected in the allocation of funds so as to reflect the constitutional principle of fairness and the right of the people as per Article 104. Moreover, Articles 217 and 218 of the Constitution allocates funds on an annual basis so parties that obtain funds from the consolidated fund should adhere to the same spirit.
26 (1) (c)	(1) Moneys allocated to a registered political party from the Fund shall be used for purposes compatible with democracy including— covering the election expenses of the political party and the broadcasting of the policies of the political party;	Amend this sub-section for clarity by adding a sub-section that states that political party funds shall not be used to directly campaign for a candidate, as follows: "limited to covering the election expenses of the political party and the broadcasting of the policies of the political party, and not for the direct financing of a candidate's campaign"	This provision does not expressly bar use of the funds to cover campaign expenses; hence, parties may assume that they can use political party funds for directly campaigning for a candidate.
37 (3)	The Public Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under subsection (1), it shall send the petition to the President	Delete the phrase "consider the petition and, if it is satisfied that it discloses the existence of a ground under subsection (1), it shall", so that it reads: "The Public Service Commission shall send the petition to the President"	The Public Service Commission should not determine whether or not the grounds for removal of the registrar have been satisfied. Instead, the PSC should simply receive the petitions and send them to the president.
44 (2)	The Chairperson and members of the Tribunal shall be paid such allowances and be reimbursed such expenses as shall be determined by the Judicial Service Commission which determine on the recommendation of the Salaries and Remuneration Commission.	Delete the provision that the words "shall be determined by the Judicial Service Commission which determine on", and amend to read as follows: "The Chairperson and members of the Tribunal shall be paid such allowances and be reimbursed such expenses upon consideration of the recommendation of the Salaries and Remuneration Commission.	Members of the tribunal established under this Act are defined as judicial officers within the meaning of Article 260 of the Constitution. Under Article 172 (1)(b)(i), the JSC cannot determine, review or make recommendations on salaries of judicial officers.

The Independent Electoral and Boundaries Commission Act 2011			
Section	Provision in the Act	CIC Proposal	Justification
20 (1)	Members and employees of the Commission shall be paid such remuneration or allowances as the Salaries and Remuneration Commission shall determine	Amend the provision to reflect the fact that the Commission should only make recommendation of salaries, as opposed to determination of salaries of employees of the Commission	The Salaries and Remuneration Commission has (a) The authority to set the salaries and allowances of state officers (Article 230 (4) (a)) (b) The Commission has no authority to set the salaries of public officers. It only has the authority to advise the national and county governments (Article 230 (4) (b) on such salaries.
Section (2) (1) of the Fifth Schedule	The Commission shall, in addressing the issues arising out of the first review – (a) use as its primary reference material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and (b) use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review.	Add a subparagraph (c) to reflect the fact that the Commission may use, in addition to the mentioned reports, other reports as it may find necessary, as follows, i.e. "The Commission shall, in addressing the issues arising out of the first review – (a) use as its primary reference material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and (b) use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review; and (c) any other relevant material	The provisions of this section are unconstitutional because: (a) It directs the Commission on the manner in which it will carry out its constitutional mandate contrary to Article 249 (2) which grants the Commission independence from any person or authority. The import of Article 249 (2) is that when carrying out its mandate, the Commission is only subject to the constitution. It is admitted that the manner in which the Commission carries out its functions can also be determined by legislation as provided in Article 88 (5) and that such legislation would include the current Act. Such legislation however cannot take away or limit a right given to the Commission by the Constitution. (b) If retained in the current form proposed, the Section would hinder the Commission from curing any defects of a constitutional nature that may be contained in the Boundaries Commission report or the Parliamentary report.
Paragraph (2) (2) (a) of the Fifth Schedule	The issues arising out of the first review are - re-distribution of such wards or administrative units in the affected constituencies as may be appropriate;	Delete the term 'administrative units' so that it reads: "The issues arising out of the first review are- re-distribution of such wards in the affected constituencies as may be appropriate;"	This Section mandates the Commission to review administrative units whereas Article 89, which grants the IEBC the mandate of reviewing boundaries, makes no mention of administrative units, and indeed, the term is not used in the Constitution
Paragraph (2)	subject to the Constitution,	Delete the specificities of this paragraph.	The paragraph directs the Commission on the

The Independent Electoral and Boundaries Commission Act 2011			
Section	Provision in the Act	CIC Proposal	Justification
(2) (b) of the Fifth Schedule	addressing issues of new 89(6) of the Constitution but at the same time ensuring that such a process shall – (i) take into account the provisions of Article 89(7)(b) of the Constitution that requires progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for the purposes of the first review; (ii) not be subject to new definitions of cities, urban areas and sparsely populated areas or to new population figures (iii) be subject to the use of enumerated national census figures and not projected figures.	i.e. sub-paragraphs (i) to (iv) so that it reads as in the IEBC Bill, 2011, i.e. “addressing issues of new constituencies falling outside the population quota as provided for in Article 89 (6) in reference to the national census data”	manner in which it should carry out its constitutional mandate and prescribes limits on how that mandate will be exercised without any constitutional basis, which is a violation of Article 249 (2) on the independence of Commissions
Paragraph (3) (6) of the Fifth Schedule	Within fourteen days of the expiry of the period provided for in sub-paragraph (5), the Commission shall, taking into account the resolutions of the National Assembly under sub-paragraph (5), prepare and submit its final report outlining the matters set out in sub-paragraph (1)(a) for publication in the Gazette.	Amend to be in line with the provisions of the IEBC Bill, 2011, as follows: “Within fourteen days of the expiry of the period provided for in sub-paragraph (5), the Commission shall, after considering the views received under paragraphs (2) and (5), prepare and submit its final report outlining the matters set out in sub-paragraph (1)(a) for publication in the Gazette.	This Section purports to direct the Commission on what should be included in the Boundaries report by providing that, in its final report, the Commission will “take into account” the resolutions of the National Assembly before preparing its final report for gazette. This Section is an affront to the Commission’s independence that is protected under Article 249(2) b. Since parliament will have taken a primary role in the setting up of the Commission, and will have expressed its sentiments through the Parliamentary Report, and considering the contentious and personalized nature of the boundaries issue, the constitution anticipates that the Commission shall be guided only by the Constitution in determining boundaries. Where members of Parliament give any recommendations on the Boundaries report, these can only be considered by the Commission but they are not binding on the Commission as the Section suggests. Members of Parliament, like all other people of Kenyan shall in any event have an opportunity to challenge the report in a court as provided for in paragraph 4 and 5 of the Fifth schedule.

National Police Service Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
4	The maximum number of officers shall be determined by the National Security Council in consultation with the National Police Service Commission.	Insert the following new section: The maximum number of officers shall be determined by the National Police Service Commission in consultation with the National Security Council.	Article 246(3) gives the National Police Service Commission the overall control over the recruitment and appointment of members of the Service.
5	The composition of the Service shall, so as far as is reasonably practicable— (a) uphold the principle that not more than two-thirds of the appointments shall be of the same gender, and (b) reflect the regional and ethnic diversity of the people of Kenya.	Delete the words “so as far as is reasonably practicable” Insert a new subsection (2) to read as follows: (2) The service shall take measures including affirmative action programmes and policies to ensure the realization of subsection (1).	The provision violates the gender, ethnic and regional balance principles in Articles 27(8) and 246(4) of the Constitution, which is intended for immediate realization and not progressive realization.
13. (7)	(7) For purposes of appointment of the Deputy Inspector General before the establishment of the Commission, the procedure set out in the Third Schedule shall apply, except that the provisions in the Schedule requiring approval by	Delete section 13(7).	The National Police Service Commission shall undertake the recruitment of the DIGs. Delete the section, as it serves no purpose. To comply with Article 245(3) of the Constitution, which states that, the

National Police Service Act, 2011			
Section	Provision in the Act	CIC Proposal	Justification
	Parliament shall not apply.		Commission shall recommend DIGs for appointment by the President.
16	Where the Inspector-General is suspended from office under section 15 or incapable of performance of his or her functions, the President may appoint the Cabinet Secretary to act as the Inspector-General for a period not exceeding three months.	The section has prolonged the replacement by the Cabinet-Secretary, to three (3) months Delete the words "The Cabinet Secretary" and substitute therefore "The Commission shall appoint one of the Deputy Inspector-Generals"	The section violates 245(2)(b) and (4). The Inspector-General has independent command over the service, to ensure the independence is maintained and noninterference by the executive, the replacement, in the absence of the IG, should be by a DIG, appointed by the Commission.
40.7	(7) Each station shall have a facility to receive, record and report complaints against police misconduct.	Insert the following: "Each station shall have a facility to receive, record and report complaints against police misconduct and report these to the Independent Policing Oversight Authority."	It violates Article 244 of the Constitution. To comply with Article 244 of the Constitution and guarantee effective oversight, and to promote transparency and accountability.
108(1)	The President may , on the application of the Government of a reciprocating country, order such number of police officers as the President may think fit to proceed to that country for service therein for the purpose of assisting the police service of that country in a temporary emergency.	Delete the subsection and substitute therefore the following new subsection: The President may, on the application of the Government of a reciprocating country, order such number of police officers as the Inspector General may, in consultation with the Commission, and in accordance with the relevant laws think fit to proceed to that country for service therein for the purpose of assisting the police service of that country in a temporary emergency.	The Inspector-General has the independent command of the Service pursuant to Article 245(2) of the Constitution. It is unconstitutional to take away the powers of the Inspector-General enshrined in the Constitution, through an Act of Parliament.
109(1)	The President may make application to the Government of a reciprocating country for police officers of that country to be sent to Kenya for service therein for the purpose of assisting the Service in a temporary emergency.	Delete the words "the president" and substitute therefore the words "Upon request of the Inspector-General," immediately before the words "the President may"	The Inspector-General has the independent command of the Service pursuant to Article 245(2) of the Constitution. The proposed change also ensures that the request is need based and the Inspector General is consulted.
Fifth Schedule 9(a)	Arrest and Detention Rules. 9. A detained person shall have the right to— (a) communicate with and receive visits of members of the family subject only to reasonable conditions and restrictions (when exceptional needs of the investigation so require) which shall be spelt out in the Standing Orders subject to the approval from the Ministry;	Delete the words "subject to the approval from the Ministry"	To ensure that the independence of the Service from the executive as envisioned under Article 245 of the Constitution is guaranteed. The Executive, through the Cabinet Secretary should only offer policy directions.

Ethics and Anti-Corruption Commission Act 2011			
Section	Provisions in the Act	CIC Proposal	Justification
3(3)	There is established an Ethics and Anti-Corruption Commission.	The headquarters of the Commission be provided for: Insert a new subsection (3) to read as follows: (3) The headquarters of the Commission shall be in the Capital City of Kenya, but the Commission shall ensure access to its services in all parts of the Republic in accordance with Article 6(3) of the Constitution.	This is to ensure consistency with other Commission laws as all other Commissions established after promulgation of the Constitution, have a similar provision.
6 (2)	The joint forum of religious organizations referred to in subsection (1)(h) shall consist of representatives of – (a) the Supreme Council of Kenya Muslims; (b) the Kenya Episcopal Conference; (c) the National Council of Churches of Kenya; (d) the Evangelical Fellowship of Kenya; and (e) the Hindu Council of Kenya.	Provide for the Public Service Commission to facilitate the forum in making the nomination of a representative.	This proposal is intended to ensure that there is no delay in the nomination of a member of the panel, in the event that the forum is unable to meet.
6(1)		Insert a new subsection 2A to read as follows: (2A) Notwithstanding subsection (1)(d), the representative of the Judicial Service Commission shall not be a judicial officer.	To ensure separation of powers between arms of government.
11 (1) (a) i.e. (iii)-(iv)	11. (1) In addition to the functions of the Commission under Article 252 and	Insert the following new paragraph: "(iii) develop procedures that give effect to	The rationale is that under Article 79, the Commission is mandated to ensure

Ethics and Anti-Corruption Commission Act 2011			
Section	Provisions in the Act	CIC Proposal	Justification
	Chapter Six of the Constitution, the Commission shall— (a) in relation to State officers,— (i) develop and promote standards and best practices in integrity and anti-corruption; (ii) develop a code of ethics;	Chapter Six of the Constitution;”	compliance with, and enforcement of the provisions of Chapter six, which includes disciplinary procedures under Article 75 and procedures required under Article 80(a)
11(o)	On the certificate of compliance with Chapter Six.	Insert a new paragraph (o) to read as follows: “upon request, issue a certificate of compliance or any other evidence to show that a person has complied with Chapter Six of the Constitution;”	The rationale is that the Commission is specifically mandated by Article 79 of the Constitution to ensure compliance with Chapter Six of the Constitution.
11(3)	The Commission may cooperate and collaborate with other State organs and agencies in the prevention and investigation for corruption.	Insert the word “prosecution” immediately after the words “agencies in the”	Allows the Commission to cooperate with other Government agencies that have prosecutorial powers.
33 (2) (b)	Provides for the regulations that the Commission may make	Insert a new paragraph (b) to read as follows: “disciplinary procedures as provided for under Chapter Six of the Constitution.	To comply with Chapter Six of the Constitution.
Insertion of a new section.		Insert a new section, to establish a duty on public officers to cooperate with the Commission. The section to read as follows: “A public officer, State organ or State office shall at all times cooperate with the Commission in ensuring that the mandates of the Commission as required under Chapter Six of the Constitution, this Act or any other written law are achieved, and in particular— (a) respond to any inquiry made by the Commission; (b) furnish the Commission with periodic reports as to the status of compliance and enforcement of Chapter Six of the Constitution; (c) provide any other information that the Commission may require in the performance of its functions under the Constitution and any other written law. (2) An public officer who breaches any of the provisions of this Act shall be deemed to be in contempt of Parliament and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.	The Commission for the implementation of the Constitution Act, 2011 has similar provision, which imposes a duty on public officers, State officers and State organs to cooperate with CIC. With regards to the enforcement of, and compliance with Chapter Six of the Constitution, the Commission will certainly require cooperation with other State organs. CIC considers the clause necessary in a bid to ensuring that the spirit and letter of the Constitution, and in particular Article 79, are achieved.

LIST OF MINISTRIES THAT HAVE SUBMITTED STATUS OF IMPLEMENTATION REPORTS

REPORTING FOR THE 3rd QUARTER

No.	Ministries that submitted status reports	No.	Ministries whose status reports are yet to be received
1	Ministry of East African Community	1	Ministry of Agriculture
2	Ministry of Co-operatives Development	2	Ministry of Energy
3	Ministry of Environment and Mineral Resources	3	Ministry of Fisheries Development
4	Ministry of Gender, Children and Social Development	4	Ministry of States for Immigration and Registrations of Persons
5	Ministry of Housing	5	Ministry of State and for Planning, National Development and Vision 2030
6	Ministry of Public Health and Sanitation	6	Ministry of Information and Communication
7	Ministry of Labour	7	Ministry of Forestry and Wildlife
8	Ministry of Justice, National Cohesion and Constitutional Affairs	8	Ministry of Regional Development Authorities
9	Ministry of Finance	9	Ministry of State for National Heritage and Culture
10	Ministry of Transport	10	Ministry for Local Government
11	Ministry of Special Programmes	11	Ministry of Home Affairs
12	Ministry of Nairobi Metropolitan Development	12	Ministry of State for Provincial Administration and Internal Security
13	Ministry of Medical Services and Ministry of Public Health and Sanitation.	13	Ministry of State for Defence

No.	Ministries that submitted status reports	No.	Ministries whose status reports are yet to be received
14	Ministry of Youth and Sports	14	Ministry of Roads
15	Office of the Prime Minister	15	Ministry of Tourism
17	Ministry of Water and Irrigation	16	Ministry of Livestock Development
18	The National Assembly	17	Ministry of Lands
19	Ministry of Higher Education, Science and Technology	18	Ministry of Trade
20	Kenya Revenue Authority	19	Ministry of State and for Public Service
		20	Attorney General
		21	Registrar- Judiciary
		22	Ministry of Education
		23	Ministry of Northern Kenya and other Arid Lands

REPORTING FOR THE 2nd QUARTER

No.	Ministries that submitted status reports	No.	Ministries whose status reports are yet to be received
1	Ministry of East African Community	1	Ministry of Agriculture
2	Ministry of Energy	2	Ministry of Co-operatives Development
3	Ministry of Fisheries Development	3	Ministry of Environment and Mineral Resources
4	Ministry of States for Immigration and Registrations of Persons	4	Ministry of Gender, Children and Social Development
5	Ministry of Information and Communication	5	Ministry of State and for Planning, National Development and Vision 2030
6	Ministry of Forestry and Wildlife	6	Ministry of Higher Education, Science and Technology
7	Ministry for Local Government	7	Ministry of Housing
8	Ministry of Justice, National Cohesion and Constitutional Affairs	8	Ministry of Public Health and Sanitation
9	Ministry of Lands	9	Ministry of Regional Development Authorities
10	Ministry of Livestock Development	10	Ministry of State for National Heritage and Culture
11	Ministry of Special Programmes	11	Ministry of Labour
12	Ministry of Tourism	12	Ministry of Home Affairs
13	Ministry of Water and Irrigation	13	Ministry of State for Provincial Administration and Internal Security
14	Ministry of State and for Public Service	14	Ministry of State for Defence
15	Ministry of Northern Kenya and other Arid Lands	15	Ministry of Medical Services
16	The National Assembly	16	Ministry of Roads
17	Ministry of Education	17	Ministry of Nairobi Metropolitan Development
		18	Ministry of Transport
		19	Ministry of Finance
		20	Ministry of Trade
		21	Ministry of Youth and Sports
		22	Attorney General
		23	Registrar- Judiciary

Annex V**AUDIT OF ACTS OF PARLIAMENT****Annex VI****COMMISSIONERS OF THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION**

CHAIRPERSON: MR. CHARLES NYACHAE

VICE-CHAIRPERSON: DR. ELIZABETH MULI

Dr. Muli is the Convener of the Executive and Security Thematic Team.

MAANA KIBAAYA LAIBUTA

Mr. Laibuta is the Convener of the Judiciary and Constitutional Commissions Thematic Team.

PROF. PETER WANYANDE

Prof. Wanyande is the Convener of the Devolved Government Thematic Team.

KAMOTHO WAIGANJO

Mr. Waiganjo is the Convener of the Public Finance Thematic Team.

Ms. CATHERINE MUYEKA MUMMA

Ms. Mumma is the Convener of the Bill of Rights and Citizenship Thematic Team.

DR. IBRAHIM M. ALI

Dr. Ali is the Convener of the Land and Environment Thematic Team.

Mr. PHILEMON MWAISAKA, EBS, SS

Mr. Mwaisaka is the Convener of the Public Service and Leadership Thematic Team.

DR. FLORENCE OMOSA

Dr. Omosa is the Convener of the Representation of the People & the Legislature Team.

Copies of the quarterly report.

GAZETTE NOTICE NO. 2056

**THE COMMISSION FOR THE IMPLEMENTATION OF THE
CONSTITUTION**

FOURTH QUARTERLY REPORT

OCTOBER – DECEMBER 2011

FOREWORD

I am pleased to present the fourth quarter report for the Commission for the Implementation of the Constitution. This report provides a summary of the many activities carried out by of the Commission for the period October – December 2011.

The end of this quarter marks one year from the appointment of CIC Commissioners. It has been a year of many successes for the implementation process as well as a number of lessons for the Commission. Above all, the Commission can proudly say that the achievements and gains far outweigh any challenges and potential impediments faced. Having passed a number of laws to establish constitutional bodies and offices, other changes in this quarter include the appointment of members to Constitutional Commissions and State Offices, the narrowing of policy differences and successful addressing of key issues pertaining to Devolution Bills and the Public Finance Management Bill. The open manner in which interviews for applicants for positions in The Independent Electoral Boundaries Commission, The Commission on Administrative Justice, The Gender and Equality Commission and The Ethics and Anti-Corruption Commission, served as a demonstration that the country is operating under a new constitutional dispensation. As a nation we continue to remind ourselves that indeed it is no longer business as usual.

On the legislative front, having successfully worked with other implementation partners including Parliament to ensure the passage of the laws required to be passed by the end of the first year from promulgation of the Constitution, CIC received other Bills scheduled for enactment by February, 2012; the bills are now undergoing CIC internal review and stakeholder consultations. These include the Teachers Service Commission Bill, the Consumer Protection Bill (a private members Bill), the Public Service Commission Bill, the Devolved Government Bill, the Intergovernmental Relations Bill and the Intergovernmental Fiscal Relations Bill. As part of the process of reviewing the Bills CIC visited a number of counties with a view to engaging with the people of Kenya and getting feedback on the bills and expectations of the people in the Constitution implementation process.

One of the emerging challenges to the Constitution implementation process is the emerging trend by the executive as well as certain members of the political leadership to move proposals for amendment to the Constitution that are not demonstrably for the benefit of the people of Kenya, and some of which would have the effect of undermining fundamental pillars of the Constitution such as devolution.

In this report we acknowledge significant progress made in both the legislative and administrative procedures, parts of the mandate of the Commission. We also observe challenges and impediments which if not addressed, will constitute a major set-back to the process.

The submission of quarterly reports is not an end in itself but a means to an end. This report and indeed the other earlier reports contain specific and general recommendations on how to address issues arising out of the implementation process. I call upon the executive and legislature to consider and address the issues raised in this and the earlier reports. It is only when the issues raised in quarterly reports elicit reactions and responses that the reports will have a meaning to implementers and the people of Kenya.

To the people of Kenya, I remind you that the Constitution embodies your sovereignty. You are called upon to be vigilant and attentive to the exercise of your sovereign power and to Constitution implementation process.

I would like to commend and thank my Commission colleagues and the staff of the Commission for their dedication to the nation's highest interests, which continues to make the success of the Commission, and this report, possible.

Charles Nyachae
Chairperson

EXECUTIVE SUMMARY

The fourth quarter of 2011, which effectively marks the last quarter of CIC's first year of operations, witnessed heightened activities at the Commission. The end of the quarter was also an important opportunity for the CIC to look back to its first year of operation and reflect on the lessons learnt and to review and think through emerging issues that will need to be addressed in 2012 and beyond to ensure that implementation is not derailed. Consequently, while this Report serves as a quarterly report it also contains observations and reflections regarding CIC work throughout 2011. The recommendations provided are also of medium to longer-term nature. This report should therefore act as a scorecard and through it the Commission hopes to sustain constant dialogue with implementers and the people of Kenya.

The report, following the introduction, opens, in Part 2, with an overview of the activities of the CIC in the fourth quarter of 2011. These are reported in two categories, namely, Commission-wide activities, including engagement with stakeholders, audits of laws/policies/procedures and public interest litigation as well as institutional development activities and thematic activities. The thematic activities include work on the development of laws/policies and administrative procedures, engagement with stakeholders, including at the county level, donor support and an overview of the thematic activities planned for the first quarter of 2012.

Part 3 of the Report, titled "One year on: Lessons learnt and emerging issues in the implementation of the Constitution" focus on the lessons that CIC has learnt in its first year of operation with respect to the discharge of its mandate and the overall efforts to implement the Constitution. It also discusses a number of systemic issues, including a range of recurring challenges and impediments that require some reflection. Reflecting on these lessons, issues and challenges is important to ensure that the people of Kenya are empowered to continue playing their critical role of ensuring the implementation of Constitution of Kenya 2010 is realised. The lessons-learnt and emerging issues are discussed under five headings. Lessons and issues relating to: the implementation process; amending the constitution; the devolution process; resistance to change and continuing impunity; and public participation.

Part 4, which concludes the substantive part of the Report, is concerned with how the momentum that has been built on constitutional implementation so far can be maintained going into 2012 and beyond. These will require:

- ❖ Constant vigilance by all Kenyans;
- ❖ Holding constitutional office holders, especially the Attorney General (AG), to their constitutional responsibilities to the people of Kenya;
- ❖ Good leadership at all level of government and society;
- ❖ Maintaining the implementation of the Constitution as a top national agenda;
- ❖ Proper strategies for change management;
- ❖ Ensuring that the national values and principles enshrined in the Constitution apply to all including elected leaders;
- ❖ Improved reporting to the CIC by state organs regarding their implementation efforts; and
- ❖ Massive civic education across the country.

The main parts of the report are complimented by five annexes, which provide additional information, including with respect to the mandate of CIC and its Commissioners, the status of enactment of legislation, the legislation that need to be enacted by 26th February 2012 and the status of submission of quarterly reports to the CIC by implementing agencies.

I. INTRODUCTION

This report is the fourth in a series of quarterly reports by the Commission for the Implementation of the Constitution (CIC) to the Parliamentary Constitutional Implementation Oversight Committee (CIOC) and the people of Kenya to inform them about the progress being made in the implementation of the Constitution of Kenya, 2010. Through the preparation and dissemination of the quarterly reports, the CIC has kept the public apprised throughout 2011 on how the Constitution is turning into reality and, ultimately, ensured that the

Commission is accountable to the people of Kenya in line with the national principles and values set out in the Constitution.

This Fourth Quarterly Report also marks one year since the CIC was constituted. For this reason, in addition to providing information on the activities of the Commission during the last quarter of 2011, this particular Report also provides an opportunity to reflect on the lessons that have been learnt in the first year of the Commission's work and to flag out systemic issues that may have significant implications for the implementation process. This is particularly important because many of the important challenges that were highlighted in the first, second and third quarterly reports, including resistance to change by some stakeholders, lack of consensus on the content of bills and deliberate misinformation to the public by some parts of the executive, has persisted. In this context, the Report also offers a range of suggestions and recommendations on how to address these systemic issues as well as other challenges going forward.

The Report is made up of four main parts in addition to the foreword, executive summary and this introductory section. The parts are as follows:

- ❖ Part 2 provides an overview of the activities of the CIC in the fourth quarter of 2011. These include both Commission-wide activities and activities under the eight thematic areas under which the CIC's work is divided.
- ❖ Part 3 of the Report discusses the lessons that have been learnt and some of the systemic issues that have emerged in the first year of CIC's work. These lessons and issues relate to process and substantive matters as well as to the challenges that the Commission and the implementation process faces.
- ❖ Part 4 focus on how the momentum towards full implementation of the Constitution of Kenya, 2010 can be maintained and, in particular, how the challenges and impediments to implementation can be addressed going forward.

Five Annexes compliment these main parts of the Report. The first annex contains the text of an open letter to the Attorney General (AG) regarding the mandate and functions of the CIC following claims by the latter that, among other things, the CIC has no role in the implementation of administrative procedures required to implement The Constitution of Kenya, 2010 and that its mandate is limited to giving advisory opinions to the Attorney-General, which opinions the Attorney-General may choose to ignore or reject. The second annex contains a summary of the status of submission of quarterly reports to the CIC by implementing agencies. As noted in the third quarterly report, CIC has requested ministries, state agencies and constitutional commissions to submit status reports to allow the CIC to provide a comprehensive picture of implementation process in the quarterly reports. The third annex provides an overview of the legislations that need to be enacted by February 2012 as per the Fifth Schedule of the Constitution. The fourth annex provides the status, as at the end of 2011, regarding the enactment of Constitutional implementation legislation. The fifth and final annex provides information about the CIC and its Commissioners, including the mandate, mission and vision and of the Commission.

2. OVERVIEW OF CIC ACTIVITIES IN THE FOURTH QUARTER OF 2011

"The Constitution Will Best Serve The People Of Kenya And Deliver Its Promises Where Each Of Us Makes An Individual Commitment To Enhance A National Ethics Based Culture. This Commitment Must Extend To A Relentless Defence Of The Constitution Including The Necessary Vigilance That Will Ensure Its Full And Faithful Implementation In The Letter And Spirit."

Excerpt of the CIC Chairperson's speech at the Eighth Annual Conference On Ethics And Integrity.

In the fourth quarter of 2011 the CIC continued to engage with the people of Kenya and various implementing agencies as well as carrying out a range of activities in line with its mandate. During the reporting period, the Commission's work can be divided into two categories of activities, namely: Commission-wide activities and activities under the various thematic areas. This part of the Report provides information regarding activities in both categories.

2.1 Commission-wide Activities

Commission-wide activities during the fourth quarter of 2011 were of two kinds. Engagements with various stakeholders and institutional development activities.

2.1.1 CIC engagements with stakeholders

CIC had various engagements in the form of meetings with various stakeholders ranging from meetings with parliament to the executive through to meetings with the public. Some of key meetings and a summary of the main issues discussed are as follows:

❖ Meeting with the Speaker of the National Assembly

On 23rd November 2011 the CIC attended a consultative meeting with the Hon. Speaker of the National Assembly, Hon. Kenneth Marende. The meeting was at the request of CIC which wanted to discuss ways of collaborating with members of parliament to ensure that the process relating to the development of private members' Bills takes into account the constitutional values and principles including the key constitutional principle of public participation. The Commission was also interested in clarifying its role with respect to the development of private members' Bills. The Hon. Minister for Justice, Cohesion and Constitutional Affairs, the Hon. Attorney General (AG) and the Chairman to the Kenya Law Reform Commission (KLRC) also attended this meeting at the invitation of the Speaker.

Since the promulgation of the Constitution there have been a range of private Members' Bills seeking to address matters relevant to the implementation the Constitution. As a matter of law these Bills, like Bills generated by the executive expected to be consistent with the constitution in compliance with Article 2(4). So far six private members' Bills have been passed by parliament and another set of more than 20 are before the House. These Bills have, however, not been subjected to the process agreed upon by the key constitutional implementation agencies for the development of Bills for the implementation of the Constitution. Considering the Constitutional provisions on representation, the CIC acknowledges the value of private members' Bills and the authority of parliament in the development and passing of these Bills. CIC's interest was therefore NOT to undermine this role of Members of parliament but to hopefully get to an agreement with Parliament on ways of enriching this process to bring it to fully resonate with the new Constitutional order that demands people centred processes and effective public participation in development of all laws and policies. In requesting the meeting with the Speaker, the CIC was hoping that Parliament would be agreeable to amending its orders to allow for broader consultation on these private members' Bills.

Regrettably this was not to be. In particular, during the meeting the CIC delegation was taken aback by some of the reactions to the proposal for CIC's involvement and broader public participation in private members' Bills affecting the Constitutional implementation process. The Hon. Attorney General opined that CIC had no business trying to monitor Constitutional compliance of private members' Bills. In his view, the office of the AG and the CIC and other non-elected officers are answerable to the elected leaders and on his part *"where his view conflicts with that of elected leaders, he will cede his view in place of the views of these leaders."* This was a disturbing opinion given that all state organs, including parliament, are subject to the Constitution and have the responsibility to conduct themselves in a manner that upholds spirit of the Constitution. In the case of CIC and other constitutional commissions the Constitution clearly states that their responsibility is to preserve the sovereignty of the people, securing the observance by all State organs of democratic values and principles; and promote constitutionalism.

During the meeting, the CIC was also informed by the team from Parliament that the procedure relating to private members Bills is the one under the old constitution and the window of opportunity for public participation is limited to the 30 days after publication of such Bills. It was argued that members of parliament are not obligated to develop private Members Bills in consultation with CIC or anybody else. It was suggested that private member Bills would be forwarded to CIC at the publication stage and not before that. Bills are published by the Government printer in Nairobi and averagely cost KShs. 200 per copy. This means that these Bills are reasonably accessible to most Kenyans particularly those outside Nairobi. The limitation of public participation role to the 30 days after the publication of a private

members Bill does not, in the view of CIC, meet the constitutional requirement of public participation. CIC believes that members of parliament, in exercising their legislative authority to generate private members Bills should also ensure that the constitutional values and principles in Article 10, read together with Article 94 (which affirms that legislative power belongs to the people of Kenya), are respected.

Notwithstanding the negative outcome at the meeting, the CIC acknowledges, and is grateful to, individual members of parliament who have, at their own initiative and in recognition of CIC role, worked with Commission and other stakeholders in developing their private Bills.

❖ Meeting with the Prime Minister

The CIC, during the reporting period, held a meeting with the Prime Minister as one of the government ministries/departments with responsibility under Article 43 of the Constitution (economic and social rights). The aim of the meeting was to find out efforts being made by the executive to implement economic and social rights and to undertake the responsibility enshrined in Article 21 of the Constitution regarding the duties of the state and state organs to implement rights and fundamental freedoms.

Following the meeting, the Office of the Prime Minister agreed, in principle, to move the process for the implementation of socio-economic rights so as to ensure that ordinary Kenyans benefit from opportunities and rights in the Constitution.

❖ Meeting With the Attorney General

CIC paid a courtesy call to the new AG Hon. Prof. Githu Muigai following his appointment. At the meeting CIC and the AG discussed modalities of engagement and of working together with respect to Constitutional implementation.

❖ Public Forums in Kisii

On 7th December 2011, CIC participated in a public forum hosted by the Kisii Catholic Church at St. Vincent's church. The participants were church leaders from the Kisii and Nyamira Counties. On 9th December 2011, CIC participated in a second forum at the Nyabururu Catholic Church, which brought together mainly women community leaders. The purpose of both forums was for CIC to give raise awareness on the Constitution, with special attention to the electoral system and process, and the devolved governance structure.

Participation at the Forum was part of CICs effort to ensure that the people of Kenya are actively involved in the implementation of the Constitution. The participants were urged to be actively involved in monitoring the implementation of the Constitution, which is a duty of all the people of Kenya. The meetings underscored the fact that special voter education is necessary before the next General Election so that all Kenyans are able to vote in an informed manner, and also to draw to the public's attention the provisions relating to electoral offences laid out in the Elections Act, 2011. In addition, the forums highlighted the fact that women need to seek elective posts in the forthcoming elections to make the gender provisions of the Constitution a reality.

❖ Dinner to celebrate the gains for women under the Constitution of Kenya, 2010

On Sunday, 4th December 2011, the Commission hosted a dinner at the Intercontinental Hotel Nairobi with the theme "Celebrating and Safeguarding the Gains for Women under the Constitution." H.E. Graca Machel, a member of the Panel of Eminent African Personalities, was the chief guest at the event. She and delivered a motivational and inspiring keynote address on the topic *'fulfilling the peoples promise, let every woman in Kenya feel the benefit of the Constitution.'* The dinner was attended by women from different sectors of the Kenyan society.

In her address, the Chief Guest called upon Kenyan women to be steadfast in their quest for inclusion and participation in nation building as a significant part of the Kenyan citizenry. She decried tokenism in application of women's rights and further called upon all women to support each other in safeguarding their rights in the Constitution.

❖ Roundtable Meeting with the Editors Guild

CIC held a media briefing on 17th November 2011. The objective of the meeting was to discuss the mandate of the CIC and the role of the media facilitating the implementation of the Constitution. The meeting discussed various issues and how to keep the Constitution implementation agenda topical for purposes of keeping the people of Kenya abreast of the implementation process and other issues emerging in the implementation of the Constitution.

Among the issues discussed were:

- The need to conduct comprehensive civic education to enhance the understanding of the Constitution by Kenyans;
- The need for public and media vigilance to ensure the letter and spirit of the Constitution are adhered to; and
- The need for CIC and the media to engage in a structured manner to ensure that issues relating to the implementation of the Constitution remain current and gets adequate attention and coverage in the media.

❖ Kenya National Dialogue and Reconciliation Conference

CIC Commissioners attended the National Dialogue and Reconciliation Conference organized by the Panel of African Eminent Personalities and the Kofi Annan Foundation. The conference, divided into a series of review meetings, was convened to take stock of the implementation of the agreements and the reform agenda resulting from the Kenya National Dialogue and Reconciliation process following the 2007/2008 post-election crisis.

Various Kenya's leaders, members of the Government, parliamentarians, business and religious leaders, members of civil society, private sector and the media, as well as members of diplomatic corps and representatives of international organizations attended the conference.

❖ Meeting with the Kenyan Diaspora in the United States of America

During the reporting period, the CIC participated, through presentations and panel discussions, in the Kenya Diaspora Conference in Washington, D.C. and other diaspora meetings in cities with a large population of Kenyans in the United States of America (U.S.A.) The Conference was an important avenue to interact with Kenyans, update them on progress in the implementation of the Constitution and urge them to actively participate in the implementation of the Constitution.

The African Union (AU) Constitutive Act forms part of Kenya's law by virtue of Article 2(6) of the Constitution (treaties and conventions ratified by Kenya). Article 3 of the AU Constitutive Act calls upon its signatories to, "invite and encourage the full participation of the African Diaspora as an important part of our continent in the building of the African Union." The Act as read together with Article 1 of the Constitution call for an inclusive approach in implementing the Constitution to ensure that all Kenyans exercise their rights effectively. It is on this basis that the Kenyan Embassy in the U.S.A convened the Conference and meetings with the general objective of informing, encouraging and catalyzing Kenyans in the Diaspora to effectively contribute to Kenya's development, including the implementation of the Constitution and Vision 2030.

Specifically, the Conference had the following objectives:

- To facilitate the growth and development of productive networks and linkages of the Diaspora with Kenyan institutions, organizations and firms, in different areas (youth, medical, academia, technology, engineering, etc..) for national development;
- To highlight and encourage the achievements of Diaspora in U.S.A in different fields and to explore how their resources, knowledge, skills, competences, technology, among others, can be harnessed systematically for Kenya's political, economic and socio-cultural development;
- To launch partnership between the Kenyan government, civil society and private sector with the Diaspora in implementing Kenya's Vision 2030 and ensure that the Diaspora remains

engaged in the development of Kenya – from remittances to investment and entrepreneurship;

- To enhance the Diaspora's role as the country's premier goodwill ambassadors; and
- To sensitize the Diaspora on the implementation and implications of the new Constitution for them.

❖ **Breakfast meeting with the Executive Leadership Network Governance Group**

The CIC attended a breakfast meeting organized by Executive Leadership Network (EL-NET) Governance Group on 23rd November 2011. The theme of the breakfast meeting was "The role of the Church in Constitutional Implementation". Different leaders of churches and church organizations in Nairobi attended the meeting. CIC took the opportunity to highlight the important role that the church plays as a stakeholder in the implementation of the Constitution and to reiterate the importance of the Church as a civic educator and hence the need for a proper understanding of the Constitution by the leadership.

❖ **Other Engagements**

In addition to the engagements discussed in detail above, CIC, during the fourth quarter of 2011, was also involved in other events organized by public bodies, the private sector and civil society. These include: The 8th Annual Conference on Ethics and Integrity organized by the Strathmore University; the Methodist University Graduation Ceremony; and the APSEA Annual Dinner under the theme 'setting the stage for ethics and integrity in the 2012 electoral processes and future leadership of Kenya'. In particular, the CIC's Chairperson and other commissioners have been called upon to make presentations on constitutional issues and topics in these meetings. These fora serve as an important part of communicating the mandate of CIC and discussing various topical issues including the status of implementation and roles to be played by different actors.

2.1.2 *Audit of laws/policies/procedures and Public interest litigation*

The submission of status reports by ministries has enabled the CIC to begin auditing laws, policies and procedures in various sectors. The reports submitted so far (Annex II) have covered key matters ranging from efforts to familiarise staff with the Constitution to integration of the Constitution in performance contracts through to efforts at change management. The CIC continued, in the fourth quarter, of 2011 to follow up with various ministries to submit status reports and also with the audit function.

In exercising its mandate the CIC is empowered to move to court. Accordingly CIC has moved to Court, joined suits filed by other parties and been enjoined as an interested party on matters of interpretation of the Constitution. The various key cases in which CIC is involved include:

❖ **Constitutional Petition No. 65 of 2011**

In the Matter of the Construction, Interpretation and Determination of the Actual Date of the Next General Elections (Between Milton Mugambi Imanyara & others and the Attorney-General and others)

The Petitioners filed three separate cases in the High Court and Supreme Court seeking a declaration on the date of the next general elections. On 15th November, the Supreme Court directed that the three petitions should be consolidated and heard together before a three Judge bench as they relate to the same subject matter, the question of the date of the next general election.

The case came up for hearing on 15th and 16th December before Justice Isaac Lenaola, Justice Mumbi Ngugi and Justice David Majanja. The court restricted itself to addressing the following main issues on the matter:

- When shall the next general election be lawfully held?
- When does the date of the current Parliament come to an end?
- Does the President have the power to dissolve the current Parliament?

- When shall the current Members of Parliament cease to enjoy the benefits and emoluments of their office?
- Whether the new Constitution can be amended to alter the date of the general election without reference to the people of Kenya through a referendum.

Petitioners concluded making their submissions on the issues and the court shall issue judgement on 13th January 2012.

❖ *Constitutional Petition No. 102 of 2011*

In the matter of the Recommendation by the Judicial Service Commission of Persons for Appointment to the Offices of Judges of the Supreme Court under the Constitution of the Republic of Kenya (Between Federation of Women Lawyers of Kenya (FIDA-K) & others and the Attorney-General and others)

The Federation of Women Lawyers-Kenya (FIDA), being the 1st Petitioner and others filed before the High Court a petition to seek the correct interpretation, full tenure, meaning and effect of Article 27 of the Constitution of Kenya 2010 and the proper approach to the interpretation of the Constitution in the specific case of the nomination of judges of the Supreme Court. The Petitioners argued that in order to comply with the Constitutional requirements of Article 27, the Judicial Service Commission (JSC) was under a duty to ensure that in the final analysis of its recommendation no gender fell below 33.3% and no gender exceeded 66.7%. It was contended that with two women and 5 men in the Supreme Court, it means that the percentage composition of the female gender is 28.57% whereas the percentage composition of the male gender is 71.43%, therefore, the recommendation by the JSC is in breach of Article 27 on the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender. Judgment was issued in the case and although it was not in favour of the Petitioners. FIDA-Kenya therefore filed an appeal contesting the Court decision.

The matter was mentioned on 7th December 2011 at the Supreme Court before Justice Mohammed Ibrahim and Justice Smokin Wanjala, the Court directed that the parties file and serve supplementary submissions ahead of the hearing on 26th and 27th January 2012.

❖ *Constitutional Petition No. 145 of 2011*

In the matter of Article 2(1), (2) and (4) of the Constitution and in the matter of Article 22, 23, 27(1) and (2), 47(1) and 258 of the Constitution and in the matter of Article 261(4) of the Constitution and in the matter of Section 2(3)(b), 14(1) and (2) and 15 of the Sixth Schedule to the Constitution (between the Commission for the Implementation of the Constitution and the Attorney-General and others)

CIC, being the Petitioner filed, on urgency basis, a Constitutional reference objecting to the AG's unconstitutional conduct in the preparation of two Bills, namely the Contingencies Fund and County Emergency Funds Bill, 2011 and the National Government Loans Guarantee Bill 2011. The Commission is seeking to restrain the Speaker of the National Assembly (named as the 2nd Respondent from dealing with the two Bills in any way connected with and enactment of the Bills). The Honourable Lady Justice Karanja certified the application as urgent and issued conservatory orders to preserve the subject matter of the Petition and to stop the unconstitutional acts being perpetrated by parties who should be safeguarding and upholding the Constitution. Consequently, the aforesaid interim orders restraining the 1st and 2nd Respondents from taking further steps in connection with the enactment of the two Bills were granted until the hearing of the application. The order and proceedings of the case were served upon the Respondents and the Government printer. However the Court order was ignored and the two Bills enacted into law and assented to.

The petition case came up for hearing on 9th December 2011 before Lady Justice Mumbi Ngugi for the mention. The purpose of the mention was to confirm compliance with earlier directions of the Court regarding filing of the Commission's Supplementary Affidavit and exchange of submissions. The Commission has filed and served the Supplementary Affidavit. In the premises, the Court admitted the Commission's Supplementary Affidavit and ordered that the Commission file and serve its written submissions. The Respondents were required to file and serve their respective written submissions by the 23rd December 2011. The matter shall be mentioned

on 6th February 2011 to confirm compliance with directions and to take a date for highlighting of submissions. The Court extended the interim orders until the hearing date.

❖ *Constitution Petition No. 137 of 2011*

In the matter of Payment/Variation/Waiver/Variation of Taxation by Members of Parliament and State/Public Officers and in the matter of the Principles of Public Finance: Openness, Equality, Fairness, prudence and Responsibility in the Application and imposition of Taxation (between Rev. Dr. Timothy Njoya & others and the Attorney-General and others)

Rev. Timothy Njoya, being the 1st Petitioner sought interpretation of the following provisions of the Constitution: whether under the Constitution all State Officers including Members of Parliament are under an obligation to pay tax as per Article 210 as read with 201 and 230 of the Constitution; whether the Executive has the powers or authority to exempt any 'State Officer' from payment of tax, whether the current Constitution or the transitional clauses saves or exempts the Members of Parliament from payment of tax, whether it would be illegal and unconstitutional for the Government to settle the tax burden of Members of Parliament using public resources or tax payer's money and whether it would be illegal and unconstitutional for the Members of Parliament to derail or frustrate the debate or passage of bills for full implementation of the Constitution on account of the demand by the Kenya Revenue Authority to pay taxes.

The matter came up for hearing on 8th September 2011 where the 1st Petitioner requested leave of the Court to amend the Petition to withdraw names of Members of Parliament who have since settled their tax arrears and to enjoin in the suit Members who had been left out but had not settled their tax obligations. The matter has been forwarded to the Chief Justice to appoint a three Judge bench and for directions.

2.1.3 *Institutional development activities*

One of the key strategic outcomes for the CIC is to achieve well functioning secretariat. In this context, CIC has continued to make significant steps to strengthen its Secretariat. In the fourth quarter of 2011 important progress was recorded in a number of areas.

❖ **Human Resource**

CIC was, for the most part of 2011 operating with staff mainly seconded from other government agencies. In the last quarter of the year following the development of organogram for the Secretariat, the Commission, in line with Article 232 of the Constitution, commenced the competitive recruitment of staff starting with the administration section. In this regard, nine (9) management positions were advertised on 7th October 2011 with the application process closing on 4th November 2011. The selection process to fill these positions will be completed in early 2012.

❖ **Financial management**

The CIC, as noted in the third quarterly report started operating with an independent vote in July 2011. During the reporting period, the Ministry of Finance developed and circulated to Ministries/Departments/Agencies guidelines on the preparation of the 2012/2013 budget and the 2014/2015 Medium Term Expenditure Framework. On the basis of these guidelines, CIC begun the process of developing its budget and expenditure framework for the relevant period, including undertaking County visits to allow for public participation in budget-making process. Overall, CIC will be seeking approximately Kshs.1.138 billion for 2012/13 based on forecasted needs.

❖ **Media and communications**

CIC continues to maintain and operate a vibrant and interactive website. On the website, the people of Kenya can access all Bills under review at CIC and post their comments and views. During 2011 CIC also successfully developed the Commissions Logo, Tagline and Lyrics as part of its corporate branding strategy. The tagline for CIC is 'Utekezaji wa Katiba, Jukumu la wote' and the lyrics, in Swahili, go as follows:

*Katiba yetu ni msingi bora
Inaangazia demokrasia*

*Na maadili ya kitaifa
Ya uzalendo pia na umoja
Chini ya umongozi wa busara
Bila ubaguzi kwa yeyote
Katiba hii ni yetu
Na kuitekeleza jukumu la wote
Nayo mamlaka ni ya mwananchi
Sisi sote tuitelekeze*

During the fourth quarter of 2011, CIC also commenced the development of a communication strategy that will ensure that implementation process and activities are adequately communicated to all Kenyans.

❖ **Offices**

Since its inauguration the CIC has been operating one office in Nairobi located at Delta House in Westland. This office was inherited The Commission will be relocating to new premises in the first half of 2012. In addition, the CIC, in order to better serve and engage with the public, CIC, in the fourth quarter of 2011, made a policy decision to establish county offices. Accordingly, CIC is developing a framework and modalities to ensure that its services are accessible to the people of Kenya in all the 47 counties.

2.2 *Thematic Activities*

As stated in earlier quarterly reports and in other communications by the CIC, the Commission's work is eight (8) thematic areas around which teams, each led by a Commissioner, has been put in place. Thematic teams have, in the last quarter of 2011, undertaken crucial implementation activities towards realization of the mandate of the Commission. This subsection provides an overview of the various activities undertaken by the thematic teams during the reporting period. For each thematic area the report provides an update on the status of Bills or enactment of laws, other activities including engagement with stakeholders, donor support and an overview of the planned activities for the first quarter of 2012.

2.2.1 *Activities under the Human Rights and Citizenship Thematic Area*

A. Development of legislation/policies/procedures

During the reporting period, one Bill relating to human rights and citizenship matters was enacted while several Bills underwent review by the CIC. These include:

❖ **Kenya Citizens and Foreign Nationals Management Service Bill**

This Bill was presented and debated in parliament after which it was passed 1st October 2011. The Act provides for reforms in the administration and management of matters relating to births and deaths, identification and registration of citizens, immigration, refugees and marriages as well as the creation and maintenance of a national population register. Since its enactment, the Ministry of State for Immigration and Registration of Persons has informed CIC that the Taskforce on Citizenship and Related provisions of the Constitution has been mandated to develop regulations for implementation of the Citizenship and Immigration Act 2011 and the Kenya Citizens and Foreign Nationals Management Service Act 2011. CIC is awaiting the receipt of the regulations which will be reviewed in accordance with the agreed upon procedure for review of bills and policies.

❖ **Registration of Persons, Immigration and Refugees Related Bills**

The Identification and Registration of Persons Bill 2011, Births and Deaths Registration Bill 2011 and the Refugee Bill 2011 were developed and forwarded to CIC by the Ministry of State for Immigration and Registration of Persons during the fourth quarter of 2011. Although the Taskforce on Citizenship and Related provisions held stakeholder consultations in the development of the bills, it had not held consultations on the actual draft bills. For this reason, CIC resolved to subject the three bills to stakeholder consultations and also undertook field-missions on the provisions of the Refugee Bill 2011.

The Identification and Registration of Persons Bill 2011 and the Births and Deaths Registration Bill 2011 are particularly important and

urgent in view of the fact that the bills relate to matters linked to elections. The bills are focused on the access to identification documents that are essential for the realization of the right to vote. It is therefore important that the process for obtaining identification documents are streamlined and finalized to facilitate registration of all those eligible to vote in the 2012 general elections.

The main issues arising from the review of the two bills included the need to review the bills and formulate a coordinated accurate and credible system of registration for all persons as well as certain aspects considered unconstitutional in the draft Identification and Registration of Persons Bill 2011. Also, in the course of consultations, the idea of a consolidated bill surfaced and it was agreed that CIC would engage the Ministry of State for Immigration and Registration of Persons to consider this idea.

With respect to the Refugee Bill 2011, CIC, in partnership, with the office of the AG and the KLRC and the United Nations High Commission for Human Rights (UNHCR) undertook a field visit to Dadaab Refugee Camps on 4th October 2011 and Kakuma Refugee Camp on 6th – 7th October 2011 to consult with refugee communities and the organizations working with the refugees as well as the host communities on issues relating to the bill.

We note that the issues relating to the Refugee Bill are under discussion when the country is at war against the Al-Shabaab and CIC hopes that international principles relating to the protection of refugees will prevail. It is also important to ensure a balance between protecting the rights of refugees while ensuring that this is not at the detriment of the host community.

At the time of the field-missions, Kenya was facing an influx of refugees particularly from Somalia who were fleeing drought situations in their war-torn countries. The mission would therefore not have come at a better time since CIC was able to witness the challenging humanitarian situation in congested camps particularly with regards to women and children. The impact on the host community was also evident. In the interactions, both the host community and the refugees raised particular issues and challenges. The issues and challenges raised by the host community and the refugee communities respectively are as follows:

➤ Issues raised by Host Community:

- Insecurity due to the lack of security vetting mechanisms at the border. This was exemplified by abduction of vehicles in the Dadaab area and increased incidences of banditry.
- Environmental degradation caused by the influx of refugees with livestock; increased demand for firewood for cooking and depletion of water dams through overconsumption of water.
- Erosion of cultural beliefs and practices resulting particularly from the prevalence of relief workers within the regions.
- Registration of members of the host community as refugees in order to access basic amenities. This result in the need for deregistration on attaining 18 years of age in order to get Kenya identification papers.
- Child labour particularly by refugees in Kakuma Refugee Camp.
- Preferential treatment of refugees including ease of access to basic services e.g. health, education.
- Employment of Refugees and personnel from other parts of the country without due consideration of the local community.

● Issues raised by the Refugee Community:

- Lack of a mechanism to address the plight of refugees who have been in the camps for long periods and whose future is uncertain.
- Challenges in exercising mobility rights. Although refugees can access Refugee ('Alien') Cards and can apply for a movement pass that allows them to travel out of the camp to other parts of Kenya most law enforcement officials do not recognise these passes. They are also not able to use their alien cards to conduct normal business activities such as opening and operating bank accounts.

- The lack of work permit means that Refugees are forced to engage in illegal trade practices including trading without licenses.
- Refugees who work as teachers as well as providers of other service within the camp receive lower pay compared to locals who are undertaking the same work and who are adequately compensated.
- The refugee community raised concerns over exploitation and harassment by police officers.

The issues arising from the field mission were discussed with the Ministry of State for Immigration and Registration of Persons and also formed the basis for discussion on refugee matters at a stakeholder's forum held between the 14th and 18th of November 2011.

Overall, due to the immense number and radical nature of contributions made towards the three bills at the stakeholder forum CIC has established a technical committee to review the bills and incorporate the issues raised by the stakeholders. The revised bills will then be subjected to a second stakeholder forum in January 2012. Thereafter, an internal CIC plenary will be held before the bill is forwarded to the AG by February 2012.

❖ Family law related bills

There are three bills that came up for review during the fourth quarter of 2011 with relation to family matters. These are the Marriage Bill 2011, the Matrimonial Property Bill 2011 and the Family Protection Bill 2011. There is particular pressure for finalisation of these bills since they touch on a range of issues related to the Bills of rights and gender-relations.

On receipt of the bills, CIC posted them on its website and received overwhelming responses from the stakeholders. In light of the great interest and public response to the drafts, the Commission resolved to hold a two-day stakeholder forum between the 31st October 2011 and the 1st of November 2011. The forum attracted the participation of various religious leaders, cultural leaders, women organizations, and the Ministry of Gender, Children and Social Development, among others.

Among the key issues that arose from the stakeholder discussions was the need to ensure that the principle of equality is realized in the bills. The stakeholders also noted that although Article 45(4) of the Constitution of Kenya 2010 provides for the legislation to include "marriages concluded under any tradition, or system of religious, personal or family law;" the bills did not adequately provide for the recognition of marriages concluded under the traditional systems and the religious systems including both the Islamic and the Hindu marriages.

CIC is currently awaiting the recommendations and proposals from the various religious groups on the minimum principles on marriage in order to review these and other proposals. A technical team comprising representatives from CIC, the Office of the AG, KLRC, the Ministry of State for Immigration and Registration of Persons, Ministry of Gender, Children and Social Development, Hindu Council of Kenya, Supreme Council of Kenya Muslims, Catholic Secretariat, Law Society of Kenya, and FIDA has been established. The technical team has been tasked to review the bills in light of the recommendations and proposals arising from the stakeholder forum. A subsequent stakeholder forum will be held in January 2012 to review the revised bills after which CIC will hold an internal plenary for final review and forward the bills to the AG for further action.

❖ Ratification of Treaties Bill

During the third quarter, as reported in that quarter's report, the Bill of Rights and Citizenship team processed the Ratification of Treaties Bill. The Bill was however not deliberated upon in Parliament. Within the quarter under review, CIC participated at a stakeholder forum that was organized by Hon. Millie Odhiambo, M.P. to obtain views from stakeholders on issues relating to the Bill. The Bill currently awaits parliamentary review and CIC hopes that the issues highlighted at the stakeholder forum will be considered during the deliberations in Parliament.

❖ Freedom of Information and Data Protection

CIC received the Freedom of Information Bill and the Data Protection Bill from the Permanent Secretary in the Ministry of Information and Communication. The Permanent Secretary informed the CIC that the bills had also been forwarded to Cabinet. As part of its review process CIC held consultative meetings with the office of the AG, the KLRC and relevant civil society organisations.

In its review, CIC noted that the Freedom of Information is heavily focused on the establishment, functions, powers and financing of a Freedom of Information Commission, which has the effect of compartmentalizing human rights notwithstanding their inter-related and indivisible nature. CIC also noted the need to consider consolidation of the two bills into one as well as the need to establish a more suitable enforcement mechanism for the right of access to information. CIC was also informed that the International Commission for Jurists (ICJ) had developed a separate Freedom of Information Bill.

To address the above issues, among others, CIC held meetings with the Ministry of Information and Communication to discuss the way forward. These issues also formed the basis for discussion at a technical forum that brought together a targeted group of stakeholders on 4th November 2011. The forum also served as a platform to consider the amalgamation of the bills from the Ministry of Information and Communication and the version from the ICJ. The forum agreed upon the need to constitute a technical committee to review and redraft the bill subject to the deliberations. The technical committee held a retreat on 5th – 6th December 2011 to review the bills, which have been revised pending stakeholder consideration in February 2011. An internal plenary will be held before the bill are forwarded to the AG.

❖ Consumer Protection Bill 2011

Under the Fifth Schedule to the Constitution a consumer protection law is to be developed within four years following the promulgation of the Constitution. On 9th September 2011 the Hon. Jakoyo Midiwo, M.P., Consumer Protection Bill was published as a private members bill. Although this Bill was not scheduled for review in this quarter, it drew the attention of the thematic team. CIC was advised that the Bill had initially been presented before parliament prior to the promulgation of the Constitution and had also been scheduled in the order paper. CIC, while recognizing the legislative authority of members of parliament to generate private members bills held consultations with the Honourable Member on the need for public participation in the formulation of the Bill.

Thereafter, CIC mobilized stakeholders from various sectors on short notice for a two-day stakeholder forum that was held on 7th – 8th December 2011 to review the issues arising from the Bill. Among the key issues identified by the stakeholders was the need to ensure that all the provisions relating to Article 46 of the Constitution (consumer rights) are adequately addressed and, in particular, Articles 46(c) and (d). It was noted that this could be done using the outline provided by Article 46 itself. Secondly, it emerged that the movers of the bill were interested in providing protection to particular sectors and to this extent, the Bill was heavily focused on protection of consumers in specific sectors to the exclusion of others and in this regard it was proposed that the Bill should focus on the principles relating to consumer protection in general as opposed to a sectoral approach.

By the end of the stakeholder forum it was clear that the Bill needed to be subjected to further consultation. In this context, CIC is currently in discussions with Hon. Midiwo to allow for further consultation and input into the Bill. Follow-up will take place in the first quarter of 2012.

❖ National Policy and Action Plan on Human Rights

One of the policies that CIC received from the Ministry of Justice, National Cohesion and Constitutional Affairs within the last quarter was the National Policy on Human Rights. CIC reviewed the policy against the human rights principles in the Constitution and international human rights treaties to which Kenya is a party. Among the key findings from the audit of the policy is that the policy does not adequately reflect a rights-based approach as contemplated in the Constitution of Kenya 2010. The methodology adopted gives precedence to international instruments to the detriment of the Bill of Rights contained in the Constitution. The audit also noted that the

Policy does not contemplate a role for the counties which are a central feature in the new structure of the state and hence a critical part of ensuring the realisation of human rights.

CIC participated at a one-day forum organized by the Ministry of Justice, National Cohesion and Constitutional Affairs on 1st December 2011 and made recommendations along the above lines. In particular, CIC suggested that the following issues be taken into account in the revision of the Policy.

- The Constitution of Kenya is rights-based and the Policy should outline all the rights enumerated in the Constitution including socio-economic rights and provide the government's position with regards to their implementation. In this regard, the Policy should be an overarching document on human rights since implementation of human rights is a mandate for all. This therefore requires that as far as possible the National Policy on Human Rights is cross-referenced with the Vision 2030 and shared to all implementers who will appreciate their role in the implementation of human rights as they do the Vision 2030.
- The policy should set out, in as detailed a fashion as possible and with the necessary nuance, the issues, programmes and the approaches that the two levels of government, that is the national and county, will pursue to fulfil obligations relating to each right.
- Because of the nature of the policy, as a government document, and the government as the bearer of the bulk of the obligations relating to human rights should provide an interpretation of what the government perceives the Bill of Rights and relevant provisions demand of it. It thus must outline specific issues goals to be achieved, standards to be met, among other issues.
- With regard to the rationale for the Policy, the framework should clarify the state actors that bear duties and should proceed on the basis that the Bill of Rights binds all organs of the state subject to Article 19 of the Constitution. The Policy should also be sensitive to the fact that the Constitution is underpinned by certain fundamental values and principles, which should be incorporated in the policy. CIC also noted that the policy should take into account other sections of the Constitution including those relating to leadership and integrity, representation of the people, devolved government, public finance, public service and national security.

Other considerations suggested by the CIC include the need for (i) broad formulation of the government's position and what is to be pursued with respect to each right; (ii) Constitutional obligations and international obligations relating to the right; (iii) Relevant Legislation in which the policy should list relevant laws and set out a plan for legal reform required; (iv) Designate the implementers; (v) Broad statement on challenges and how these are to be addressed; (vi) Resources (including institutional and human) and budgetary requirements.

B. Other activities under the human rights and citizenship thematic area

The human rights and citizenship thematic team also undertook a range of other activities in the fourth quarter of 2011. Among others these included:

❖ Elaborating a Roadmap for the implementation of Socio-Economic Rights

As part of the efforts to get the executive to implement its obligation under Article 21 on putting in place the mechanism for the progressive realization of socio-economic rights, the thematic team met with two ministries (the Ministry of Finance and Ministry of Education) in addition to CIC's meeting (mentioned in part 2.1 above) with the Prime Minister. During the meetings, it was clear that both ministries appreciate the need to refine the planning and budgeting processes in order to achieve the delivery of the Article 21 responsibility. The Ministry of Finance was particularly keen on a mechanism that would facilitate coordinated and joint planning of the different sectors to ensure optimum and prudent use of resources for better service delivery that will ensure progress in the achievement of socio-economic rights.

CIC is hoping to meet with more ministries and also for an appointment with His Excellency the President to discuss the issue of

socio-economic rights. Overall, the hope is that the following issues, which formed the basis for discussion with the two ministries, will guide the approach to the implementation of Article 21.

- The responsibility to implement the Bill of Rights, including socio-economic rights, is immediate. The state must therefore begin the process of ensuring that the mechanism for facilitating the enjoyment of these rights is put in place without delay.
- Socio-economic rights as provided in Article 43 of the Constitution and the relevant ratified international treaties are to be achieved progressively. In the view of CIC, reference to progressive realisation is not an excuse to postpone action; instead it requires immediate action for the state to organize its planning and budgeting in such a way as to achieve progress in facilitating access by more Kenyans (eventually all) to each of the rights provided in this Article and the relevant treaties (the right to health; right to accessible and adequate housing and reasonable standards of sanitation; freedom from hunger and to have adequate and of acceptable quality; right to clean and safe water; right social security and the right to education).
- Because the Bill of Rights is immediately applicable, there is a danger of litigation by the citizens against the state with respect to socio-economic rights at any time. This might result in confusion on measures that may be undertaken with respect all the different socio-economic rights. Immediate pro-active measures to forestall such a situation are therefore needed.
- Socio-economic rights require resources to be realised and therefore the obligation to implement these rights must be interpreted together with the obligation to ensure equitable distribution of resources in chapter 12 of the Constitution. This means that the development planning, sectoral planning and the budgeting process have to be coordinated in such a way as to ensure progressive access of socio-economic rights by all Kenyans.
- To achieve equity, there is a need to institute a number of steps including the (i) mapping of the county by county and region on access levels to the different rights; (ii) determination of access needs by county; (iii) determination of priorities by county; (iv) planning of national resources using this information; (iii) equitable allocation including of the equalisation fund. This distribution is expected to result in a clear roadmap to demonstrate how each of the rights will progressively be achieved.
- County governments are principally charged with service delivery and can therefore provide the principle interface for the realisation of social-economic rights. Therefore in preparation for transition to county governments, key government departments whose mandate include implementation of socio-economic rights and other relevant stakeholders should engage in resource and productivity mapping which will inform planning for transition to county governments.
- It is important for the government to adopt programmes that will trigger economic growth and create the resources necessary to realise socio-economic rights. This is because unless wealth is created, resources may not be available to channel to the programmes and activities that will facilitate the progress in the realization of the social-economic rights.

❖ **Development of a guide for the implementation of human rights**

The human rights and citizenship thematic team commenced, during the reporting period, the process of developing an implementers manual that will guide implementers on how to integrate human rights in policies, laws and apply the rights approach in administrative procedures. The manual is intended to give general guidance to the implementation of the Constitution of Kenya 2010, which is anchored on human rights principles. The development of the manual will be undertaken in consultation with other stakeholders. The finalisation of this manual is expected in the second half of 2012.

❖ **Engagement with Other Bodies**

The CIC, through the human rights and citizenship thematic team was invited to address and participate in a range of human rights related activities of other organizations including the Stakeholder Forum

Organized by the National Aids Control Council (NACC) and the United Nations Joint Programme on HIV/AIDS (UNAIDS) to celebrate the courage and role played by women living with HIV in Kenya. The thematic team presented on the opportunities in the Constitution for women including those affected and infected with HIV.

The Commission was also invited to participate in the panel discussion during the Kenya Human Rights Commission (KHRC) annual lecture on 9th December 2011 as part of its activities towards the human rights day celebrations. The lecture this year was on the topic "Constitutionalism and Judicialism: Ideologies of Kenya's new Constitution"- By the Hon. Justice (Prof) J.B. Ojwang. The contribution of CIC focused on the need for vigilance to ensure Constitutional implementation in all sectors.

C. Donor support

The work under this thematic area received donor support for some of its activities in the fourth quarter of 2011 from GIZ, IDLO, UNHCR and IRC.

D. Activities planned for the first quarter of 2012

The activities planned in the human rights and citizenship thematic area for the first quarter of 2012 include:

- Finalization of the review of the Freedom of Information and the Data Protection bills.
- Finalization of the review of the Births and Deaths Registration 2011, the Identification and Registration of Persons 2011 and Refugee Bill 2011.
- Finalization of the review of the Marriage Bill 2011, the Matrimonial Property Bill 2011 and the Family Protection Bill 2011.
- Continuation of activities relating to the development implementers manual.
- Continuation of activities towards the development of standards on socio-economic rights.
- Finalization of the review of the Consumer Protection Bill.
- Continuation of activities relating to the development of the Bill on Public Participation.
- Stakeholder forum on human rights approach and socio-economic rights.

2.2.2 Activities under the Land and Environment Thematic Area

The Land and Environment thematic area draws its mandate from chapter five of the Constitution, which provides the framework and principles with regards to Lands and Environment. The following ministries which deal with aspects of land and environment issues are the principle focus of the work under the thematic area: the Ministry of Land, the Ministry of Environment and Mineral Resources, the Ministry of Forestry and Wildlife, the Ministry of Water and irrigation, Ministry of Livestock Development, the Ministry of Northern and Arid Lands, the Ministry of Regional Development, and the Ministry of Tourism.

During the fourth quarter of 2011 the land and environment thematic team undertook various activities including with respect to the development of laws, policies and administrative procedures as well as engagement with stakeholders. An overview of the various activities follows below.

A. Development of legislation/policies/procedures

❖ **Land Bills and Policy**

On 9th December 2011 the CIC received the Land Bill, 2011 and the Land Registration Bill, 2011. The Bills are due for enactment within 18 months from the date of promulgation of the Constitution that is by 27th February 2012. The Bills are intended to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land-based resources, to revise consolidate and rationalize the law governing the registration of title to land and to regulate land dealings in registered land respectively.

The bills are currently undergoing internal review at CIC, will be subjected to further stakeholder input directly and through the media to get views and comments of the people of Kenya. The Commission has scheduled various activities such as county visits and stakeholder

consultations to ensure broad and robust public participation on the legislation on land.

Additionally, during the fourth quarter of 2011, CIC, with the support of WWF has commissioned a consultant to review and revise the National Land Policy to align it with the Constitution. The thematic team, with the support of IDLO, has also commissioned an additional consultant to assist the Commission to consolidate and ensure integration of the various policies, bills and administrative procedures from the various ministries, departments and parastatals within the environment and natural resources sector. This will entail liaising with the sector actors to effectively map out their planned initiatives and focus these to bring about conformity and coherence in their policies and legislation. The Consultant will also be responsible for facilitating internal as well as external discussions and debate on the status and future direction of environment and natural resources sector in the country.

B. Engagement with stakeholders

During the reporting period the land and environment thematic team continued to engage various stakeholders. These included:

❖ Stakeholder Consultations on the National Land Commission Bill

The thematic team held two stakeholders meeting with Ministry of Land and all the other relevant ministries respectively on the Land Commission Bill. The objective of the meetings was to assess the Bill and address any gaps or areas for improvement that may be necessary in bringing the Bill into conformity with the Constitution. The team also held a Roundtable on the National Land Commission Bill with the AG, KLRRC and the Ministry of Lands to finalize the bill and address any outstanding issues before submitting to Parliament for tabling.

❖ Stakeholders Consultation on the Management of Land and Natural Resources, Devolution, and Public Participation

The thematic team also conducted a two-day stakeholders consultation in Garissa County to discuss the management of land and natural resources under the devolved system. Participants engaged in robust discussions over how land and natural resources should be utilised to ensure sustainable administration of land and natural resources and to address historical injustices relating to land and natural resources.

C. Donor support

WWF Eastern Africa Regional Office continued to support the Commission in providing technical and financial support to make enable civil society input into the Constitution Implementation process in the area of land and the environment and review of specific policies during the reporting period. Further donor support was received from IDLO.

D. Activities planned for the first quarter of 2012

The activities planned in the land and environment thematic area for the first quarter of 2012 include:

- Organizing additional stakeholder forums on the Lands Bill and the Land Registration Bill.
- Undertaking County visits to ensure broad and robust public participation on the review of the land and natural resources related bills and policies.
- Holding consultative meetings with the Ministry of Lands on the Land Policy.
- Harmonising the existing policies, legislations, and administrative procedures in the environment and natural resources sector.

2.2.3 Activities under the Public Service and Leadership Thematic Area

These values and principles include; accountability and transparency, fair competition and merit based appointment, adequate and equal opportunities for men and women, members of all ethnic groups and

persons with disabilities. It is in this context that Chapter 13 of the Constitution establishes the Public Service Commission (Article 233), and gives it its functions and powers in Article 234. Staffing of county governments is covered in Article 235 and 236 on protection of public officers. During the first three quarters of 2011, the Ethics and Anti-Corruption Commission Act was enacted. In the fourth quarter, the public service and leadership thematic team continued to work on various legislative and policies issues and to engage stakeholders. Some of the team's key activities during this period include:

A. Development of legislation/policies/procedures

❖ Public Service Commission Bill

CIC received the Public Service Commission Bill from the AG's in the fourth quarter 2011. Thereafter the thematic team held consultative meetings with the Ministry of State for Public Service on 12th October, 2011, KLRRC and Ministry of State for Public Service on 16th November, 2011 and the Public Service Commission on 10th October, 2011.

Following the consultative meetings, a stakeholder forum was held on 7th December 2011 at Kenya Institute of Administration. Participants gave their input in ways in which the Bill should be improved to adhere to the letter and spirit of the Constitution. The next step will be review the Bill at a CIC plenary after which the Bill and suggested changes will be forwarded to the AG.

❖ Public Service Management Bill

Since public officers fall under the Public Service Commission, the Parliamentary Service Commission, the Judicial Service Commission and the county public services, CIC considers it prudent to develop a general law on public service for Kenya so that all public officers are guided by the same principles and that there can develop a general public service culture at all levels. To this end, CIC has requested the three commissions to be engaged in the development of a Public Service Management Bill. The aim of the Bill is to provide broad guidelines to cover issues relating to entry into, expected behaviour while in office and exit of public officers.

❖ Review of the State Corporations Act, Chapter 446 of the Laws of Kenya

The thematic team, in conjunction with the State Corporations Advisory Committee, participated in reviewing the State Corporations Act, Chapter 446 of the Laws of Kenya to ensure compliance with the Constitution during the last quarter of 2011. The State Corporations Advisory Committee has since developed a draft policy after which they shall develop legislation in line with the policy. This process is aimed at aligning the legislation with the Constitution and streamlining the State corporations sector to ensure increased efficiency and accountability towards achieving vision 2030.

❖ Guidelines on recruitment of public officers

During the quarter, the Commission's judiciary and constitutional commissions and representation of the people and legislature thematic teams collaborated with the public service and leadership thematic team to develop guidelines on the recruitment process of all public officers at both the national and county level in the public service. It is expected that these guidelines will ensure that the recruitment process will be in line with Articles 10 and 232 of the Constitution. The draft guidelines will be availed to the relevant Commissions and the Ministry of State for Public Service for their input and review.

B. Engagement with stakeholders and other activities under the thematic area

During the reporting period the public service and leadership thematic team held other meetings with various stakeholders and undertook a number of other activities. These included:

❖ Meeting with the Public Transformation Department in the Office of the Prime Minister

On 6th October 2011, the thematic team on public service and leadership convened a meeting with the Public Transformation Department in the Office of the Prime Minister. The purpose of the visit was to better understand the work being undertaken by the

department in relation to Public Service and to be informed of their involvement in public sector reforms. CIC emphasized the fact that reforms in public service have to be taken seriously in order for change to be effected in the public service in line with the Constitution. It was agreed that CIC would work closely with the department and other stakeholders to ensure that this happens.

❖ Engagements with Civil Society

On 11th November 2011, CIC attended a breakfast meeting hosted by the Association of Professional Societies in East Africa (APSEA) to discuss one of the possible tools and content of the public service legislation. In addition on 22nd November 2011, CIC attended a workshop, hosted by the Legal Resources Foundation Trust (LRF) and National Council of Churches of Kenya (NCCK) to discuss stakeholder's input on the legislation.

C. Activities planned for the first quarter of 2012

The following are the planned activities in the public service and leadership thematic area for the first quarter of 2012.

- Completion of the review process of Public Service Commission Bill.
- Review of the Anti-Corruption and Economic Crimes Act to ensure that it adheres to the letter and spirit of the Constitution.
- Consultative engagement with the relevant stakeholders in the development of the Public Service Management Bill.
- Engagement with Ministry of Justice, National Cohesion and Constitutional Affairs in the development of Legislation on Leadership (Article 80) and the review of the National Value System as developed by the Taskforce of National Values.
- Engagement with the Ministry of State for Public Service in the development of legislation that gives full effect to Values & Principles in Public Service (Article 232).

2.2.4 Activities under the Representation of the People and the Legislature Thematic Area

The objective of the Representation and the Legislature work is to ensure that the policies, laws, systems, structures and administrative procedures developed/reviewed and applied at all levels of elections, in every political party, in parliamentary affairs, and in other departments are consistent with the letter and the spirit of the Constitution. In the fourth quarter of 2011 the thematic team continued work on the legislation and policies and to engage with various relevant stakeholders. The various activities undertaken by the team are as follows:

A. Development of legislation/policies/procedures

❖ *The Campaign Financing Bill, 2011*

In the fourth quarter of 2011 CIC, through the representation of the people and the legislature thematic team began to review reviewing the Campaign Financing Bill, 2011. The Bill seeks to put a limit to the funds used during campaigns for elections, including the in the nominations, the general and by- elections, and for referendum campaigns. The Bill also provides for the specifics of managing funds during any election or referendum campaign. With the 2012 general elections coming up it is critical that this law is put in place in a timely manner. Overall, the law needs to be in place by 27th February 2012.

❖ Policies and Regulations relating to Election Laws

CIC did not have a chance to examine the policies that informed the development of the Independent Electoral and Boundaries Commission (IEBC) Act 2010, Elections Act, 2011 and the Political Parties Act 2011. In order to fully understand these Acts, the CIC needs to have access to the relevant guiding policies. Consequently, the thematic team wrote to IEBC and the Registrar of Political Parties requesting them for the policies that informed the development of these laws. The two offices were also requested for the regulations that they have developed with respect to the IEBC Act, Elections Act and Political Parties Act and their plans of action for the period up to the next general elections. The Parliamentary Service Commission was also asked to provide CIC with a list of the policies, legislation and plans being prepared with respect to elective bodies. To date, CIC still awaits response from IEBC and the Public Service Commission on the

same. The Registrar of Political Parties did respond but did not provide the documents requested for.

B. Engagement with stakeholders and other activities under the thematic area

During the fourth quarter of 2011 the representation of the people and legislature thematic team held various meetings and engaged with various stakeholders. The team also undertook a number of other activities. These included:

❖ *Parliament and the Parliamentary Service Commission*

The thematic team made efforts to have meetings with the Public Service Commission and Parliament so as to agree with them on how to work with the CIC. We also did request PSC to share with CIC their plans of action. The team was however unable to secure the necessary appointments during the quarter.

❖ **The IEBC**

CIC, through the representation of the people and legislature thematic team, also requested for a meeting with the IEBC during the reporting period. One of the objectives of the meeting being sought was to discuss the draft framework that has been elaborated by the thematic team on how the CIC can monitor the implementation of the laws and constitutional requirements relating to elections. An appointment could not, however be secured with the IEBC during the quarter. This will be followed up in 2012.

❖ **Registrar of Political Parties**

Similarly, the CIC requested for a meeting with the Registrar of Political Parties to discuss any policies and the plan of action with respect to the registration, regulation, monitoring, investigation and supervision of political parties, and the application of the Political Parties Act, 2011, in readiness for the general elections in 2012. As in the case of the Parliamentary Service Commission and the IEBC this meeting did not happen during the quarter and an appointment will be sought in the new year.

❖ *Engagement with the Youth*

The thematic team, during the fourth quarter of 2011, developed a draft strategy on how to engage the people of Kenya and different stakeholders for the implementation of the constitution with specific focus on elections. The thematic team has already had initial engagements with the media and began to make efforts to engage the youth as specific stakeholder. To do this, the thematic team is working on developing a specific youth focused strategy in the first quarter of 2012.

❖ *The 6th Electoral Institute for Sustainable Development in Africa (EISA) Symposium*

On the 23rd and 24th November 2011, CIC, through the representation of the people and legislature thematic team, attended the 6th EISA symposium. The symposium brought together key stakeholders in the democracy movement across the African continent and beyond and provided a platform to share experiences and learn from best practices on the use of ICT in promoting political change in Africa, and in particular, as relates to elections.

The stakeholders included representatives from civil society organizations, political parties, academia, continental and regional economic communities, international donor agencies and international NGOs. As relates to Kenya, the IEBC Chairperson, Mr. Ahmed Isack Hassan, who spoke at the symposium, noted that major strides had been made by the country in the use of ICT in elections, especially as relates to the transmission of election results as was witnessed during the 2010 Constitutional referendum. While noting that actual electronic voting could not be achieved in time for the 2012 general elections, Mr. Hassan stated that this was a goal towards which IEBC would work to achieve by the 2017 general election.

The forum's main conclusion was that computerisation of the electoral system generally reduces elections fraud. Therefore, CIC will continue to monitor the progresses being made by IEBC to ensure country wide electronic registration and electronic results transmission in the 2012

general election process, as well as the steps being taken to ensure the eventual realisation of actual electronic voting by 2017.

❖ The Catholic Diocese of Kisii

The Catholic Diocese of Kisii wrote to CIC and requested CIC to go and talk to leaders of the region (heads of parish councils, priests, head teachers of Catholic schools, etc.) on the implementation of the Constitution with a specific focus on devolution and elections. In this context, on the 7th of December 2011, the representation of the people and the legislature thematic team, in conjunction with the devolved government thematic team participated in a forum hosted by the Kisii Catholic Diocese as noted in the report on the Commission-wide activities in part 2.1 above.

On the 9th of December 2011, the thematic area met with representatives of women in the Diocese. Some of the issues discussed included security problems, poor health facilities and services, lack of learning at government schools, water problems, violence in homes and in the communities, changaa issues, harassment from the police, environmental issues, poor roads, youth unemployment, land problems and general poor service delivery from the government.

C. Activities planned for the first quarter of 2012

The following are the planned activities in the representation of the people and legislature thematic area for the first quarter of 2012.

- Organise a forum for 18-25 years old people to develop a strategy on how that age-group may be involved in the implementation of the Constitution and specifically, in the electoral process.
- Continue to monitor the legislative process of the Campaign Financing Bill; and together with the public service and leadership and judiciary and the constitutional commissions thematic teams, monitor the public service management bill and the bill on the assessment of those who wish to be selected into public service.
- Monitor the process of delimitation of electoral boundaries, registration of voters and the general preparations for the realisation of a transparent and accountable electoral process for the next general election by IEBC.
- Monitor the implementation of the Political Parties Act, 2011.
- Follow up on the progress made by media stations in their role in the implementation of the electoral process as per the new dispensation.
- In conjunction with the judiciary and the constitutional commissions thematic team, work to monitor the progress made in the establishment of courts and/or judges to handle election petition from the 2012 general elections.

2.2.5 Activities under the Executive and Security Thematic Area

The fourth quarter of 2011 saw some significant events that impacted on the implementation of the Constitution in the thematic area. First, a key change was the appointment of the sixth AG of Kenya as required by Article 156 of the Constitution in late August 2011. The office of the AG is a key implementation partner of the CIC under section six of the Sixth Schedule to the Constitution and Article 260(4) and the level of capacity, professionalism and the policy direction of that office, has the potential to either advance and promote effective implementation or impede the progress of implementation. Secondly, the engagement of Kenya's Defence Forces (KDF) in the fight against Al Shabaab has required various implementing agencies to justifiably prioritise this issue that is critical to national security. This has affected the level of engagement between CIC and implementing agencies on matters relating to implementation of the Constitution.

The core concern of the thematic area remains ensuring that the values and principles of the Constitution with respect to the executive and security sector are respected and upheld, both in letter and spirit. The Commission has employed tremendous effort in ensuring this is achieved. During the reporting period the thematic team continued work in this direction.

A. Development of legislation/policies/procedures

❖ Rules and Procedure in the Presidency and Cabinet Office

During the fourth quarter of 2011 the Commission is currently reviewing the existing administrative rules and procedures that were submitted to it by the Office of Cabinet Affairs for compliance with the Constitution. During the reporting period, the CIC also requested a meeting to discuss the progress on the implementation measures being undertaken by the Presidency and the Office of Cabinet Affairs and is awaiting confirmation of a date. Some of the issues the Commission is interested in discussing relate to the measures put in place by the office of Cabinet Affairs to operationalise the values and principles of the Constitution, the principles of executive as stipulated under Article 129 and other transitional arrangements.

While Articles 129-155 of Chapter nine of the Constitution are suspended, it is important that the administrative procedures that shall ensure compliance with the Constitution immediately after the first elections are reviewed or developed to ensure for smooth transition. These procedures will relate, among others to the role and function of non-elected cabinet secretaries, principal secretaries and the reporting lines between those offices to give effect to Articles 129,152-155.

❖ Assumption of the Office of the President Bill

The Assumption of Office of the President Bill is yet to be formally submitted to the Commission for review. Nonetheless, during the fourth quarter of 2011, the Office of the President, invited the Commission to a stakeholders forum on the 29th November 2011, where the Bill was discussed. The thematic team has reviewed the Bill that has been publicized on the official website of the Office of Cabinet Affairs and is awaiting the final draft to enable the Commission to undertake a formal review.

❖ Legislation/Policies and Procedures relating to Kenya Defence Forces

Article 239(6) provides that Parliament shall enact legislation to provide for the functions, organization and administration of the national security organs. Additionally, the Fifth Schedule to the Constitution requires that the legislation envisaged under Article 239(6) shall be enacted within the two years after promulgation. It is in this context that the executive and security thematic team sought appointments with the Kenya Defence Forces (KDF) and the Ministry of State for Security to discuss, among other issues, the implementation of Chapter Fourteen of the Constitution and in particular, measures being put in place to implement Articles 241 in conformity with the principles of national security set out in Article 238, the development of legislation envisaged under Articles 239(6) and 241(7) of the Constitution.

The team met the KDF on the 21st November 2011 at which KDF provided an overview of the working draft of the Kenya Defence Forces Bill. Regrettably, although the Commission's intention was to also have an overview of the progress on other measures being put in place by the KDF, including procedures and policies, these were not discussed.

❖ National Coroners Service and Private Securities Regulation Bill

The CIC, led by the thematic team on the executive and security successfully concluded the review of the National Coroners and Private Securities Regulation bills in the last quarter of 2011. This followed a successful process of soliciting views from stakeholders, including through a meeting on the 7th November 2011 the Thematic with the Ministry of State for Medical Services, specifically, the pathologists in the ministry, to discuss National Coroners Service Bill. Various issues were raised and comments on how best to improve the Bill were made.

❖ Implementation of the National Police Service Act

The publication of the National Police Service Commission Act was an important milestone in the implementation of the constitution. During the fourth quarter of 2011 the thematic team focused on the process of appointing commissioners. In this regard, the CIC communicated to the National Police Service Commission selection panel urging the panel to ensure that the principles and values in the Constitution, and in particular Article 250(4) are upheld in the process. The thematic team also followed up on the publication of the Act and

the establishment of administrative procedures to operationalize the Act. In this context, on 21st October 2011 the thematic team met the Directorate of Criminal Investigations to discuss, among other issues, the restructuring of the Directorate. During the meeting, the Directorate also shared their comments on the National Security Council Bill, National Intelligence Service Bill, National Coroners Service Bill and Private Securities Regulation Bill.

Following the enactment of the National Police Service Act the executive and security thematic team, in the fourth quarter of 2011, also focused its review work the existing Standing Orders to verify their conformity with the Constitution, the National Police Service Act and the National Police Service Commission.

❖ Implementation of the Independent Policing Oversight Authority Act

The Independent Policing Oversight Authority Act has been enacted. However, like in the case of the National Police Service Act, the Act is yet to be published. CIC is very concerned that the Act has not been published and, most importantly, that the Authority has yet to be established. The importance of the establishment of the Independent Oversight Authority cannot be overstated. The Act provides for a mechanism to hold the police accountable to the public in the performance of their functions, including with respect to matters of professionalism and discipline, transparency and accountability. Additionally, the Act provides for a mechanism of ensure independent oversight of the handling of complaints by the Service. Consequently, although the Act is in place, the thematic team continued to focus on this matter in the last quarter of 2011.

❖ Vetting of State and Public Officers Bill

Key security organs, including National Intelligence Service and National Police Service, are significantly involved in the vetting of the State and public officers. This raises important concerns, including the fact that, for example, police officials are themselves yet to be vetted and that these services can unduly influence the process of vetting. To ensure credible and transparent vetting processes the thematic team on the executive and security considers that it is critical to develop guidelines and/or legislation on vetting. It is in this context that the Vetting of State and Public Officers Bill has come up.

As part of its efforts in this area, the thematic team met, on the 21st November 2011 with the Legal Resource Foundation Trust (LRF) to discuss, among other things, the vetting score card. Further, the team, together with the judiciary and constitutional commissions and the representation of the people and legislature thematic teams, met the Association of Professional Societies in East Africa (APSEA) on 11th November 2011 to discuss the State Officers Vetting Guidelines Bill. The Bill, formulated by APSEA, proposes a framework to guide the vetting of state officers. Further consultations are expected to address the concerns raised in the meeting.

B. Engagement with stakeholders and other activities under the thematic area

In addition to the work and meetings related to legislations, policies and administrative procedures, the executive and security thematic team also continued to make efforts to engage with various stakeholders during the reporting period. Among others, these efforts included engagement with:

❖ The AG

Article 156 of the Constitution provides for the office of the AG, who is the principal legal adviser to the Government. The AG, being part of the Executive is bound by the values and principles enshrined in the Constitution. During the period under review, the Commission persistently sought appointments to discuss the implementation of Article 156 with the office of the AG, in vain. Some of the issues that the Commission wanted to address included how the AG is and shall promote, protect and uphold the rule of law and defend the public interest; the administrative procedures put in place to ensure accountability and proper reporting mechanism within the office of the AG and by the AG to the Cabinet, President and Parliament as required under the Constitution. The CIC was also interested to know the role of the AG in the development of government policies and the extent to which the Acts of Parliaments (including subsidiary legislation, and other administrative measures that the AG administers) conform to the letter and spirit of the Constitution and the extent to

which the office of the AG is operationalising the provisions of Article 35 on the access to information and measures to promote public participation in the development of legislation as envisioned in Article 10 of the Constitution.

Regrettably the Office of the AG was not keen to meet the Commission in as far as its role as an implementer of the Constitution was concerned. The refusal or failure for the AG to submit a progress report or meet to discuss the same is a matter of significant concern to the Commission. While the AG has a role in implementation in relation to the preparation of legislation, the office of AG as a State organ including the departments that constitute the office is an implementing agency. As such, CIC in exercise of its mandate to monitor, facilitate and oversee the development of legislation as well as administrative procedures is required to report on the progress of implementation of the Constitution within the office of the AG. The reluctance of the office of the AG to cooperate is a recent development and was not the case until the appointment of the new AG in August 2011. The claim by the AG that the office of the AG was in existence before the 2010 Constitution has also created some uncertainty as to whether the office is operating under the old dispensation or the new one.

❖ The Director of Public Prosecutions

Article 157 of the Constitution provides for the establishment of the Office of the Director of Public Prosecutions (DPP). As part of the Commission's mandate to oversee, facilitate and monitor the implementation of the Constitution, the Commission, during the last quarter of 2011, made several attempts to meet the DPP. Regrettably, the Commission did not secure an appointment before the end of the year.

It is well accepted that the Office of the DPP requires major reforms to conform to the Constitution. The fact that the Constitution delinks this important office from the Office of the AG is, in itself, a very significant paradigm shift from the old dispensation and as such the Commission considers it critical, to monitor, facilitate and oversee, among other issues, the implementation of Article 157 of the Constitution, especially the exercise of the functions and powers of the DPP, the relationship and administrative measures put in place to ensure and guide the relationships between the DPP and the Inspector-General of the National Police Service, the AG, Parliament, Independent Policing Oversight Authority (IPOA), constitutional commissions, the Ethics and Anti-Corruption Commission (EACC), National Police Service Commission (NPSC), Kenya National Human Rights Commission (KNHRC), among others agencies and offices.

❖ National Intelligence Service

Article 242 of the Constitution establishes the National Intelligence Service, which is responsible for security intelligence and counter intelligence to enhance national security in accordance with the Constitution and may perform any other function conferred on it by an Act of Parliament. In the fourth quarter of 2011, the thematic team on the executive and security had successful meeting with the National Intelligence Service. The meeting took place on 13th October 2011. The purpose of the meeting was to discuss the implementation of the Constitution generally, and, in particular, Chapter Fourteen of the Constitution among other issues. The Commission also sought to know the position on the development of the National Intelligence Service Bill pursuant to Article 239(6) of the Constitution. The National Intelligence Service responded by taking the thematic team through the various facets of the working draft of the Bill.

The thematic team was also appraised on the progress being made by the Service in the implementation of the Constitution. The cooperation of the Director General and internal implementation committee is to be commended. The Commission encouraged the intelligence agency to be more transparent, ensure application of Article 31 on right to privacy and 35 on access to information.

C. Donor support

During the reporting period, the executive and security thematic area received support from IDLO and UNODC. This support was in the form of technical support involving these agencies engaging security experts/consultants who assisted the thematic team in reviewing the security related Bills.

D. Activities planned for the first quarter of 2012

In the first quarter of the year 2012, the planned activities in the executive and security thematic area are:

- Engage stakeholders on the National Coroners Service Bill, Private Security Industry Regulation Bill, National Security Council Bill and National Intelligence Service Bill; hold consultative meetings with security organs, namely the National Police, Kenya Defence Force, National Security Council on the training institutions and other administrative measures.
- Upon submission of the Kenya Defence Forces Bill, finalise, review and submit to the AG's office for finalisation.
- Auditing of the existing administrative measures including, policies and guidelines and work with the implementing partners in the formulation of the administrative measures, including regulations required under the National Police Service Act, National Police Service Commission Act and Power of Mercy Act.
- Organise meetings with the Office of the President, AG, DPP, Ministry of State for Defence, Ministry of Foreign Affairs, Inspector General of Police, amongst other Executive and Security organs to discuss their implementation plans.
- Conduct County visits to hold forums with county-based stakeholders on the draft Bills under Chapter Nine and Fourteen of the Constitution.

2.2.6 Activities under the Judiciary and Constitutional Commissions Thematic Area

This thematic area is concerned with the constitutional establishment and/or institutional reform of the judiciary and constitutional commissions as respectively provided in Chapter Ten and Fifteen of the Constitution of Kenya, 2010. During the last quarter of 2011 the thematic team on the judiciary and constitutional commissions undertook various activities related to the enactment and/or amendment of legislation, policy development or review, and formulation of administrative and continued to engage relevant stakeholders.

A. Development of legislation/policies/administrative procedures

❖ Teachers Service Commission Bill, 2011

Article 237 of the Constitution substantially changed the status of the Teachers Service Commission (TSC) from a semi-autonomous government agency under the Ministry of Education to a constitutional commission. In order to align the Teachers Service Commission Act with the new constitutional provisions, TSC constituted a specialized technical team to prepare a new law. The technical team completed its review of the TSC Act and developed a draft TSC Bill that was then submitted to CIC. In carrying out its review of the Bill, the thematic team on the judiciary and constitutional commissions held a stakeholders' forum at Kenya Utalii College on 15th November 2011 to gather input from stakeholders and submitted the Bill to the a CIC plenary meeting held on 23rd November 2011. Following the plenary meeting, the Bill was submitted to a legislative draftsman at the KLRC look at issues relating to technical and legal soundness.

❖ Other Legislative Work on Constitutional Commissions

In addition to the TSC Bill, the thematic team also contributed to the work on the National Land Commission Bill, 2011 and the Public Service Commission Bill, 2011. The details of the work undertaken on these bills are reported under the land and environment and public service and leadership thematic areas.

B. Engagement with stakeholders

In October 2011 the CIC participated in a series of advocacy and training workshops for legal practitioners, government officials, commissioners and human rights activists with the view to promoting the adoption of comprehensive anti-discrimination legislation, organised by the Kenya Human Rights Commission (KHRC) in collaboration with Equal Rights Trust (ERT). The Commissioner Mwaisaka and Laibuta attended the training. The purpose of the workshop was to develop the capacity of participants to implement

principles of equality and non-discrimination under the Constitution of Kenya, 2010.

C. Donor support

On 18th November 2011, the thematic area held a meeting with GIZ to identify potential areas for collaboration and partnership. GIZ has been supporting the judiciary as part of its project on Good Governance. It was agreed at the meeting that GIZ would support CIC to collaborate with the Judiciary in programmes relating to access to justice and the rule of law. Accordingly, meetings are scheduled for the next quarter with the judiciary and their consultants to explore collaboration opportunities.

D. Activities planned for the first quarter of 2012

The thematic team has scheduled the following activities for the first quarter of 2012:

- Organising a consultative meeting with the Judicial Transformative Steering Committee to discuss matters relating to access to justice and implementation of Article 105, 163 (3) (a) and 165 (3) (a) on the election court. The purpose of the meeting will be to ascertain areas of joint action and collaboration and to agree on the way forward.
- Organising consultative forum with constitutional commissions to explore and agree on working relations with CIC in the implementation of the Constitution.
- Organising a consultative forum with state and non-state actors to take stock of gains made in reforming the judiciary and to identify remaining gaps.
- Organising a consultative forum with state and non-state actors to collect views on the formulation on the System of Courts Bill as contemplated under Article 162(2) of the Constitution and harmonization of legislation for delivery of judicial services in accordance with the Constitution.

2.2.7 Activities under the Devolved Government Thematic Area

The devolved government thematic team has, during the fourth quarter of 2011, been engaged in range of activities aimed at ensuring the seamless transition to devolved government and to achieve the implementation of devolution as envisaged in the Constitution of Kenya, 2010. An overview of the work of the team during the quarter follows.

A. Development of Legislation/policies/administrative procedures

❖ The County Government Bill, 2011

The County Government Bill, 2011 seeks to give effect to devolution provisions in the Constitution and specifically Chapter Eleven of the Constitution by providing for the powers, functions, and responsibilities of county governments to deliver services and for other connected purposes. The Bill is currently with the AG's office. Before forwarding to the AGs, CIC subjected the bill to various discussions, which included discussions at a stakeholder meeting on 13th October 2011. The stakeholder's meeting was followed by public hearings from 24th to 28th October 2011 in six different counties. These were Kakamega, Baringo, Tharaka Nithi, Kirinyaga, Migori and Narok counties. There was also plenary discussion on the Bill on 1st November 2011, and finally a roundtable meeting attended by the KLRC, AG's office and the Ministry of Local Government.

❖ The Transition to Devolved Government Bill, 2011

The transfer of power, functions and resources from the centralised government structure to a devolved structure which comes into being after the next general election requires that there be a transition process to allow for coordinated and timely restructuring and reorganization of government. The Transition to Devolved Government Bill, 2011 address this transition question and to give effect to Section 15 of the Sixth Schedule of the Constitution (phased transfer of power) and to provide a framework such transfer of power.

During the fourth quarter of 2011, the CIC undertook a review of the Bill. As part of the review process, the CIC subjected it to stakeholder discussions in a forum held on 18th October 2011. Public hearing followed up the forum from 24th to 28th October 2011 Kakamega,

Baringo, Tharaka Nithi, Kirinyaga, Migori and Narok. A roundtable meeting on the Bill was held on 25th November 2011 after which the Bill was forwarded to the AG for publication.

❖ **The Intergovernmental Relations Bill 2011**

The Intergovernmental Relations Bill 2011 seeks to establish a framework for consultation and co-operation between National and County governments; among county governments; establish mechanisms for dispute resolution and other connected purposes therein. CIC undertook a review of the draft during the reporting period. In this regard, the Commission held a roundtable meeting on 2nd November 2011, a stakeholders meeting on 8th November 2011 and, finally, a plenary meeting on 24th November 2011.

❖ **The Intergovernmental Fiscal Relation Bill 2011**

The Intergovernmental Fiscal Relation Bill seeks to provide for co-operation and consultation between the national and county levels of government on fiscal, budgetary and financial matters; to prescribe a process for budgeting and the determination of equitable sharing and allocation of revenue raised nationally; to provide for a process for the determination of the control, coordination and management of borrowing; the granting of loan guarantees; the proper management of public debt by both the national and county levels government; the receipt and use by both the national and county levels of government of donor grants; and to provide for connected purposes.

CIC began the review process for the Bill in the last quarter of 2011 and subjected it to a stakeholders meeting on 8th November 2011. Since, the Bill addresses issues that are and/or could be part of the Public Finance Management Bill 2011, CIC after consultation, has proposed to have this bill discussed as part of the finance management structure under the latter Bill.

❖ **The County Government Finance Management Bill 2011**

The County Government Finance Management Bill was among the devolution bills received by CIC on the 14th of July 2011. The Bill seeks to provide a legislative framework for the most suitable financial management systems for county governments. In particular, it seeks to secure sound and sustainable management of the financial affairs of county governments, cities and urban areas, and other county public entities and to provide for matters connected thereto.

Though received in the third quarter of 2011, the Bill was put on hold by CIC awaiting policy decision by the executive as to whether the contents of the Bill would be captured in the Public Finance Management Bill 2011. This decision has not been made. It is CIC's considered opinion that that if the two bills are merged, the single bill would adequately cater for the two levels of government and would conform with the letter and spirit of the Constitution.

B. Engagement with stakeholders

During the reporting period, the thematic team on devolved government participated in and/or organised various meetings and engagements with stakeholders. These included:

❖ **CIC Devolution Workshop**

Between 26th and 30th September 2011, devolved government thematic team conducted a workshop for CIC Commissioners on devolution generally and transition to devolution specifically. The workshop was held at the Kenya Commercial Bank (KCB) Leadership Centre Karen. The overall objective of the workshop was to provide a forum for the Commissioners to critically discuss the implementation process with respect to devolution.

In specific terms, the workshop was aimed at:

- Discussing and developing a shared understanding of the concept of transition to devolved government among the CIC Commissioners and researchers.
- Identifying potential challenges and risks to the process of transition to devolved governance.
- Identifying the process and administrative issues that must be addressed in order to effectively transition to devolved governments.
- Developing a strategy for monitoring the transition process.

- Identifying key aspects of different CIC thematic areas that have a bearing on transition to devolved governance.
- ❖ **County Visits**

The thematic team on devolved government organised and participated in a number of county consultative forums between 24th to 28th October 2011. Different centres in the six counties were visited as indicated below.

- Kakamega County – Kakamega and Mumias.
- Baringo County – Eldama Ravine, Mogotio, Kabarnet and Marigat.
- Tharaka Nithi County – Chuka and Marimanti.
- Kirinyaga County – Mwea, Kerugoya and Gichugu.
- Migori County – Migori and Kehancha.
- Narok County – Kilgoris and Narok.

The objective of the consultative forums was to give the people in these counties and centres an opportunity to discuss issues relating to devolution in general and, in particular, the County Government Bill 2011 and the Transition to Devolved Government Bill 2011. The views gathered from these forums were taken into account when the two bills were finalized by CIC in preparation for the roundtable meetings on the bill.

❖ **Kenya Alliance of Residents Association (KARA) Bi-monthly Talk**

KARA invited CIC to talk at their bi-monthly talk series on 14th November 2011. The theme of the talk was on devolution, responsiveness and participation. The convener of devolved government thematic team, Commissioner Wanyande, addressed the forum. Among the issues highlighted in his talk were: the importance of devolution; the status of various bills relating to devolution; the role of people in Kenya making devolution a reality; CIC's work with other constitutional commission and other actors in ensuring that the effective implementation of the Constitution; and optimism that implementation will remain on course.

C. Activities planned for the first quarter of 2012

The devolved government thematic team has planned the following activities in the first quarter of 2012:

- Hold consultative meetings with ministries on their transition to devolution work plans.
- Continue to monitor and facilitate transition activities, including working with ministries to review administrative procedure necessary for effecting devolution.
- Monitor and report on cases of violations of devolution principles.
- Undertake further county visits to sensitize citizens on matters relating to devolution.

4.8 Activities under the Public Finance Thematic Area

The public finance thematic team is responsible for guiding and coordinating all activities aimed at implementing Chapter 12 of the Constitution. Since the commencement of the activities of CIC in January 2011, the team has undertaken numerous activities aimed at facilitating, monitoring and coordinating all stakeholders involved in the generation and development of a constitutionally compliant public finance management legal and institutional framework. In the fourth quarter of 2012 the thematic team on public finance continued to undertake activities along the same lines.

A. Development of Bills/Policies/Administrative Procedures

❖ **Finance Related Laws**

One of the issues that remained outstanding after the work in the first, second and third quarter of 2011 related to the completion of the process of developing new public finance legislation. In the first three quarters of the year the thematic team had held several in-house and stakeholder forums aimed at reaching consensus on the content of such legislation. After numerous challenges, including dissonance within the executive on the form and substance of the legislation, the Ministry of Finance on the 24th of November 2011 finally released the draft Public Financial Management Bill (hereinafter PFM Bill) for input by CIC and other stakeholders. The Bill seeks to integrate the Public Finance Management Bill, the County Public Finance management

Bill and the intergovernmental Fiscal Relations Bill. The thematic team started the review process during the reporting period but will continue with this work in the first quarter of 2012.

With the assistance of GIZ and IDLO, CIC enlisted the services several international consultants on Public Finance, including Alta Folscher and David Solomon, both from South Africa, to assist the thematic team in understanding global best practices on the management of public finance and to advise on what an ideal public finance management framework would look like in view of Kenya's Constitutional architecture. The assistance from IDLO also enabled CIC to get assistance from local consultants in finance and institutional strengthening including a constitutional lawyer and the Chief Executive of the Institute of Economic Affairs (IEA). With the assistance these consultants CIC was able to achieve a comprehensive understanding of the requirements of an effective public finance management regime.

❖ **Controller of Budget Bill**

The thematic team started work to review the Controller of Budget Bill during the quarter under review. Following receipt of views from various stakeholders and, taking into account the presentations received from the Controller of Budget, the CIC organized a meeting jointly with the Commission on Revenue Allocation (CRA) to address the suggestions. The Bill will be put to a roundtable meeting in the next quarter.

B. Engagement with stakeholders

During the fourth quarter of 2011, the thematic team on public finance held various meetings and conducted other engagements with stakeholders as follows:

❖ **Meetings with Treasury on the Budget process**

CIC held two meetings with Treasury on the budget process. The main aim of the meetings was to review the process of generating the budget for the year 2012/2013 to ensure that the same was reflective of the Constitutional requirements particularly with respect to the issue of public participation. The Treasury shared its proposed process and CIC made recommendations for the improvement of the process, which were taken on board. CIC will continue to review the process as it is rolled out to ensure that it meets the threshold required under the Constitution.

❖ **Meeting with the Controller of Budget**

On the 14th October 2011, the thematic team on public finance met with the Controller of Budget, Mrs Agnes Odhiambo. The meeting focused on the review of the draft Controller of Budget Bill that CIC had held in abeyance pending the appointment of the holder of this important office. The meeting agreed on the basic framework of the Controller of Budget office necessary to effectively carry out its constitutional mandate of overseeing the implementation of the budget pursuant to Article 228 of the Constitution.

❖ **Stakeholder Forum and CIC meetings on the Public Finance Management Bill**

Due to the need to meet the constitutional requirement for public participation in the generation of laws, on the 7th December 2011, CIC organized a stakeholder consultation around the PFM Bill. The meeting brought together experts on public finance management as well as representatives drawn from the civil society and the non-state actors. Key constitutional offices, including the Controller of Budget and the Auditor General, also attended the forum. Senior Treasury officers who had been part of the team that drafted the Bill were also in attendance and were able to highlight on the thinking that informed various segments of the Bill.

Whereas many of the participants appreciated that most of the views expressed in earlier forums had been incorporated in the Bill, it was also felt that the Bill still retained sections that needed changing to bring it in conformity with the Constitution. Many of these sections related to the need to ensure that devolution is a fundamental part of public finance management and that there is adequate public participation public finance management.

Following the forum, CIC organized several retreats to discuss the PFM Bill. Between 8th and 10th December, a retreat comprising of the CIC, CRA representatives and various consultants was organized for purposes of thrashing out the issues raised in the forum, among other issues.

C. Activities planned for the first quarter of 2012

The thematic team on public finance has planned the following activities in the next quarter:

- Finalisation of the review of the PFM Bill: With the stakeholder and internal review of the PFM Bill having been undertaken, CIC expects to complete the final review of the Bill for enactment by parliament by February 2012 as required by the Constitution.
- Finalisation of the review of Controller of Budget Bill: CIC intends to hold the roundtable meeting on the Controller of Budget Bill in early January 2012 to ensure that the Bill is expeditiously processed. With the appointment of the Controller of Budget it is essential that the law relating to the functioning of this office be completed as soon as possible.
- Review of the Public Audit Act: The newly appointed Auditor General together with the Treasury are currently reviewing the Public Audit Act to bring it in line with the constitution. CIC hopes to receive the proposal for changes or new legislation in the first quarter of 2012.
- Review of the Public Procurement and Disposal Act: CIC has requested the Public Procurement Authority to hasten the process of review of the Public Procurement and Disposal Act in line with Article 227(1) and (2) of the Constitution. The thematic team hopes to commence the comprehensive review of this Bill in the next quarter.
- Review of the Central Bank Act and the Kenya Revenue Authority Act: CIC has commenced discussions with the Kenya Revenue Authority (KRA) and the Central Bank of Kenya (CBK) on the review of their existing statutes for these two bodies. The thematic team hopes to advance these discussions and reach consensus on the process and content of the reviewed Bills in the first quarter of 2012.

3. ONE YEAR ON: LESSONS LEARNT AND EMERGING ISSUES, CHALLENGES AND IMPEDIMENTS IN THE IMPLEMENTATION OF THE CONSTITUTION

It is close to twelve months since CIC started, in collaboration with other agencies, to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution of Kenya 2010 in terms of its mandate set out in the Constitution. The ultimate goal of CIC's work is to protect the sovereignty of the people of Kenya, secure the observance by all state organs of democratic values and principles, and to promote constitutionalism. In working towards this goal, CIC has no doubt recorded a range of achievements during its first year of work.

During 2011 CIC has also learnt a number of lessons with respect to the discharge of its mandate and the overall efforts to implement the Constitution and identified a number of systemic issues, including a range of recurring challenges and impediments that require some reflection. Such reflection at this stage is important to ensure that the people of Kenya to whom all sovereign power belongs, understand the issues at hand and are empowered to continue playing their critical vigilance role of ensuring the implementation of Constitution of Kenya 2010 is realised. This part of the report discusses these lessons and issues. The lessons and emerging issues relate generally to: the overall process of implementation; attempts to amend the Constitution; public participation; issues relating devolved government; and resistance to change and impunity.

3.1 The Process of Implementation

CIC, together with the implementing agencies agreed, early on, on a process for implementing the Constitution of Kenya 2010. The process entails the development and/or review of policies, legislation and administrative procedures and the application of the same by the implementing agencies. CIC's role is to monitor, facilitate and oversee the implementation in order to ensure that the agencies and the people of Kenya adhere to the requirements of the Constitution.

During the year, all implementing partners worked within the constitutional timelines to ensure that Parliament passed the legislation required to have been passed by the end of the first year after the promulgation of the Constitution, that is, by 26th August 2011. Most of these legislations, particularly the laws dealing with the electoral process and the reforms in the police, herald major changes in these key sectors of our nation.

However, a number of issues have arisen and there have been some challenges in ensuring a smooth implementation process, seamless interagency coordination and adherence to timelines. These include the following:

❖ **Deliberate attempts to misrepresent, misinterpret and/or underplay the mandate of CIC**

It has become clear, as demonstrated by the latest statements by the AG, that not everyone is clear or willing to accept the unique and important role of the CIC in the implementation process. There have therefore been a number of cases where certain quarters have sought to downplay or misguide the public regarding the role and mandate of the CIC.

In a number of instances we have also witnessed inexcusable cases of non-responsiveness from key implementing agencies. For example, the IEBC and the Parliamentary Service Commission have not found time to respond to CIC written requests yet the information requested for is key in monitoring progress in implementing the constitution and where necessary, assist the agencies involved in achieving the same.

❖ **Lack of policies, administrative procedures and other measures to back enacted laws**

Most of the bills developed have not been based on policies and the laws passed have not been reinforced by administrative procedures. This makes delivery of service to the people of Kenya hard and in the end such laws may not promote constitutionalism. There is also an emerging notion that implementation of the Constitution entails only the formulation of legislation required under the Fifth Schedule to the Constitution and nothing more. The slow pace of developing regulations under the Elections Act and the Political Parties Act is one example. The lack of an agreed conceptual framework on public finance and fiscal decentralisation as provided under the Constitution has unnecessarily delayed the finance management related laws. Clearly, without clear policy guidance and administrative procedures coupled with cultural shift legislation alone cannot bring about the reform process.

❖ **Unconstitutional provisions in enacted laws and disregard for due process**

Some provisions in the enacted legislation either violate the letter of the Constitution or are in conflict with the spirit of reform that underpinned the development and promulgation of the Constitution. In order to initiate amendments to certain pieces of legislation, CIC audited all legislation enacted in 2011 and submitted its views to the AG in September 2011. This legislative audit was also shared with the President, The Prime Minister and The National Assembly. CIC hopes that the AG will take steps to ensure amendments to bring these statutes in line with the Constitution are effected as soon as possible. In the meantime, it is a matter of concern and regret for CIC that we are yet to receive response or feedback to our said legislative audit.

Despite having agreed with Ministries and other implementing partners on the legislative process to be used in the enactment of legislation, certain legislation were enacted in direct violation of the due process laid out in Article 261 (4) and Section 5 (6)(b) of the Sixth Schedule to the Constitution. Such laws include the Contingencies Fund Act 2011 and County Emergency Funds Act 2011 and the National Government Loans Guarantee Act 2011. In this context, CIC has been forced to instituted court proceedings redress these violations of the Constitution. Flouting the procedures for developing and enacting legislation presents a major challenge to the implementation process since the Constitutional validity of the resultant laws is put to question. This means that even if the deadlines for passing the laws are met if the enacted laws are found to be unconstitutional it would effectively mean that the required law were not passed in time as required. While the CIC has consistently flag the issue of process, the executive has at best remained ambivalent on the issue of compliance. At worst, the executive appears determined to flout clear constitutional

provisions, the latest being the irregular and unconstitutional process relating to the Judicature (Amendment) Act 2011.

❖ **Dissonance within the executive**

During the year, CIC also noted some level of dissonance within the executive, which has caused delays in the generation of certain key legislation. For example, the Public Finance Management Bill 2011 and the legislation on Public Service. In addition to the delays, such dissonance creates anxiety as regards the commitment to implementing the Constitution and in particular, the provisions relating to devolved Government.

❖ **Private members bills and possible circumvention of due process requirements**

CIC acknowledges the value of private members bills and the authority of parliament in the development and passing of laws. However, it is important that the process of developing private members' bills fully complies with the Constitution. Parliament and individual members of parliament are all subject to the Constitution. Compliance with the Constitutional requirements particularly with respect to public participation will ensure that demands of people centred processes and effective public participation in development of all laws and policies are met. A number of recent private members bill that seek to implement the Constitution such as the Consumer Protection Bill (by Hon. Midiwo) and the Social Protection Bill (by Hon. Laboso) have been generated without following the process for laws on implementation of the Constitution, including with respect to the involvement of the CIC. Where CIC has been involved this has been through rushed processes. CIC is keen to constructively engage with Parliament to allow for broader stakeholder and public consultation on these private members bills. Some members of parliament, such as Hon. Midiwo, have responded positively to CIC's suggestions in this regard.

❖ **Individual and vested interests**

While the Constitution of Kenya 2010 goes to great length to ensure credible processes for appointment of constitutional office holders and other key public officers, some of those who have been appointed through this process seem to assume that vetting puts them above the law. The emerging tendency to flout or disregard the Constitution by some of those who personally and individually benefited by filling the newly created offices or positions is an area of concern. There may also be a danger of the urge to immediately accrue personal gain and/or pander to vested interests. This will undermine the vision for a better Kenya built on constitutionalism.

❖ **Availability of expertise on key areas of implementation**

Another issue that has arisen is the difficulty of getting available experts in various areas of CIC's work. This has been particularly a challenge in the area of public finance. Due to the paucity of experienced consultants locally and internationally, even when available, key consultants are not able to work with CIC for long periods thus prejudicing the process of reviewing the public finance laws.

The overall lesson for CIC with respect to the process issues is that there are no guarantees that even where the Constitution has clearly spelt out procedures that these will be followed. There remain vested interests and an entrenched culture against due process and rule of law that will rear its ugly head at different points in the implementation process.

3.2 The danger of mutilating the Constitution

While the Constitution contemplates the possibility of its amendment, CIC is concerned that during 2011 a number of unnecessary and self-serving amendments have been proposed this early in the implementation process. These types of amendments threaten to undermine the Constitution. Any amendment to the Constitution should enhance, not impede the realisation of the letter and spirit of the Constitution. As a general rule, except in exceptional circumstances, amendments, if any, should take place after the Constitution has been tested through its implementation. In addition, any bill seeking to amend the Constitution should follow the legislative process laid out in the Constitution, and involve a high level of public participation before its introduction in Parliament. Any amendment to the Constitution must pass the test of being on behalf of, and for, the benefit of the people of Kenya.

CIC's fears regarding ill-conceived and mischievous constitutional amendments are confirmed by the on-going debate on a proposed amendment to the Constitution to abolish the Senate and restore a unicameral Parliament. Another example of a problematic amendment is that relating to the amendment of the election date. CIC has objected to the Constitution (Amendment) Bill 2011 to the extent that it seeks to deal with the issue of the elections date. While CIC reading of the Constitution is that the constitutional provisions on the election date are clear, we reiterate that for us, the important issue is not what we as CIC read the Constitution to say, but what is the process that we as a country use, to determine the election date. CIC believes that the correct forum to determine the issue of the date of elections is the courts. CIC will respect the court rulings on the matter even where they may be contrary to CIC's stated view. It is important that the critical role of the court is affirmed where differences of opinion on interpretation arise. The role of 'clarifying' what the constitution means was never intended to be Parliament's.

Here, the underlying lesson is that notwithstanding the overwhelming support that the Constitution in the current form received at the referendum in 2010 there are still forces within and outside parliament that will use all means to derail or otherwise reverse the gains of the new order. Anti-reform forces are regrouping and lifting the forces of change hard. While this is expected the challenge is when these forces are made up of persons whose entities are key to the implementation for the Constitution. It can therefore not be assumed that elected leaders or constitutional office holders will always act in the best interest of the people of Kenya.

3.3 Lessons and emerging issues on devolved government

CIC recognises the efforts that different sectors are playing in readiness for the devolved government system after the 2012 general elections. There are currently various laws relating to the devolved government system, e.g. the County Government Bill 2011, the Transition to Devolved Government Bill 2011 and the Intergovernmental Relations Bill 2011 that are currently with the office of the AG waiting to be introduced to Parliament for debate.

Unfortunately, some of the efforts to prepare for devolution have led to the execution of activities that are in violation of Constitution. One example is the appointment by the Executive, of county officers and coordinators. Pending passage of the law and in view of the critical importance of handling the transition properly, CIC is of the view that the government should urgently institute a defined structured and transparent process of preparing for the transition to a devolved government structure.

The situation that now obtains poses a range of challenges and raise a number of issues. In particular, as things stand there is:

- Lack of clarity in the management of transition.
- Lack of clarity in the activities relating to transition and their prioritization.
- Lack of coordination of the activities relating to transition to devolved government.
- Apparent inability of a section of the executive to adhere to the process involved in handling bills relating to devolution. In this regard it is noted with concern that the Permanent Secretary Ministry of Local Government wrote to CIC purporting to withdraw two bills when in fact the bills were not submitted to CIC by Ministry of Local Government. The bills are the County Government Finance Management and the Intergovernmental Fiscal Relations Bill, 2011.
- Concern that the bills on devolution received by CIC from the Ministry of Local Government deal mainly with county governments and yet bills on devolution should cover both national and county governments. The failure to provide for national governments in these bills is a major omission.

In the context of these challenges there are a number of key areas that need urgent attention, including:

- Unbundling of functional assignments in the Fourth Schedule of the Constitution to the National and County governments.
- Asset and liability audit of all public entities in preparation of allocation of the same to the National and County governments.
- Protection of government assets especially those currently owned by the local authorities.

- Designing a structured system to make preparations for the transition in a way that respects Constitution, including with respect to generation and review of legislation.

3.4 Resistance to change and the continuing culture of impunity

Many of those involved in, and leading, the implementation process have embraced the attitude and behaviour called for by the new dispensation and they are thus trying their best to have the Constitution implemented successfully. Many also recognise that change has come and are working to adapt accordingly. It may also have been assumed with such large support for the new order those who do not change shall be changed by Constitution.

In the course of 2011 CIC has, however, increasingly noticed resistance to the Constitution implementation process and hence change by certain quarter in the executive and the legislative arms of the government as well as other players. This resistance comes in various forms such as frustration of the constitutional implementation process, inadequacy in the provisions of some legislation despite advisories issued by CIC to the various implementing partners, participation of the people not being taken seriously, attacks on the judiciary despite the independence of the judiciary and the principle of separation of powers between the three arms of the government, various violations on human rights contrary to the Bill of Rights of the Constitution, and, general impunity within government and the country in general. These happenings pose grave dangers not just to the implementation process but to the peace and harmony that are essential for nation building.

Part of the resistance to change is simply typical human behaviour towards change while another part is caused by sheer impunity. There is a section of Kenyans who still believe that they are living under the old dispensation and can therefore do as they like, including blatantly violating the Constitution of Kenya 2010, and get away with it. It is this attitude that for example informs the AG lack of respect for Article 261, which requires the AG to consult CIC before tabling bills in Parliament. Unfortunately the AG has expressed his willingness, indeed his commitment to subjugate his opinions to those of other organs of government, even where those organs may be acting in breach of the constitution. The AG's recent interpretation of the Constitution has proved not to be serving the public interest, but purely as the implementer of executive directives regardless of whether or not they promote constitutionalism. A failure by the AG to discharge his advisory role faithfully, will inevitably result in the executive, inadvertently or knowingly violating mandatory constitutional provisions, with consequential domino effects that delay or derail the implementation process. The AG's statement to the CIC that "*the office of the Attorney General existed and was fully functional before the promulgation of the New Constitution*" speaks volumes.

Another case in point is the submission of names by the President to the National Assembly of nominees to the Ethics and Anti-corruption Commission. CIC had occasions to write to H.E. The President, The Rt. Hon. Prime Minister, and to The Speaker of The National Assembly, to express concern regarding the fact that on the basis of the information available to the public, these names were submitted to The National Assembly, outside the mandatory period that is slated in Section 6(6) of The Ethics and Anti-Corruption Commission Act. Section 6(18) of the same Act gives the President by Gazette Notice power to extend the period by a period not exceeding twenty-one days. If this was not done, then it is the view of CIC, that any consequential process would, by reason of that violation of Section 6(6) of the Act, render the process and any resultant appointments a nullity, and open to legal challenge.

Evidence of resistance to change and of impunity also emerges where there has been failure or reluctance by state organs to prioritize implementation of the Constitution and in cases where there is refusal or delay in the publication of critical legislation, such a number of security legislation despite their enactment by parliament.

3.5 Public Participation

A major gain brought about by the provisions of the Constitution of Kenya 2010, is that the extent of public participation in the legislative process is greater than at any other time in Kenya's history. CIC wishes to recognise the efforts made so far, by the people of Kenya, government ministries, religious institutions and civil society

organisations at all stages of the legislative process of enactment of laws.

A worrying trend has however been emerging in relation to the effectiveness of public participation. In addition to the issue of public participation in private members bills it has become evident that the quality and level of public participation is not sufficiently robust and in some cases the interest in the implementation process is waning. Part of the reason for this is a general lack of civic awareness, especially at the grass-roots regarding the opportunities, procedures and the rights related to participation in legislative, policy and other processes.

Public participation may also be affected by the emerging of other issues on the national agenda. For example, the current economic crisis being experienced by the country may have a negative impact on the implementation process. The war on Al Shabaab also has implications and has already made it difficult for the executive and the security thematic team to make appointments with key players in the defence sector. Similarly, the labour unrest may replace the national reform agenda.

Impediment of the AG's office

The Commission for the Implementation of the Constitution (CIC) is concerned that the office of the Attorney General is increasingly becoming an impediment to the implementation of the Constitution. Three recent events are pointers to this reality.

Firstly on this issue of the amendment of the constitution, the Attorney General, who had entered into office vigorously discouraging amendments, has completely revised his position and now vigorously articulates and pursues the position taken by the Executive. There is no rational explanation for this sudden change of heart as no fresh perspectives on the matter have arisen to warrant a review. Such turnaround by the AG on such a key national issue on which he ought to be the principal adviser to government is of great concern to CIC. CIC hopes that the AG has not been captured by interests inimical to the reform process.

Further, the AG has failed in his duty to advise the Executive on the proper process through which amendments to the constitution can be processed. In the first instance, despite the constitution of Kenya requiring public participation in the process of law making, no process of public consultation was even carried out prior to the publication of the Constitutional Amendment Bill. Even more worrying, there has been failure to comply with article 261(1) and (4) of the constitution under the watch of the Attorney General. Under article 261(1) and (4) of the Constitution, the Attorney General is expected to consult with CIC on legislation that is prepared for tabling in Parliament and that relates to the implementation of the constitution. The amendments being sought are the sort contemplated by these Articles. As the primary adviser to Government and protector of the public interest, CIC expected the AG to be at the forefront in advising adherence to the constitution in letter and spirit by the Executive.

In our several interactions with the Attorney General, we have also been concerned by the Attorney General's willingness to subjugate his opinions to that of other organs of government, even where those organs may be acting in breach of the constitution. Situations of this nature include the AG's willingness to table before Parliament legislation related to the implementation of the constitution without involving the CIC as required under Article 261(4). This casual disregard of clear constitutional provisions may be a pointer to further violations that may happen under the watch of the AG.

Finally, CIC is concerned that the office of the Attorney General has taken the position that it will continue to function in the manner that the office was functioning prior to the promulgation of the Constitution of Kenya, 2010 and that nothing had changed in that office with respect to its mandate and operations. This unfortunate position taken under the direction of the Attorney General of Kenya who took an oath of office that he will obey, respect and uphold the Constitution of Kenya, 2010 is not only alarming but a red flag of the potential impediment that a non-reformist attitude and culture in the Office of Attorney General portends for the implementation of the Constitution. It fails to recognize the revolutionary changes that the constitution has introduced, not just for the AG's office but for all state organs in their operations.

The AG is a key implementer of the Constitution both with respect to the development and preparation of implementing legislation as well as an office that is part of the Executive. With several departments under its umbrella as well as having the power to issue circulars and developing internal administrative procedures such as policies and

regulations, it is required to ensure that the administrative procedures comply with the letter and spirit of the Constitution.

Part of the mandate of CIC under requires it to monitor the extent of compliance with the constitution by the office of the Attorney General and other state organs. As the principal legal advisor to Government, the Attorney General's office should be a role model in compliance with the Constitution internally and in the delivery of its mandate with regard to other implementing agencies.

These recent actions by the AG indicate that the AG's is interpreting his mandate in a limited and restricted manner, not as serving the public interest, but purely as the implementer of Executive directives regardless of whether or not they promote constitutionalism. A restrictive interpretation of the role of the AG will seriously impede the implementation and violate the spirit of the Constitution that elevates the sovereign power of people of Kenya above that of the arms of government and expects all state officers to at all times serve the interest, not of any person, or partisan interest, but the public interest.

4. KEEPING THE MOMENTUM – ADDRESSING THE CHALLENGES AND IMPEDIMENTS TO CONSTITUTIONAL IMPLEMENTATION IN 2012 AND BEYOND

“Electing a thief as a Governor is like putting a hyena to sell meat in your butchery” (sic).

A participant in Migori during a County Visit by CIC

Realising the full potential of the Constitution of Kenya 2010 requires the will and effort of all state organs and all Kenyans. Getting the support and directed effort from all, as the discussion in the preceding part of this Report shows, is however not a given and in some instances has proven elusive. There is therefore no doubt it will take significant work from reform minded and committed stakeholders to realise the promise of a new dispensation in Kenya. The CIC, together with other stakeholders in the executive, parliament and judiciary as well as non-state actors, have succeeded, despite various challenges, to build quite some momentum behind the implementation process. This momentum needs to be maintained and built upon.

In order to keep the momentum in 2012 and beyond, effective strategies and tactics will have to be deployed to address the various systemic challenges and issues that have been discussed in Part 3 of this Report. In CIC's view, the strategies and tactics required should be built around a number of recommendations. These include:

1. **Constant vigilance:** There is need for all stakeholders and Kenyans to constantly exercise vigilance to ensure the implementation of the Constitution is on track. Kenyans must also work to ward off any attempts to frustrate the implementation process and the efforts to build a better Kenya. In this regard, it bears repeating that anti-reform troops have regrouped and are now demonstrating that their brief honeymoon with the Constitution and its implementation is over. It is clear that these forces will resist the transformative change at every turn. Vigilance must remain the buzzword for every Kenyan. CIC suggests that the greatest vigilance should focus on those, in whatever capacity, charged with the responsibility to ensure the implementation of the Constitution. The Constitution of Kenya 2010 is in its greatest peril, when the warden turns into the poacher.
2. **The AG - Holding constitutional office holders to their responsibilities:** The AG's office is critical to the implementation of the Constitution. Indeed, it is in recognition of this fact that the Constitution required the previous holder of that office to vacate the office within one year from the date of promulgation to pave way for a new person not carrying the baggage of the past. Consequently, the new AG should exercise his mandate as chief legal adviser to the government to provide the required legal guidance in an objective manner to ensure that provisions of the Constitution are adhered to and the spirit of the constitution upheld. His client, as a constitutional office holder, is the people of Kenya and his rulebook the Constitution of Kenya 2010.
3. **Leadership:** CIC calls upon all arms of government to demonstrate leadership and steer the constitution implementation process to ensure successful development of Bills and integration of constitutionalism. Leadership will be

required at all levels from the principals to ordinary civil servants and other state offices as well as from non-state actors.

- 4. Maintaining implementation at the top of the national agenda:** CIC recommends that all State organs prioritize implementation of the Constitution to ensure laws, policies and administrative procedures are developed in accordance with constitutional timelines and the letter and spirit of the Constitution is observed. It will also be important that Kenyans, including the media, maintain the issues of constitutional implementation as a key part of the national agenda. While other issues, such as the economic crisis and the war on Al Shabaab obviously deserve attention, ultimately, the full implementation of the Constitution is what will guarantee that we have the institutions and means to effectively tackle our economic, security and other challenges.
- 5. Managing change:** CIC emphasizes that implementation of the Constitution goes beyond only the formulation of legislation required under the Fifth Schedule to the Constitution. Implementation of the Constitution entails the formulation of the aforesaid legislation and administrative measures, review of existing legislation and administrative measures to conform to the letter and spirit, and most importantly, ensuring that the said legislation and administrative measures are fully implemented/administered through a culture of constitutionalism. There is need for the general Kenyan population to understand that the Constitution is a transformative document and aims to bring forth change for a better Kenya. Promulgation was an initial step in a long journey that has to be managed properly.
- 6. Parliament - Applying the national principles and values by all:** Beyond the work of the executive to generate bills for the implementation of the Constitution, members of parliament can also play an important role in ensuring that the relevant laws are passed. The issue of private members bills touching on constitutional implementation is therefore critical. To ensure compliance with the national values and principles particularly the principle of public participation, CIC recommends that members of parliament, in exercising their legislative authority to generate private members bills should also ensure that the constitutional values and principles in Article 10 are respected. Of great importance is the need to ensure that the principle of Public participation is met and the role of institutions with the mandate on implementation is taken into account. As already noted in this Report, it has been argued in some quarters that the applicable law in matters of private members bills is the old

Constitution and members of the public and institutions that wish to audit these bills will have to contend with the 30 days after publication to give any input they wish into these laws. CIC believes that the limitation of the public participation role to the 30 days after the publication of a private members Bill does not comply with the constitutional requirement for effective public participation. The Bills are published in Nairobi by the government printers and averagely cost Kshs. 200. They cannot be said to be reasonably accessible to Kenyans on all parts of the country. In the end, as Article 94 of the Constitution clearly states, legislative power belongs to the people of Kenya and is only delegated to parliament. In this context, it may be prudent to amend the applicable parliamentary standing orders to ensure reasonable access by Kenyans to the process relating to private members bills.

- 7. Status reports by implementing agencies:** As noted in the introduction to this report CIC has requested ministries, state agencies and constitutional commissions to submit status reports on their efforts to implement the Constitution. So far, CIC has only received 12 reports as shown in Annex II. While this shows that a number of ministries and agencies are serious about implementation it remains an issues that many ministries, agencies and commissions have not submitted this reports. To ensure accountability and transparency it will be critical that all ministries, state agencies and constitutional commissions submit these reports so that Kenyans can fully appreciate their efforts as well as challenges in carrying out their functions.
- 8. Civic Education:** The Constitution anticipates participatory governance and legislation where the people of Kenya are involved in their own governance with state organs and institutions acting only on delegated authority. As such the people only delegate the authority but remain responsible in the implementation of the Constitution. As such it is necessary that efforts are made to carry out comprehensive civic education both by the state and non-state actors to facilitate effective exercise of sovereign power by the people of Kenya. There is an urgent need for a massive civic education exercise so that all Kenyans can be actively involved in the implementation of a document, which they understand. CIC recognises that the Ministry of Justice, National Cohesion and Constitutional Affairs is spearheading civic education under the Kenya National Integrated Civic Education (K-NICE) programme. The programme has, however, either not started or it is yet to make an impact.

Annex II

SUMMARY OF SUBMISSION OF QUARTERLY REPORTS BY IMPLEMENTING AGENCIES AS AT 31st DECEMBER, 2011

LIST OF MINISTRIES	2nd Quarter	3rd Quarter	4th Quarter
• Office of the President			
Cabinet Office	√	x	
Ministry of State for Defence	√	√	
Ministry of Provincial Administration and Internal Security	x	x	
State House	x	x	
• Office of the Prime Minister		√	
Ministry of Planning, National Development and Vision 2030	x	x	√
Ministry of State for Public Service	√	√	√
• Office of the Vice President			
Ministry of Home Affairs	x	x	
Ministry of Immigration and Registration of Persons	√	x	
Ministry of National Heritage and Culture	x	√	√
• Others			
Ministry of Agriculture	√	√	
Ministry of Cooperative Development and Marketing	√	√	√
Ministry of Development of Northern Kenya and other Arid Lands	x	√	
Ministry of East African Community	√	√	
Ministry of Education	√	√	√
Ministry of Energy	√	x	
Ministry of Environment and Mineral Resources	x	√	
Ministry of Fisheries Development	√	x	
Ministry of Foreign Affairs	√	x	
Ministry of Forestry and Wildlife	√	x	
Ministry of Higher Education, Science and Technology	x	√	

LIST OF MINISTRIES	2nd Quarter	3rd Quarter	4th Quarter
Ministry of Housing	√	√	√
Ministry of Industrialization	√	√	
Ministry of Information and Communications	√	√	
Ministry of Justice, National Cohesion and Constitutional Affairs	√	√	
Ministry of Labour	√	√	√
Ministry of Lands	√	√	
Ministry of Livestock Development	√	√	
Ministry of Medical Services	√	√	
Ministry of Gender, Children and Social Development	√	√	
Ministry of Nairobi Metropolitan Development	√	√	
Office of Deputy Prime Minister and Ministry of Finance	√	√	
Office of Deputy Prime Minister and Ministry of Local Government	√	√	
Ministry of Public Health and Sanitation	√	√	
Ministry of Public Works			
Ministry of Regional Development Authorities	√	√	
Ministry of Roads	√	√	
Ministry of Special Programmes	√	√	
State Law Office	√	√	
Ministry of Tourism	√	√	
Ministry of Trade	√	√	√
Ministry of Transport	√	√	
Ministry of Water and Irrigation	√	√	
Ministry of Youth and Sports	√	√	

CONSTITUTIONAL COMMISSIONS

COMMISSION	2nd Quarter	3rd Quarter	4th Quarter
Commission on Revenue Allocation	√		
Independent Electoral and Boundaries Commission			
Judicial Service Commission	√	√	
Kenya National Human Rights Commission			
Parliamentary Service Commission	√	√	
Public Service Commission of Kenya			
Teachers Service Commission			
Poverty Eradication Commission			
National Gender and Equality Commission			
Commission on Administrative Justice			

Annex III

LEGISLATION TO BE ENACTED BY 26th FEBRUARY 2012 - AS PER THE FIFTH SCHEDULE OF THE CONSTITUTION

LEGISLATION TO BE ENACTED BY FEBRUARY, 2012 - AS PER THE FIFTH SCHEDULE OF THE CONSTITUTION											
	Specific Name of Bill	Policy Development by the Executive and Commissions by	Policy Document from line Ministry after Cabinet's involvement, to CIC by	Policy Released to Ministry by CIC by	Raw draft Bill from line Ministry after Cabinet's involvement to KLRC/AG by	Draft Bill by KLR C/AG released to CIC by	Round table AG/KL RC/CI C/line Ministry/institution finalized by	Final draft bill released by AG for tabling before Parliament, after Consultations with CIC by	Public action by	Constitution- (Schedule 5) Deadline	Proposed date for enactment by
1. Legislation on Land (Article 68)											
a.	National Land Commission Bill					15.06.2011	16.11.2011	30.11.2011	7.12.2011	18 months (26.02.2012)	26.01.2012
b.	Lands Bill (The Bill has not been received by CIC)						7.12.2011	21.12.2011	28.12.2011	18 months (26.02.2012)	26.01.2012
2. Removal of a county governor (Article 181)		Provision was provided for by CIC in the Elections Bill. However, it was neither in the published Elections Bill, 2011, nor in the Elections Act, 2011. In its Audit of Acts, CIC recommended that this provision should be included in the Elections Act, 2011; <i>This provision is now included in the County Governments Bill.</i>								18 months (26.02.2012)	26.01.2012
3. Vacation of office of member of county assembly (Article 194)		Legislation provided for within the Elections Act, 2011								18 months (26.02.2012)	Enacted

4. Legislations to effect Chapter 11 (Article 200 & Section 15 of the Sixth Schedule)											
a.	County Governments Bill					1.08.2011	2.11.2011 (roundtable) 10.11.2011 (CIC to release Bill to the AG)	24.11.2011	1.12.2011	18 months (26.02.2012)	26.01.2012
	Specific Name of Bill	Policy Development by the Executive and Commissions by	Policy Document from line Ministry after Cabinet's involvement, to CIC by	Policy Released to Ministry by CIC by	Raw draft Bill from line Ministry after Cabinet's involvement to KLRC/AG by	Draft Bill by KLR C/AG released to CIC by	Roundtable AG/KLRC/C/line Ministry/institution finalized by	Final draft bill released by AG for tabling before Parliament, after Consultations with CIC by	Publication by	Constitution-(Schedule 5) Deadline	Proposed date for enactment by
b.	Transition to Devolved Government Bill					1.08.2011	17.11.2011	1.12.2011	8.12.2011	18 months (26.02.2012)	26.01.2012
c.	Intergovernmental Relations Bill					1.08.2011	8.12.2011	22.12.2011	29.12.2011	18 months (26.02.2012)	26.01.2012
d.	Intergovernmental Fiscal Relations Bill					1.08.2011	9.12.2011	22.12.2011	29.12.2011	18 months (26.02.2012)	26.01.2012
5. Revenue Funds for county governments (Article 207)											
	Public Finance Management Bill (The Bill has not been received by CIC)						15.12.2011	22.12.2011	29.12.2012	18 months (26.02.2012)	26.01.2012

Annex IV

STATUS OF ENACTMENT OF LEGISLATION

CITIZENSHIP AND HUMAN RIGHTS		
ACT	STATUS	CONSTITUTIONAL TIMELINES
1. The National, Gender and Equality Commission Act, 2011.	Enacted in August 2011.	One year
2. The Kenya National Human Rights Commission Act, 2011.	Enacted in August 2011.	One year
3. The Commission on Administrative Justice Act, 2011.	Enacted in August 2011.	One year
4. The Kenya Citizenship and Immigrations Act, 2011.	Enacted in August 2011.	One year
5. The Foreign Nationals Service and Management Act, 2011.	Enacted in October 2011.	
BILLS		
	STATUS	CONSTITUTIONAL TIMELINES
15. The Ratification of Treaties Bill 2011.	Awaiting parliamentary debate.	Five years
16. Marriage Bill 2011	Undergoing internal review.	Five years
17. Matrimonial Property Bill 2011	Undergoing internal review.	Five years
18. Family Protection Bill 2011	Undergoing internal review.	Five years
19. Births and Deaths Registration Bill 2011	Undergoing internal review.	
20. Identification and Registration of Citizens Bill 2011	Undergoing internal review.	
21. Refugee Bill 2011	Undergoing internal review.	
22. Freedom of Information Bill 2008.	Undergoing internal review.	Three years
23. Data Protection Bill 2009	Undergoing internal review.	Three years

24. Consumer Protection Bill 2011.	Undergoing internal review.	Four years
LAND AND ENVIRONMENT		
BILL		
STATUS		
1. National Land Commission Bill	Undergoing internal review	Eighteen months
2. Land Bill	Undergoing internal review.	Eighteen months
PUBLIC SERVICE & LEADERSHIP		
ACT		
STATUS		
CONSTITUTIONAL TIMELINES		
Ethics and Anti-Corruption Commission Act	Enacted in August 2011	One year
BILL		
STATUS		
CONSTITUTIONAL TIMELINES		
Public Service Commission Bill (Article 233)	Undergoing internal review	
REPRESENTATION OF THE PEOPLE AND LEGISLATURE		
ACT		
STATUS		
CONSTITUTIONAL TIMELINES		
The Independent Electoral and Boundaries Commission Act, 2011	Enacted in August 2011	One year
The Political Parties Act, 2011	Enacted in August 2011	One year
The Elections Act, 2011	Enacted in August 2011	One year
BILL		
STATUS		
CONSTITUTIONAL TIMELINES		
The Campaign Financing Bill, 2011	Undergoing internal review	
EXECUTIVE AND SECURITY		
ACT		
STATUS		
CONSTITUTIONAL TIMELINES		
National Police Service Commission Act	Enacted in August 2011	Two years
National Police Service Act	Enacted in August 2011	Two years
Independent Policing Oversight Authority Act	Enacted in August 2011	Two years
Power of Mercy	Enacted in August 2011	One year
BILL		
STATUS		
CONSTITUTIONAL TIMELINES		
National Coroners Service Bill	Undergoing internal review	Two years
Private Securities Regulation Bill	Undergoing internal review	Two years
Assumption Of Office of President	Undergoing internal review	Two years
JUDICIARY AND CONSTITUTIONAL COMMISSIONS		
ACT		
STATUS		
CONSTITUTIONAL TIMELINES		
The Judicial Service Act, 2011	Enacted	Two years
The Vetting of Judges and Magistrates Act, 2011	Enacted	
The Supreme Court Act, 2011	Enacted	One year
The Industrial Court Act 2011	Enacted	
The Environment and Land Court Act, 2011	Enacted	
BILL		
STATUS		
CONSTITUTIONAL TIMELINES		
The Teachers Service Commission Bill	Undergoing internal review	
DEVOLVED GOVERNMENT		
ACT		
STATUS		
CONSTITUTIONAL TIMELINES		
Urban Areas and Cities Act	Enacted	One year
BILL		
STATUS		
CONSTITUTIONAL TIMELINES		
Transition to Devolved Government Bill	Undergoing internal review	Eighteen months
Intergovernmental Relations Bill	Undergoing internal review	Eighteen months
Intergovernmental Fiscal Relations Bill	Undergoing internal review	Eighteen months
County Government Finance Management Bill	Undergoing internal review	Eighteen months
County Government Bill	Finalized and forwarded to Attorney General for publication	Eighteen months
PUBLIC FINANCE		
ACT		
STATUS		
CONSTITUTIONAL TIMELINES		
Commission on Revenue Allocation Act (2011)	Enacted	
Independent Offices Appointment (Amendment) Act, 2011.	Enacted	
Salaries and Remuneration Commission Act	Enacted	
BILL		
STATUS		
CONSTITUTIONAL TIMELINES		
Public Financial Management Bill	Undergoing internal review	Two years
Controller of Budget Bill	Undergoing internal review	

Annex V

About the Commission and the Commissioners

A. The Mandate of CIC

The CIC is the focal institution charged with facilitating, monitoring and overseeing the implementation of the new Constitution. Its mandate is to:

- (a) Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution;
- (b) Coordinate with the Attorney-General (AG) and the Kenya Law Reform Commission (KLRC); in preparing for tabling in Parliament, the legislation required to implement the Constitution;
- (c) Report regularly to the Constitutional Implementation Oversight Committee (CIOC) on:
 - (i) The progress in the implementation of the Constitution; and
 - (ii) Any impediments to the implementation process.
- (d) Work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.
- (e) Monitor the implementation of the system of devolved government effectively.

The CIC is further required to meet the objectives of Article 249 of the Constitution of the Kenya 2010. The objects are to:

- (a) Protect the sovereignty of the people;
- (b) Secure the observance by all state organs of the democratic values and principles; and
- (c) Promote constitutionalism.

In performing its functions, CIC is bound by national values and principles of governance laid out in Article 10(2) of the Constitution. The national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

CIC operations are accordingly guided by the National Values and Principles of Governance as stipulated in Article 10 of the Constitution. These are: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, and participation of the people, Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized, Good governance, integrity, transparency, and accountability and Sustainable development.

B. Vision, Mission and Strategic Outcome Results

In order to fulfil its mandate the CIC has developed a clear vision and mission to guide its work. Based on this vision and mission the Commission undertakes its work within an outcomes framework under which it has defined key result areas. These outcome results assist in guiding the Commission's work and providing the basis for accountability to other institutions and the public at large. The vision, mission and the outcome results are as follows:

Vision:

A united, peaceful and prosperous Kenya in which all citizens including leaders respect the rule of law, uphold national values and live by the Constitution.

Mission:

To ensure that policies, laws, structures, systems and administrative procedures developed and applied at all levels are consistent with and according to the letter and spirit of the Constitution of Kenya.

Strategic outcomes:

To achieve the Vision and Mission, CIC has identified four strategic outcomes, that is: a respected, well-functioning and independent Commission effectively delivering on its mandate, policies which are compliant with the letter and the spirit of the Constitution, laws which are compliant with the letter and the spirit of the Constitution and effective institutional frameworks and administrative procedures for the implementation of the Constitution.

C. The Commissioners

Mr. Charles Nyachae
Chairperson

Dr. Elizabeth Muli
Vice-Chairperson
Convener, Executive and Security Thematic Team.

Ms. Catherine M. Mumma
Convener, of the Bill of Rights and Citizenship Thematic Team.

Dr. Ibrahim M. Ali
Convener of the Land and Environment Thematic Team.

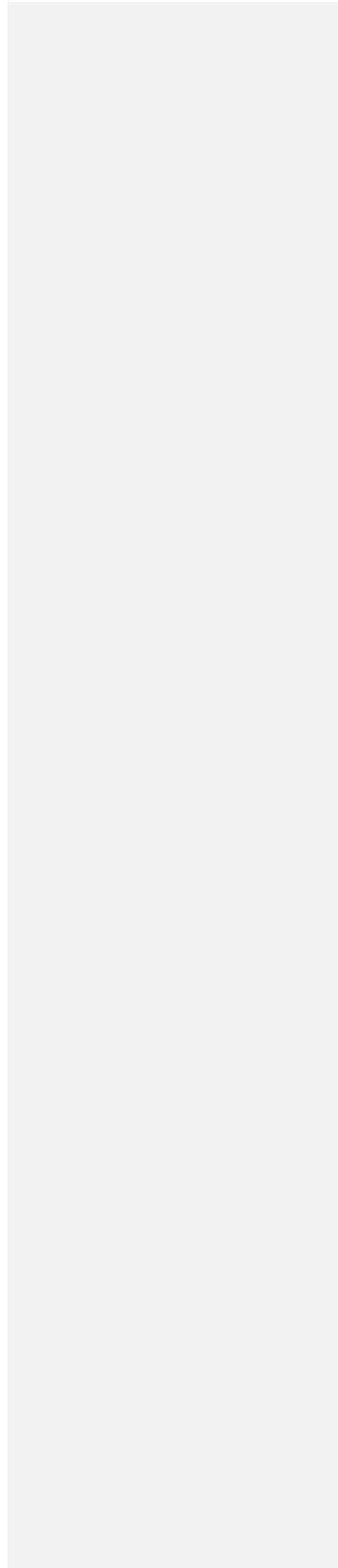
Mr. Philemon Mwaisaka, EBS, SS
Convener of the Public Service and Leadership Thematic Team.

Dr. Florence Omosa
Convener, Representation of the People & the Legislature Team.

Mr. Imaana Kibaaya Laibuta
Convener, Judiciary and Constitutional Commissions Thematic Team.

Prof. Peter Wanyande
Convener, Devolved Government Thematic Team.

Mr. Kamotho Waiganjo
Convener of Public Finance Thematic Team



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