

## **SPECIAL ISSUE**



# **THE KENYA GAZETTE**

**Published by Authority of the Republic of Kenya**

(Registered as a Newspaper at the G.P.O.)

---

**Vol. CXV—No. 73**

**NAIROBI, 10th May, 2013**

**Price Sh. 60**

---

GAZETTE NOTICE No. 6465

### **COMMISSION OF IMPLEMENTATION OF THE CONSTITUTION ACT**

(No. 9 of 2010)

### **COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)**

**ANNUAL REPORT 2011/2012**

#### *Statement from the Chairperson*

The Commission for the Implementation of the Constitution (CIC) is a constitutional mechanism established to monitor, facilitate, co-ordinate and oversee the implementation of The Constitution of Kenya 2010.

Members of the Commission were sworn in on 4th January, 2011, slightly over four months from the date of the Promulgation of the Constitution. In view of the legislative timelines in the Fifth Schedule of the Constitution, the Commission had to hit the ground running. Working with other implementation partners and, in particular the Attorney General and the Kenya Law Reform Commission as well as the various Ministries, the Commission has been able to deliver on its mandate on legislative implementation.

However, there have been a few occasions when apparently differing appreciation of the CIC mandate and the constitutional process have threatened to affect the process. Indeed, in Parliament where most of the legislation contemplated in the Fifth Schedule has been subjected to the constitutional process, difficulties continue to manifest themselves from time to time as regards draft legislation that finds its way to the National Assembly outside the constitutional process. The Commission continues to engage the Executive to ensure that the process used in all legislation remains faithful to the Constitution.

Whereas it is accepted by all implementation partners that policy should precede legislation, in many cases this has not been so and CIC continues to impress upon the Ministries, Departments and other agencies originating legislation, the need to develop policies and subject them to review for constitutional compliance before developing legislation based on them. Following the enactment of legislation required to implement the Constitution, CIC continues to review regulations and other administrative procedures to ensure they comply with the letter and spirit of the Constitution.

In most instances, the legislative process has benefitted from the co-operation of the implementation partners. However, there have been instances where significant deviation from this common purpose has been, in the view of CIC, fundamentally injurious to the process. A case in point is the Leadership and Integrity Act 2012, which is now the subject of litigation arising from CIC's conviction that the law passed does not meet the threshold required by the Constitution.

The Commission continues to have grave concerns regarding post-legislative implementation. This is due to the slow pace (and sometimes seeming reluctance) to implement that which has already been enacted. There are numerous examples: The Ethics and Anti-Corruption Commission, The National Police Service Commission and The National Land Commission have to date not been appointed, despite the respective Acts having been enacted more than a year ago. In the case of The Police Reforms, the story is even more worrying, with the evident refusal by the Executive to appoint The Inspector-General of Police and the two Deputies. This, in the view of CIC, apart from being a violation of the Constitution, does not portend well for the implementation process generally. Additionally, the several instances of blatant contempt for the rule of law and for court orders by Constitutional Office holders and the Executive poses the risk of derailing the Constitution and its implementation.

In the discharge of its mandate, CIC continues to place a high premium on the constitutional principle of Public Participation. This has been done through consultative fora with Civil Society Organizations, community engagement at County level and through the media. The Commission continues to be encouraged by the uncompromising commitment of the people of Kenya to their Constitution and its faithful implementation.

Institutionally, the Commission has received the requisite support from the Government of Kenya, and also appreciates supplementary support given by development partners. The members of the Commission and staff of CIC remain fully committed to the Commission's mandate to ensure that the Constitution of Kenya, 2010 is fully and effectively implemented in both letter and spirit for the benefit of the people of Kenya.

**CHARLES NYACHAE,**  
*Chairperson.*

*Statement from the Secretary/Chief Executive Officer*

The Commission for the Implementation of the Constitution (CIC) established its secretariat immediately upon assumption of office on 4th January 2011 to facilitate its day-to-day administration and the effective management of its affairs. In order to effectively deliver on its statutory mandate, the CIC developed and implemented its organisational structure comprised of a staff complement of 108 with the requisite approval of the Ministry of State for Public Service. The Commission continues to strengthen its secretariat in accordance with its strategic objectives. To this end, it appointed key officers, including its Secretary/Chief Executive Officer, directors of programmes and management services, heads of monitoring and evaluation, communication, procurement, finance and accounts, principal, senior and other programme officers.

In order to effectively discharge its mandate, the Commission continues to build its capacity. During the period under review, it trained its programme staff in policy review and development and legislative drafting. In addition, other members of staff in various support functions including procurement, finance and accounts, were trained in their respective fields.

In January 2011, the Commission developed an interim strategic plan from which annual work plans were derived to guide the implementation process. This was in compliance with the constitutional timelines for the formulation of various policies and administrative procedures, and for the enactment of various legislations necessary for the implementation of the Constitution. The 2013-2015 Strategic Plan is expected to be finalised in October 2012.

In discharging its mandate, CIC upholds the principle of public participation. In order to enhance public and stakeholder participation, the Commission engages the public through various channels, including programme-based consultative forums, workshops, conferences, print and electronic media, an interactive website, social networks and periodic reports.

The Commission takes this opportunity to express its gratitude for the financial support it has received from the Ministry of Finance, Ministry of Justice, National Cohesion and Constitutional Affairs (MoJNCCA) and from various development partners such as the United Nations Development Programme (UNDP), United Nations High Commissioner for Refugees (UNHCR), United Nations Office of the High Commissioner for Human Rights, Government of Japan, The Royal Netherlands Government, United States Agency for International Development (USAID), SUNY-Kenya, Department for International Development (DfID), GIZ-Deutsche Gesellschaft für Internationale Zusammenarbeit, Swedish International Development Cooperation Agency (SIDA), Danish International Development Agency (DANIDA), International Development Law Organisation (IDLO), International Rescue Committee (IRC) and Worldwide Fund for Nature (WWF). It also appreciates the technical support from the Kenya Law Reform Commission, the office of the Hon. Attorney-General and various civil society organisations in addition to the collaborative effort of all its stakeholders.

AMB. PETER O. OLE NKURAIYA,  
*Secretary/Chief Executive Officer.*

*Executive Summary*

The Constitution was promulgated on 27th August 2010. On 27th August 2012, Kenyans celebrated the second anniversary of the promulgation of the Constitution. Despite ongoing challenges, Kenyans can look back with pride at the ground they have covered towards the satisfaction of their long-held aspirations of good governance as enshrined in the Constitution. Among the demonstrable gains so far include more openness and transparency in governance, increased accountability of public officers, the restructuring and reform of public institutions and the creation of new ones, expanded democratic space, and greater Government responsiveness to public demands.

As provided for in The Commission for the Implementation of the Constitution (CIC) Act, 2010, the mandate and functions of CIC are to: monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution; co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement the Constitution; report every three (3) months 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 and Independent Offices to ensure that the letter and spirit of the Constitution is respected and; exercise such other functions as are provided for by the Constitution or any other written law.

As the country moves ahead with the implementation of the Constitution, it has continued to garner valuable lessons that are sure to inform the process moving forward. Among the lessons learnt include the following:

- For effective public participation as envisaged in the Constitution, there is need for structured and continuous public engagement.
- The need for a comprehensive change management programme addressing policy, legislation, administrative procedures and institutional framework gaps leading to constitutionalism and informed consent.
- All actors involved in implementing the Constitution need to act together in line with the constitutional 'duty to cooperate', not just with CIC, but with all partners in the process of implementation.
- When implementing the Constitution, the national principles and values should act as a guide to be upheld by all actors.
- The need to forgo short term political gain and instead focus on implementing the Constitution and upholding national interests.

In view of the experiences of implementing the Constitution and the lessons learnt therefrom, among the recommendations that CIC offers to help drive the process of implementation include the following:

- Streamlining of the legislative process
- Civic education
- Responsible political leadership
- Respect for the imperative of public participation
- Fast-tracking the operationalization of constitutional offices
- Development of a national government framework Increased co-ordination in the Executive
- Fostering changes in attitudes and mind-sets
- Development of policies prior to preparation of bills, regulations and administrative procedures

In the pursuit of its mandate, CIC has continued to work tirelessly as guided by its mission objective, which is "To ensure that policies, laws, structures, systems and administrative procedures developed and applied at all levels are consistent and in accord with the letter and spirit of the Constitution of Kenya." In that endeavour, CIC adopted the results-based approach and defined expected key result areas to guide the Commission's work and provide the basis for its accountability to other institutions and the public at large as follows:

- *Result 1:* A respected, well-functioning and independent Commission effectively delivering on its mandate.
- *Result 2:* Policies which are compliant with the letter and spirit of the Constitution.
- *Result 3:* Laws which are compliant with the letter and spirit of the Constitution.
- *Result 4:* Effective institutional frameworks and administrative procedures for the implementation of the Constitution.

In addition, CIC adopted a thematic approach and divided its executive function into eight thematic areas, each convened by a Commissioner who acts as its convenor. The Commission's thematic structure comprises eight thematic areas drawn from the subject matter of the different chapters of the Constitution as outlined below:

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

Other modalities adopted by CIC to facilitate its work include: stakeholder engagement, sector-based approaches, advisory opinions, judicial intervention, public participation, collaborative arrangements with other partners such as constitutional commissions and independent public offices, comparative analysis and incorporation of international best practices and monitoring and reporting, among others.

As specifically provided for in Section 27 (1) of the CIC Act, that means that every public officer, State Organ or State office shall at all times co-operate with the Commission in 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.

Such cooperation is necessary to enable CIC carry out its functions with the ultimate aim of achieving the objects of the constitutional commissions and independent offices as stated in Article 249 (1), and in so doing: protect the sovereignty of the people; secure the observance by all State organs of the democratic values and principles; and promote constitutionalism. A concerted effort among all the partners, and which is guided by the National Values and Principles of Governance would enable CIC achieve its vision 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."

In the reporting period, CIC recorded significant achievements and milestones in each of the key areas of its mandate. A review of these initiatives and achievements is given in this report. However, the journey of implementation has not been without its challenges. Specifically, among the challenges that the Commission has encountered in the discharge of its mandate include the following:

- Irregular amendment of bills by the Executive and the Legislature
- Attempts to mislead the public on some constitutional issues
- Delay in operationalizing some constitutional offices
- Disregard of the constitutional implementation process and mandate of the CIC
- Late submission of bills
- Failure to develop policies prior to preparation of bills
- Non-compliant regulations and administrative procedures
- Lack of legislation on national government
- The role of the Attorney-General's office in the new dispensation
- Unconstitutional provisions in the enacted laws and disregard of due process
- Limited civic awareness on the Constitution
- Resistance to change and the continuing culture of impunity

In spite of the challenges in implementing the constitution, CIC remains firmly convinced that all the challenges in the path of implementation of the Constitution are not insurmountable. The Commission looks forward to a cooperative, amicable and enthusiastic working partnership with all partners in the implementation process that is anchored on unswerving commitment to constitutionalism and rule of law, adherence to the constitutional principles on leadership and integrity, and the wholehearted participation of all Kenyans.

#### List of Acronyms

AG	Attorney-General
APS	Administration Police Service
CDF	Constituency Development Fund
CRA	Commission for Revenue Allocation
CIC	Commission for the Implementation of the Constitution
CIOC	Constitutional Implementation Oversight Committee
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
CSOs	Civil Society Organizations
DANIDA	Danish International Development Agency
DPP	Director of Public Prosecutions
ECK	Electoral Commission of Kenya
ICJ	International Commission of Jurists
IDLO	International Development Law Organization
IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent Electoral Commission (Now IEBC)
IED	Institute for Education in Democracy
IRC	Independent Review Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KDF	Kenya Defence Forces
KLRC	Kenya Law Reform Commission
KPS	Kenya Police Service
LATF	Local Authority Transfer Fund
MTEF	Medium Term Expenditure Framework
MoJNCCA	Ministry of Justice, National Cohesion and Constitutional Affairs
NARC	National Rainbow Coalition
NGOs	Non-Governmental Organizations
NSAs	Non-State Actors
NPS	National Police Service
NSS	National Security Service



PEV	Post-Election Violence
PSC	Parliamentary Service Commission
SIDA	Swedish International Development Cooperation Agency
SRC	Salaries and Remuneration Commission
TISA	The Institute for Social Accountability
TA	Transitional Authority
UNDP	United Nations Development Programme
WWF	Worldwide Fund for Nature

## SECTION 1

## INTRODUCTION

The Constitution of Kenya, 2010 was promulgated on 27th August 2010 following its adoption in a referendum on 4th August 2010 by 67% of the votes cast. It replaced the independence constitution in force since 1963. The adoption of the Constitution of Kenya 2010 was preceded by years of agitation for constitutional reform during which the reformists called for political pluralism, presidential term limits, and expanded political freedom. These demands led to the repeal of Section 2A of the old constitution that had made Kenya a *de jure* one party state since 1982. Additional constitutional reforms were introduced in 1997 leading to the enactment of the Constitution of Kenya Review Act of 1998, which provided for a legal framework for the comprehensive review of the independence constitution.

The constitutional review process that followed was designed to be inclusive and consultative, leading to a representative constitution-drafting conference in 2000 steered by the Constitution of Kenya Review Commission (CKRC) under the chairmanship of Professor Yash Pal Ghai. The proposed new constitution developed by that Commission was rejected by 57 % of the votes cast in a referendum conducted on 25th of November 2005. The rejection of the draft constitution, however, did not mark the end of the clamour for a new constitution. The urgency for the enactment of a new constitution was underscored by the Post-Election Violence (PEV) that followed the hotly disputed 2007 presidential election results. The violence was ended through the mediation of a team of eminent African personalities led by former UN Secretary General Kofi Anan. The team of eminent African personalities that included Dr. Graca Machel and former President of Tanzania Benjamin Mkapa recommended, among other things, constitutional, institutional and legal reforms as a way of addressing some of the causes of the violence.

In light of the recommendations of the team of eminent African personalities, the Government of Kenya established the Independent Review Commission (IRC) headed by Justice Johann Kriegler, a retired South African Judge. This Commission recommended, among other things, constitutional and legal reforms which ultimately led to the establishment of the Committee of Experts (CoE) through the Constitution of Kenya (Amendment) Act 2008. On the 17th of November 2009, the CoE published a Draft Constitution that was approved by the National Assembly and subjected to a referendum conducted by the Interim Independent Electoral Commission (IIEC), the body that had replaced the discredited Electoral Commission of Kenya (ECK). In the referendum conducted on 4th August 2010, the Draft Constitution received 67% support of those who voted and, in accordance with the enabling law, came into force on 27th August 2010 in a promulgation ceremony presided over by His Excellency President Mwai Kibaki.

The new Constitution, which is transformative in many respects, gives hope for improved governance, political stability and economic prosperity. The implementation of the Constitution began in earnest immediately after its promulgation and the Commission for the Implementation of the Constitution (CIC) was established through an Act of Parliament to oversee its full implementation. The Commission is required in the Act to submit an annual report to the President and Parliament for each financial year. This is the first annual report for the period January 2011 to June 2012.

## SECTION 2

## THE COMMISSION FOR IMPLEMENTATION OF THE CONSTITUTION (CIC)

## 2.0 The Mandate and Role of the Commission

The Commission for the Implementation of the Constitution is established under Section 5(1) of the Sixth schedule to the Constitution. Section 4 of the Commission for the Implementation of the Constitution Act, 2010 read together with section 5(6) of the sixth schedule to the Constitution specifies its mandate, functions and objects, namely to:

1. Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution;
2. Co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement the Constitution;
3. Report every three (3) months to the Constitutional Implementation Oversight Committee (CIOC) on:
  - (a) progress in the implementation of the Constitution; and
  - (b) any impediments to its implementation;
4. Work with each Constitutional Commission to ensure that the letter and spirit of the Constitution is respected, and;
5. Exercise such other functions as are provided for by the Constitution or any other written law.

This mandate is further amplified by Article 249 (1) which sets the objects of the constitutional commissions. Section 15 (2) (d) of the Sixth Schedule to the Constitution enhances the functions with the empowerment of Parliament, by legislation, to provide mechanisms that ensure that CIC will effectively perform its role in monitoring the implementation of the system of devolved government. The Commission is obligated to carry out the above functions with the ultimate aim of achieving the objects of the constitutional commissions and other independent offices as stated in Article 249 (1), namely to:

1. Protect the sovereignty of the people;
2. Secure the observance by all State organs of the democratic values and principles; and
3. Promote constitutionalism.

Article 249(2)(a) provides that the Commission is to be subject only to the Constitution and the law and, in the performance of its mandate, is independent and not subject to direction or control by any person or authority. Accordingly, CIC performs its functions by ensuring that it is accountable to the people of Kenya, upholding the principle of public participation and securing the observance of all State organs of the values and principles of governance without fear or favour.

In its operations, CIC is guided by the National Values and Principles of Governance as prescribed in Article 10(2) of the Constitution, among others. These principles regulate all public policy decisions and are binding upon all State organs, State officers, public officers and all persons whenever any of them enacts, interprets or applies the Constitution or any law. The National Values and Principles of Governance are outlined in Box 1.

- 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 marginalised;
- Good governance, integrity, transparency and accountability; and
- Sustainable development.



**Box 1: National Values and Principles of Governance**

The Commission is mandated to oversee the full implementation of the Constitution and, to that end, 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. The Commission adopted the following vision and mission.

**2.1 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."*

**2.2 Mission**

*"To ensure that policies, laws, structures, systems and administrative procedures developed and applied at all levels are consistent and in accord with the letter and spirit of the Constitution."*

**2.3 Strategic Outcome Results**

In the execution of its mandate, CIC has adopted the results-based approach and defined expected key result areas to guide the Commission's work and provide the basis for its accountability to other institutions and the public at large. These are as shown in Box 2.

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

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

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

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

**Box 2: Key Result Areas****2.4 Implementation in the Context of the Commission's Mandate**

The implementation of the Constitution with regard to the Commission's mandate involves:

1. Monitoring, facilitating and overseeing the Development of laws, policies and administrative procedures required to implement the Constitution;
2. Reviewing existing laws, policies, administrative procedures and legislation required to implement the Constitution;
3. Monitoring, facilitating and overseeing the putting in place of structures necessary to give effect to the Constitution, especially in relation to devolved government;
4. Ensuring active public participation by the people of Kenya in governance at both the County and National Government levels and in the constitutional reform process in accordance with the national values and principles prescribed in Articles 1, 10, 118, 232 of the Constitution.
5. Ensuring that the legislative process adheres to the provisions of Article 261 of the Constitution;
6. Coordinating with the Attorney-General and the Kenya Law Reform Commission in drafting bills in consultation with originating institutions;
7. Coordinating with the Attorney-General and the Kenya Law Reform Commission, the Constitutional Implementation Oversight Committee (CIOC) and parliamentary committees to ensure timely enactment of bills in Parliament.
8. Coordinating development of change-management strategies.
9. Monitoring effective implementation of the Constitution in devolved units of governance.

**SECTION 3****IMPLEMENTATION MODALITIES****3.0 Introduction**

In carrying out its constitutional mandate as stipulated in The Commission for the Implementation of the Constitution (CIC) Act, 2010 and other constitutional provisions, CIC has adopted appropriate organization structures, processes and strategies. In this regard CIC operates at two main levels: at the Commission-wide level, and its two directorates, namely the Programmes and Management Services.

**3.1 Thematic Areas**

The Commission carries out its technical work through eight thematic areas drawn from the subject matter of the different chapters of the Constitution as outlined below:

1. *Citizenship and Bill of Rights*: This thematic area coordinates activities dealing with human rights and citizenship as found in Chapters Three and Four of the Constitution.
2. *Land and Environment*: This thematic area coordinates activities with regard to the implementation of Chapter Five of the Constitution on Land and Environment.
3. *Public Service and Leadership*: This thematic area coordinates the implementation of Chapter Six of the Constitution on Leadership and Integrity and Chapter Thirteen on Public Service.
4. *Representation of the People and The Legislature*: This thematic area deals with the implementation of Chapters Seven and Eight on Representation of the People and the Legislature respectively.
5. *Executive and Security*: This thematic area coordinates the implementation of Chapters Nine and Fourteen of the Constitution on the Executive and Security respectively.
6. *The Judiciary and Constitutional Commissions*: This thematic area coordinates the implementation of Chapter Ten of the Constitution on the Judiciary and Chapter Fifteen of the Constitution on Constitutional Commissions and Independent Offices.
7. *Devolved Government*: This thematic area coordinates the implementation of Chapter Eleven of the Constitution and Section Fifteen (2) (d) of the Sixth Schedule to the Constitution.
8. *Public Finance*: This thematic area coordinates the implementation of Chapter Twelve of the Constitution.

### 3.2 Stakeholder Engagement

The Commission works with different stakeholders in fulfilling its mandate. This has taken various forms which include inviting submissions by the public on matters to do with policies, legislation and administrative procedures developed to effect the Constitution. To facilitate this, CIC issued guidelines to the public on the steps to be followed to make their participation in the implementation of the Constitution effective. The Commission held public consultative meetings, forums, workshops and seminars in all the counties as part of facilitating public participation in the implementation of the Constitution.

In 2011 the Commission issued guidelines to Government Ministries and public corporations on the ways in which these entities can assist, in a systematic way, the implementation of the Constitution. These guidelines require Ministries and public corporations to submit their implementation plans to CIC. These reports have been used by CIC in monitoring the status of implementation of the Constitution by Ministries and public corporations. The Commission also engaged other public institutions such as the Judiciary, Legislature and the Executive, as well as the constitutional offices including the Attorney General and the Kenya Law Reform Commission through meetings and consultations on matters relating to the implementation of the Constitution. In addition, CIC engaged Non-State Actors including civil society and the media. The Commission underscores the need for a consultative approach by all state and non-state actors in the implementation of the Constitution.

### 3.3 Advisory Opinions

As part of its strategy of public education for meaningful public involvement, CIC issued a number of advisories on pertinent constitutional matters. These were meant to clarify the relevant issues and to clearly communicate the Commission's position on any raging constitutional matter of the day. Such advisory opinions were widely disseminated through the mainstream media outlets as well as in the CIC website.

### 3.4 Comparative Analysis and Incorporation of Best Practices

In appreciation of the fact that there are comparative cases of constitution-making and implementation that bear direct relevance to the Kenyan case, CIC undertook benchmarking studies to India, Uganda, South Africa, Canada, Brazil and Indonesia. These studies provided CIC with valuable lessons on implementation of the Constitution.

### 3.5 Reporting on Implementation Activities

As required by the Constitution, CIC has prepared and submitted quarterly reports to the Constitutional Implementation Oversight Committee (CIOC). These reports contain information on progress in the implementation of the Constitution and any impediments to its implementation. To date six such reports have been submitted to CIOC. The reports have also been presented to the President and the Prime Minister and made accessible to the public.

## SECTION 4

### ACHIEVEMENTS IN THE IMPLEMENTATION OF THE CONSTITUTION

#### 4.0 Introduction

During the period under review, the Commission recorded significant gains in the discharge of its functions. This section highlights the main achievements of the Commission in relation to its core mandate during the period between 4th January 2011 and 30th June 2012.

#### 4.1 Development of Legislation and Administrative Procedures

During the period under review, the Commission coordinated and facilitated the formulation and enactment of all legislation and related rules and regulations required for the implementation of the Constitution within the timelines specified in the Fifth Schedule. However, the National Assembly extended the period prescribed for the enactment of the bills relating to Public Finance Management, Land and County Government to allow time for more comprehensive public participation and to address what the respective ministries considered to be contentious issues. The table below lists the legislation whose enactment the Commission has facilitated:

#### A. LEGISLATION ENACTED BY 26TH AUGUST, 2011 UNDER THE FIFTH SCHEDULE TO THE CONSTITUTION AND THE AGREED TIMELINE

<i>Bill</i>	<i>Constitution Timeline</i>	<i>Status</i>
Supreme Court: The Supreme Court Act, 2011 (Article 163)	One year	Enacted in June 2011
Independent Electoral and Boundaries Commission: The Independent Electoral and Boundaries Commission Act, 2011 (Article 88)	One year	Enacted in July 2011
System of Courts: The Industrial Court Act, 2011 (Article 162)	One year	Enacted in August 2011
Urban areas and Cities: The Urban Areas and Cities Act (Article 184)	One year	Enacted in August 2011
System of Courts: The Environment and Land Court Act, 2011 (Article 162)	One year	Enacted in August 2011
Kenya National Human Rights and Equality Commission: The National Gender and Equality Commission Act, 2011 (Article 59)	One year	Enacted in August 2011
Ethics and Anti-corruption Commission: The Ethics and Anti-Corruption Commission Act, 2011 (Article 79)	One year	Enacted in August 2011
Legislation on elections: The Elections Act, 2011 (Article 82)	One year	Enacted in August 2011
Legislation on citizenship: The Kenya Citizenship and Immigrations Act, 2011 (Article 18)	One year	Enacted in August 2011
Commission on Revenue Allocation: The Commission on Revenue Allocation Act, 2011 (Article 215)	Five years	Enacted in August 2011
Power of mercy: The Power of Mercy Act, 2011 (Article 133)	One year	Enacted in August 2011
Vetting of Judges and Magistrates: The Vetting of Judges and Magistrate Act, 2011 (Article Sixth Schedule Section 23)	One year	Enacted in August 2011
The Judicial Service Act, 2011 (Chapter 10)	One year	Enacted in August 2011
Attorney General and Independent offices: The Independent Offices (Appointment) Act, 2011 (Article 156&248)	Five years	Enacted in August 2011
Kenya National Human Rights and equality Commission: The Kenya National Human Rights Commission Act, 2011 (Article 50)	One year	Enacted in August 2011
Kenya National Human Rights and equality Commission: The Commission on Administrative Justice Act, 2011 (Article 59)	One year	Enacted in August 2011
Legislation on political parties: The Political Parties Act, 2011 (Article 92)	One year	Enacted in August 2011
Salaries and Remuneration Commission: The Salaries and Remuneration Commission Act, 2011 (Article 230)	One year	Enacted in August 2011

**B. LEGISLATION ENACTED BY 26TH FEBRUARY, 2012 UNDER THE FIFTH SCHEDULE TO THE CONSTITUTION AND THE AGREED SCHEDULE OF BILLS**

Legislation on Chapter 11: The Transition to Devolved Government Act, 2012 (Article 200 & Sixth schedule, Section 15)	Eighteen months	Enacted in February 2012
Legislation on Chapter 11: The Intergovernmental Relations Act, 2012 (Article 200 & Sixth schedule, Section 15)	Eighteen months	Enacted in February 2012
Legislation on Land: The Land Registration Act, 2012 (Article 68)	Eighteen months	Enacted April 2012
Legislation on Land: The Land Act, 2012 (Article 68)	Eighteen months	Enacted April 2012
National Land Commission: The National Land Commission Act, 2012 (Article 67)	Eighteen months	Enacted April 2012
Legislation on Chapter 11: The County Government Act, 2012 (Article 200 & Sixth schedule, Section 15)	Eighteen months	Enacted in June 2012
Teachers Service Commission: The Teachers Service Commission Act, 2012 (Article 237)	Five years	Enacted June 2012
Legislation on Chapter 12: The Public Financial Management Act, 2012 (Chapter 12)	Two years	Enacted July 2012
The Public Service Commission: The Public Service Commission Act, 2012 (Article 233)	Five years	Enacted August 2012

**C. LEGISLATION ENACTED BY 26TH AUGUST, 2012 UNDER THE FIFTH SCHEDULE TO THE CONSTITUTION**

<i>Bill</i>	<i>Constitution Timeline</i>	<i>Status</i>
Judiciary Fund (Article 173)	Two years	Provided for in the Judicial Service Act, Enacted in March 2011
Determination of Questions of Membership of Parliament (Article 105)	Two years	Provided for in the Elections Act, 2011
The Public Finance Management Act, 2012	Two years	Enacted May 2012
Financial Control (Article 225)	Two years	Legislation included in Public Finance Management Act, 2012. Enacted May 2012
Legislation on Leadership: The Leadership and Integrity Bill, 2012 (Article 80)	Two years	To be enacted by August 2012
Right to Petition Parliament: The Petition to Parliament (Procedure) Bill, 2012 (Article 119)	Two years	To be enacted by August 2012
Assumption of Office of the President: The Assumption of the Office of the President Bill, 2012 (Article 141)	Two years	To be enacted by August 2012
National Security Organs: National Intelligence Service Bill, 2012 (Article 239)	Two years	To be enacted by August 2012
National Security Organs: National Security Council Bill, 2012 (Article 239)	Two years	To be enacted by August 2012
National Security Organs (Article 239): Kenya Defence Forces Bill, 2012	Two years	To be enacted by August 2012
Command of the Police Service: National Police Service Act, 2011 (Article 245)	Two years	Enacted in August 2011
Independent Police Oversight Authority Act, 2011	Two years	Enacted in November 2011

In an attempt to provide guidance to public institutions on the process of implementation of the Constitution, the Commission facilitated the issuance of Process Circular No. OP/CAB/17/84/1A highlighting the role of Government institutions in the implementation of the Constitution. Pursuant to this Circular, Ministries and State Agencies have set up working teams to revise existing policies and administrative procedures.

Working through its thematic teams, CIC engaged with the different implementers to ensure that there is adequate public participation and stakeholder consultation in the development and review of policies. Some policies identified for review and development include policies relating to Disaster Management, Access to Justice, Gender Mainstreaming, Refugees, Foreign Relations, National Housing, Education and Health.

The Commission facilitated the development and implementation of administrative procedures, especially those aimed at promoting equality and non-discrimination in the recruitment of National Youth Service and the Kenya Police Service personnel. The Commission also monitored judicial reforms and related administrative procedures designed to transform the

Judiciary in its endeavour to deliver equal access to justice.

#### 4.2 Reporting to Parliament

The Commission has prepared and published in the Kenya Gazette and other mass media channels quarterly reports for distribution to the people of Kenya. The reports offer an important tool of informing Parliament and the people of Kenya on progress in the implementation of the Constitution. The reports are available on CIC website: [www.cickenya.org](http://www.cickenya.org)

#### 4.3 Work with Constitutional Commissions and Independent Offices

Chapter 15 of the Constitution establishes ten commissions and requires Parliament to establish one more under Article 79. During the period under review, CIC worked with these constitutional commissions in undertaking consultative forums and consultative county visits.

The Commission partnered with other Constitutional Commissions in the formation of the 'Chairpersons' Forum' to deal with governance issues of public concern relating to the effective implementation of the Constitution, and to help coordinate constitutional commissions and independent offices for the effective discharge of their respective constitutional and statutory mandates.

#### 4.4 Transition to Devolved System of Government

The Commission reviewed and facilitated laws dealing with Devolution including County Governments Act 2012, Urban Areas and Cities Act 2012, Inter-Governmental Relations Act 2012, Transition to Devolved Government Act 2012, Elections Act 2011 and Public Finance Management Act 2012.

During the period under review, the Commission sensitized and consulted with Local Authorities in a bid to ensure participation, ownership and smooth transition to devolved government. As required by law, CIC continues to hold consultative meetings with the Commission on Revenue Allocation (CRA) and the Transition Authority (TA) to address issues relating to transition to devolved government.



#### 4.5 Judicial Intervention

In exercise of its mandate and to promote constitutionalism, CIC sought the court's guidance through legal proceedings in cases of real or perceived misinterpretation or misapplication of the Constitution. These cases include:

1. *Constitutional Petition No. 65, 74 & 82 of 2011 (Consolidated)* seeking the Determination of the Date for the Next General Elections
2. *Constitutional Petition No. 208 of 2012 and Judicial Review No. 207 of 2012 (Consolidated)* challenging the Appointment of County Commissioners
3. *Constitutional Petition No. 94 of 2012* Seeking to Clarify the Procedure for the Preparation of Legislation to Implement the Constitution
4. *Constitutional Petition No. 137 of 2011* Seeking to Determine whether Members of Parliament (MPs) should Pay Income Tax

For a detailed presentation on CIC judicial interventions, see Annex III.

In conclusion, the Commission endeavoured and achieved good success in key areas of its mandate in the period under review. However, it also encountered some challenges from which it drew valuable lessons.

### SECTIONS 5

#### CHALLENGES AND IMPEDIMENTS TO THE IMPLEMENTATION OF THE CONSTITUTION

##### 5.0 Introduction

The implementation of the Constitution began immediately after its promulgation on 27th August 2012. While great strides have been made in the implementation, the process has also been affected by a range of challenges. The following challenges were experienced during the reporting period.

##### 5.1 Irregular Amendment of Bills by the Executive and Legislature

The Executive altered the content of some of the bills which had been finalized by CIC, the originating Ministry, the AG and the Kenya Law Reform Commission and forwarded for publication. This was done without reference to CIC as required by a process agreed upon by implementing agencies including CIOC. This challenge was however sorted out in subsequent discussions between CIC, the AG and the Executive.

##### 5.2 Attempts to Mislead the Public on Some Constitutional Issues

There were some instances in which some politicians attempted to mislead the public on aspects of the implementation of the Constitution. These included instances of use of hate speech, attacks on constitutional offices, and disregard of the authority and mandate of constitutional offices for example attempts to review terms of service of parliamentary office holders. Such actions led to anxiety and uncertainty that risk compromising implementation, such as regarding the date of election, for example.

##### 5.3 Delay in Operationalizing Some Constitutional Offices

During the reporting period, the Executive failed to appoint key members to some institutions and commissions whose mandate are critical for the implementation of the Constitution. The affected institutions and commissions included the Registrar of Political Parties, the Ethics and Anti-Corruption Commission, the National Police Service Commission, and the National Land Commission.

##### 5.4 Disregard of the Constitutional Implementation Process and Mandate of CIC

A number of bills were approved by the Cabinet and subsequently passed by Parliament without being reviewed by CIC. Also, some of these bills were not subjected to public participation as required by the Constitution. A number of Private Members Bills were also published and subsequently debated in Parliament without review by CIC yet they have a direct bearing on the implementation of the Constitution.

##### 5.5 Late Submission of Bills

Some Constitution implementing partners failed to submit bills originated by them to CIC in good time. As a result, some bills were reviewed by CIC within very tight deadlines. In addition, Parliament was in some instances forced to enact pieces of legislation without first critically scrutinizing the content to avoid offending the constitutional and agreed timelines.

##### 5.6 Failure to Develop Policies Prior to Preparation of Bills

Most Ministries have prepared and submitted bills to CIC for review without first elaborating the requisite policy framework. This has led to a situation where policies are subsequently prepared to meet the provisions of the law rather than the other way around. The danger of this approach is that there may be incongruence between such policies and the law.

##### 5.7 Non-Compliant Regulations and Administrative Procedures

Many Ministries and institutions are yet to develop regulations and/or administrative procedures to accord with the laws that have been enacted. At the same time, other Ministries and institutions are yet to review existing regulations and administrative procedures to make them consistent with the letter and spirit of the Constitution. Similarly, local authorities are yet to review their by-laws to make them consistent with the Urban Areas and Cities Act 2011.<sup>29</sup>

##### 5.8 Lack of Legislation on National Government

The Executive is yet to develop and submit to CIC for review, a law to govern the operations of the National Government. This legislation should have been developed together with the bills dealing with County Governments which were enacted in February 2012.

##### 5.9 The Role of the Attorney-General's Office in the New Dispensation

In some instances, the Attorney-General failed to give sound legal advice to the Executive on matters relevant to the implementation of the Constitution. In other cases, The Attorney-General's advice was ignored by the Executive, and this led to violation of some key provisions of the Constitution by the Executive. However, subsequent discussions between CIC and the Attorney General have since ironed out this challenge.

##### 5.10 Unconstitutional Provisions in the Enacted Laws and Disregard of Due Process

There were instances in which Parliament introduced unconstitutional provisions in the bills. A case in point is the introduction of unconstitutional provisions in the County Government Bill 2012, which, subject to the operational command structure set out in the National Police Service Act or any other National Security legislation, purported to give the Governor the power to chair the County equivalent of the National Security Council as provided in Article 239 (5) of the Constitution. This provision contravened Chapter Fourteen of the Constitution, which places the National Security Council under the National Government. Further, National Security is not among the functions of County Governments as set out in Part Two of the Fourth Schedule to the Constitution, hence there is no County equivalent of the National Security Council. The President declined to assent to the bill and this led to a delay in its enactment.

### 5.11 Limited Civic Awareness on the Constitution

Although the Constitution was promulgated on August 27th 2010, there is evidence that the majority of Kenyans are yet to adequately understand and internalize the provisions of the Constitution. Under such circumstances, it becomes very difficult for the people to identify violations of the Constitution by public servants and to defend the Constitution. This has posed a major challenge to the implementation of the Constitution.

### 5.12 Resistance to Change and the Continuing Culture of Impunity

Partly as a result of limited understanding of the Constitution, CIC has observed with concern the resistance of the full implementation of the Constitution by some forces in society.

## SECTION 6

### LESSONS LEARNT AND RECOMMENDATIONS

#### 6.0 Introduction

Two years after the promulgation of the Constitution, the people of Kenya have started experiencing the fruits of a new dawn manifested in the implementation of the Constitution. There has been increased openness, transparency in governance, accountability of public officers, restructuring and reform of public institutions to accord with the institutional framework prescribed by the Constitution, and creation of new institutions leading to increased democratic space and greater Government responsiveness to public demands.

#### 6.1 Lessons Learnt

A number of lessons have been learnt in the process of implementing the constitution that will advise the implementation going forward. These include:

- For effective public participation as envisaged in the Constitution, there is need for structured and continuous public engagement.
- The need for a comprehensive change management programme addressing policy, legislation, administrative procedures and institutional framework gaps leading to constitutionalism and informed consent.
- All actors involved in implementing the Constitution need to act together in the line with the constitutional 'duty to cooperate', not just with CIC, but with all partners in the process of implementation.
- When implementing the Constitution, the national principles and values should act as a guide to be upheld by all actors.
- The need to forgo short term political gain and instead focus on implementing the Constitution and upholding national interests.

#### 6.2 Recommendations

##### *Streamlining of the Legislative Process*

The Commission recommends that all draft bills are reviewed by CIC before being submitted to Parliament. In the same manner, CIC recommends that, just as is provided for in the Constitution, public participation should be incorporated in the review and development of all legislation, policies and administrative procedures.

##### *Civic Education*

There is need for urgent civic education to increase awareness, especially at the grass-roots regarding the opportunities, procedures and the rights relating to participation in legislative policy and other processes. In this regard civic education should be rolled out while ensuring that the content complies with the letter and spirit of the Constitution.

##### *Responsible Political Leadership*

The political leadership have a direct responsibility to practise and propagate responsible politics, and to promote constitutionalism and rule of law in order to ensure achievement of the vision of a united, peaceful and prosperous Kenya in which all citizens respect the rule of law, uphold national values and live by the Constitution.

##### *Respect for the Imperative of Public Participation*

Public participation is a principle in the Constitution that needs to be respected and facilitated. The people's participation in any legislation is a key element in according it legitimacy and acceptability. The Commission calls upon all partners to do their part in engendering effective public participation whenever deciding on matters that affect them.

##### *Fast-tracking the Operationalization of Constitutional Offices*

The Executive should prioritize operationalization of constitutional commissions to ensure reforms are on track. Although the Ethics and Anti-Corruption Commission has continued to function, it is imperative that commissioners are successfully appointed and take up offices as soon as possible. The Police Service Commission is another fundamental organ that needs to be urgently constituted and rolled out.

##### *Development of a National Government Framework*

The Commission recommends the development of a bill to specifically provide for issues relating to operations of National Government and transition from the existing structure to the two-tier system of government.

##### *Increased Co-ordination in the Executive*

There is need for increased co-ordination within and from the Executive to ensure that relevant processes in the preparation of the bills are undertaken in a timely manner.

##### *Fostering Changes in Attitudes and Mind-sets*

The Commission recommends the development and implementation of programmes to foster attitude change, entrench constitutionalism and propagate the values enshrined in the Constitution.

##### *Development of Policies Prior to Preparation of Bills, Regulations and Administrative Procedures*

Development of policies to guide the preparation of bills is necessary to ensure a comprehensive approach to development of legislation. Further, there is need to develop regulations and administrative procedures to accord with the laws that have been enacted. Additionally, there is need for implementing agencies to review existing regulations and administrative procedures. Similarly local authorities need to review their by-laws to make them consistent with the Urban Areas and Cities Act 2011.

## FINANCIAL STATEMENTS FOR THE 2011/2012 FINANCIAL YEAR

## CONTENTS

- Commission Information
- Statement of Commission Responsibilities
- Auditors Report of the Commission
- Financial Statements:
- Appropriation Statement
- Notes to the Financial Statements
- Statement of Appropriations In Aid
- Statement of Assets and Liabilities

## COMMISSION INFORMATION

## HEAD OFFICE

Parklands Plaza  
Chiromo Lane /Muthithi Road Junction  
P O Box 40841 - 00100  
Nairobi

## BANKERS

*Central Bank of Kenya*  
P O Box 6000  
Nairobi

*Kenya Commercial Bank Limited*  
Sarit Centre Branch  
P O Box 182  
Westlands, Nairobi

## AUDITORS

Kenya National Audit Office  
P O Box 30084 - 00100  
Nairobi

## STATEMENT OF COMMISSION RESPONSIBILITIES ON THE FINANCIAL STATEMENTS FOR THE YEAR ENDED 30TH JUNE 2012

The CIC Act 2010 requires the Commission to prepare financial statements for each financial year, which give a true and fair view of the state of affairs of the Commission as at the end of the financial year and of the operating results for that year. It also requires the Commission to keep proper accounting records which disclose, with reasonable accuracy, the financial position of the Commission. They are also responsible for safeguarding the assets of the Commission.

The Commission accepts responsibility for the annual financial statements, which have been prepared using appropriate accounting policies supported by reasonable and prudent judgments and estimates, in conformity with Government of Kenya financial regulations and the generally accepted accounting principles. The Commission is of the opinion that the financial statements give a true and fair view of the state of the financial affairs of the Commission and of its operating results. The Commission further accepts responsibility for the maintenance of accounting records, which may be relied upon in the preparation of financial statements, as well as adequate systems of internal control.

Date: 28th September, 2012.

P. O. O. NKURAIYA,  
*Secretary/Chief Executive Officer.*

## REPORT OF THE COMMISSION FOR THE YEAR ENDED 30TH JUNE, 2012

The Commission submits their report and the unaudited financial statements for the year ended 30 June, 2012 which show the state of the Commission financial status.

## 1. AUDITORS

The Kenya National Audit Office is responsible for the statutory audit of the Commission books of account in accordance with the CIC Act. Currently the audit of the financial statements is on-going.

2. The Commission was established under section 5 (6) sixth schedule and the CIC Act 2010. It has been in existence since January 2011. CIC was initially allocated Kshs 262 million in the FY 2010/11. The expenditure was carried out under the Ministry of Justice, National Cohesion and

Constitutional Affairs (MOJNCCA). CIC managed to spend 215 million during that period.

During the FY 2011/12, CIC was allocated Kshs. 514 Million.

Major achievements include review of various bills in accordance with the constitutional and agreed timelines, monitoring and reporting on the implementation of the Constitution, as well as institutional development for the Commission. The major challenges experienced were initially to do with release of funds but this has been addressed since the Commission has managed to get an independent vote. CIC had requested for an allocation of Kshs 1.2 billion. However in the printed estimates released by the Treasury CIC was allocated Kshs 514 Million.

Although CIC has received additional bilateral donor support of an equivalent of Kshs 300 million, the amount falls short of the estimated expenditure for the FY 2012/2013. CIC fears that this will negatively impact on its ability to effectively deliver on its mandate. The Commission hopes that Parliament will exercise its mandate to review CIC's allocation and ensure the Commission is adequately resourced.

During the current MTEF period, the Commission will continue to be guided by the following four key result areas in its work namely;

1. A respected, well-functioning and independent Commission effectively delivering on its mandate
2. Policies which are compliant with the letter and spirit of the Constitution
3. Laws which are compliant with the letter and spirit of the Constitution
4. Effective institutional frameworks and administrative procedures for implementation of the Constitution.



## ACCOUNTING OFFICER PUBLIC FUNDS REPORT

During the year under review, the Commission has been able to dispense with various bills which Parliament has so far enacted into law. The medium term plan is to focus on bills with deadlines to facilitate implementation of the Constitution. The priority plan is to have participation by the people of Kenya in the implementation process by carrying out County visits to enlighten and seek opinion of the public on various bills to be enacted.

The Commission achieved most of the targets despite the challenge of not having adequate staff to carry out the functions. It is worth stating here that during the financial year, there was change of guard when the Commission recruited the Secretary /Chief Executive Officer. We would like to appreciate the assistance and cooperation so far extended to the Commission by the Treasury.

## (a) APPROPRIATION ACCOUNT

## APPROPRIATION ACCOUNT FOR THE YEAR ENDED 30TH JUNE, 2012

Sub Vote	Approved Estimates KSh.	Actual Expenditure KSh.	Surplus/Deficit KSh.
General Admin & planning	414,000,000.00	390,867,192.50	23,132,807.50

The exchequer released to the Commission Kshs. 414 Million during the financial year 2011/12. The Commission spent Kshs. 390 Million on its programmes and therefore Kshs. 23 Million was not used. This amount had been earmarked for partitioning of the Commission's offices.

Below, see the detailed appropriation account.

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)					
RECURRENT APPROPRIATION ACCOUNT FOR THE YEAR ENDED 30TH JUNE 2012					
Item	Title	Revised Estimates	Expenditure	Under Expenditure	Over Expenditure
2110200	Basic Wages - Temporary Employees	90,204,256.00	91,522,774.15		1,318,518.15
2110300	Personal Allowance - Paid as part of Salary	4,470,744.00	4,572,863.25		102,119.25
2210100	Utilities Supplies and Services	1,500,000.00	1,275,980.40	224,019.60	
2210200	Communication Supplies and Services	4,500,000.00	5,739,044.00		1,239,044.00
2210300	Domestic Travel and Subsistence, and other Transport Costs	47,650,000.00	42,916,983.75	4,733,016.25	
2210400	Foreign Travel and Subsistence, and other Transport Costs	18,048,500.00	16,672,589.84	1,375,910.16	
2210500	Printing, Advertising and Information Supplies and Services	38,501,280.00	38,843,850.00		342,570.00
2210600	Rentals of Produced Assets	32,500,000.00	32,500,309.65		309.65
2210700	Training Expenses	4,500,000.00	3,783,812.00	716,188.00	
2210800	Hospitality Supplies and Services	33,551,500.00	34,802,293.25		1,250,793.25
2210900	Insurance Costs	15,000,000.00	14,927,708.45	72,291.55	
2211000	Specialized Materials and Supplies	5,600,000.00	1,886,440.00	3,713,560.00	
2211100	Office and General Supplies and Services	4,500,000.00	5,018,995.00		518,995.00
2211200	Fuel Oil and Lubricants	7,900,000.00	8,899,682.00		999,682.00
2211300	Other Operating Expenses	14,550,000.00	12,512,322.67	2,037,677.33	
2220100	Routine Maintenance - Vehicles and other Transport Equipment	3,000,000.00	3,593,232.00		593,232.00
2220200	Routine Maintenance - Other Assets	1,200,000.00	1,418,802.00		218,802.00
3110300	Refurbishment of Buildings	50,000,000.00	37,888,481.10	12,111,518.90	
3110700	Purchase of Vehicles and other Transport Equipment	14,962,720.00	14,962,719.40	0.60	
3111000	Purchase of Office Furniture and General Equipment	11,000,000.00	9,694,809.80	1,305,190.20	
3111400	Research, Feasibility Study & Project - Preparation, Design, Supervision	12,000,000.00	8,572,499.78	3,427,500.22	
	GROSS TOTAL	415,139,000.00	392,006,192.49	29,716,872.81	6,584,065.30
	Less A.I.A	1,139,000.00	1,139,000.00		
	NET TOTAL	414,000,000.00	390,867,192.49	29,716,872.81	6,584,065.30

## NOTES 1

## Basic Wages - 2110200.

The over-expenditure on basic wages of Kshs. 1,318,518.15 was due to re-allocation of funds to undertake partitioning during the year which was under-budgeted.

## NOTES 2

## Domestic Travel - 2210300

The under-expenditure of Kshs.4,733,016.25 was occasioned by the time frame within which programmes which had been planned could not be undertaken due to deadlines for legislation.

## NOTES 3

## Foreign Travel - 2210400

The under-expenditure of Kshs.1, 375,910.16 was occasioned by the cancellation of some benchmarking study tours for the Commission to Hong Kong and Singapore.

## NOTES 4

## Communication supplies and services - 2210200

The over-expenditure of Kshs. 1,239,044.00 was occasioned by underestimates at the time of budget.

## NOTES 5

Hospitality supplies and services – 2210800

The over-expenditure of Kshs 1,250,793.25 was occasioned by the underestimates made at the time of the budget.

## NOTES 6

Specialised materials and supplies – 2211000

The under-expenditure of Kshs 3,713,560 was caused by the prolonged procurement procedures before the closure of the financial year.

## NOTES 7

Other Operating Expenses

The under-expenditure of Kshs 2,037,677.33 was occasioned by the lack of sufficient personnel.

## NOTES 8

Refurbishments of buildings – 3110300

The under-expenditure of Kshs.12,111,518.90 was caused by the prolonged procurement procedures which requires the Ministry of Public Works to be on board in line with the Public Procurement Act of 2005.

## NOTES 9

Purchase of Office furniture and General Equipment – 3111000

The under-expenditure of Kshs. 1,305,190.20 was occasioned by the lengthy procurement procedures.

## NOTES 10

Research, Feasibility study and Project Preparation, Design and Supervision – 3111400

The under-expenditure was caused by the prolonged procurement procedures as per the Public Procurement Act of 2005 which requires the consultants to be selected through competitive bidding.

## (b) REVENUE STATEMENTS APPROPRIATION IN AID STATEMENT

<i>Sub Vote</i>	<i>Approved Estimates Kshs.</i>	<i>Actual Expenditure Kshs.</i>
AIA	1,139,000.00	1,139,000.00

The Commission managed to collect the above amount being from advertisement and subsequent sale of tender documents. The amount was not submitted to the Treasury but was spent.

## (c) STATEMENTS OF ASSETS AND LIABILITIES

## ASSETS AND LIABILITIES STATEMENT FOR THE YEAR ENDED 30TH JUNE, 2012

<i>Sub Vote</i>	<i>Amount Kshs.</i>	<i>General Accounts Of Vote (Gav)</i>
TEMPORARY IMPREST	9,110,812.75	
SALARY ADVANCE	1,903,450.00	
BANK BALANCES(PMG)	10,215,095.25	21,229,358.00
TOTAL AMOUNT	21,229,358.00	21,229,358

JOSEPH YAMO,  
Head of Accounting Unit.

## ANNEXES

## ANNEX I

## Biographies of Commissioners

## 1. Chair: Mr. Charles Nyachae

Mr. Charles Nyachae is an experienced lawyer who has practiced Commercial and Property Law for over 26 years. A graduate of the London School of Economics & Political Science, and a former Council Member of the Law Society of Kenya, Mr. Nyachae has chaired the Kenya Chapter of the International Commission for Jurists (ICJ) and has also been the Chairperson of the Institute for Education and Democracy, IED. Mr. Nyachae formerly served as a Commissioner with the Kenya Law Review Commission and sits on the board of the Center for Governance & Democracy. Mr. Nyachae has vast experience in Human Rights, Democracy & Electoral laws. As the Chairperson, Mr Nyachae is the official spokesman for the Commission.<sup>5</sup>

## 2. Vice-chair: Dr. Elizabeth Muli

Dr. Muli is an Advocate of the High Court of Kenya of more than 16 years standing. She is a Fulbright Fellow and holds a doctorate degree from Stanford Law School, a Masters of Laws from the University of Bristol and a Bachelor of Laws degree from the University of Nairobi. Prior to joining the CIC, she taught law at the University of Nairobi School of Law and was Chair, Department of Commercial Law. Her fields of expertise are human rights, international law and conflict resolution. Elizabeth has served as a consultant to international organizations and civil society organizations on human rights issues and is a member of the boards of human rights organizations. She has served as a member of the National Committee on the Implementation of International Humanitarian Law. Before joining academia, she was a state counsel in the treaties & agreements department of the State Law Office. Dr Muli is the Vice-Chairperson of CIC and Convener of the Executive & Security Thematic Team at the CIC.

## Commissioner Mr. Kibaya Imaana Laibuta

Mr. Kibaya Imaana Laibuta is a Ph.D. candidate at the University of Nairobi Law School. He holds a Master of Laws Degree from the London School of Economics and Political Science (University of London) and a Bachelor of Laws Degree from the University of Nairobi. He has a Post-Graduate Diploma in Law from the Kenya School of Law. Mr. Laibuta is a Mediator, a Chartered Arbitrator and a Fellow of the Chartered Institute of Arbitrators.

He is an Advocate of the High Court of Kenya of 25 years standing. Before his appointment to CIC, Mr. Laibuta was a legal practitioner and a law lecturer at the Kenya Polytechnic University College of the University of Nairobi for 24 years. He sits on the International Board of the Voluntary Services Overseas (VSO) Federation and the Kenya Institute for the Blind (KIB). He also served as the Chair of VSO (Kenya) and of the National Council for Persons with Disabilities. Mr. Laibuta also served as a Board member of Export Processing Zone Authority, the National Development Fund for Persons with Disabilities and the Kenya Society for the Blind. He is a writer in the areas of Commercial Law and Poetry. Mr Laibuta is the Convener of the Judiciary and Constitutional Commissions Thematic Team in CIC.

*Commissioner Prof. Peter Wanyande*

Professor Peter Wanyande holds a PhD degree in Political Science from the University of Florida, USA specializing in comparative politics and public policy; a Master of Arts (MA) degree in Government and a Bachelor of Arts (BA, Hons.) degree in Government & Sociology from the University of Nairobi. Prof Wanyande has taught political science at the University of

Nairobi for over 20 years. He has conducted research, and authored and edited numerous scholarly publications including books, book chapters and refereed journals on issues relating to governance, democracy, constitutional politics and civil society among others. Prof. Wanyande has also held administrative positions at the university. Immediately prior to joining CIC, Prof Wanyande was Chairman, Department of Political Science at the University of Nairobi. Before that, Prof Wanyande had also served as Dean, Faculty of Arts, University of Nairobi. In addition, he has served in various capacities in many committees of the University of Nairobi. Prof. Wanyande is the Convener of the Devolution Thematic Team at CIC.

*Commissioner Mr. Kamotho Waiganjo*

Mr Waiganjo holds a Bachelor of Laws and Master of Laws degree both from the University of Nairobi. He is also a Chartered Arbitrator. Has been in private law practice for over 20 years and was a senior partner at Kamotho Maiyo & Mbatia Advocates specializing in commercial and conveyancing law. He has taught law at the Kenya School of Law. In addition, Mr Waiganjo has been involved in wide ranging consultancies in constitutional law and was advisor to numerous bodies during the constitution-making process. He is extensively involved in public interest work and sits in the boards of several charities and civil society organizations in Kenya. Mr. Waiganjo is the Convener of the Public Finance Thematic Team.

*Commissioner Mrs Catherine Muyeka Mumma*

Mrs Catherine Muyeka Mumma is a human rights lawyer with a Master of Laws (LLM) degree from Queen Mary and Westfield College of the University of London and a Bachelor of Laws (LLB) degree from the University of Nairobi. She is an advocate of the High Court of Kenya and has a work experience spanning more than 19 years. Catherine's experience includes work in the public service (State Law Office), and she was one of the pioneer Commissioners to the Kenya National Commission on Human Rights (KNCHR). She also served as a Commissioner on the Independent Review Commission (IREC) which was appointed to look into the electoral issues that affected the 2007 general election. Mrs Mumma also has experience in the civil society sector where she has worked in 42 communities with vulnerable populations and marginalized populations. She has broad experience of working on all areas of human rights. Mrs Mumma is the Convener of the Bill of Rights and Citizenship Thematic Team.

*Commissioner Dr. Ibrahim M. Ali*

Dr. Ibrahim M Ali was previously Director of the African Conservation Centre and the Wildlife Clubs of Kenya. Dr. Ali also founded and set up the Syracuse Wildlife House and Research Centre behind Nairobi National Park. This is the first local private research centre in Kenya whose primary mission is to build capacity for development through training and research. In addition, Dr. Ali is a science teacher and conservationist with a keen interest in ideas, knowledge and attitudes about Environment and Conservation as well as research and training. Dr. Ali holds a PhD from the University of East Anglia and an M.Sc degree from the same university, as well as a Bachelor of Education degree from the University of Exeter—all in the UK. Dr Ali is the Convener of the Land and Environment Thematic Team.

*Commissioner Mr. Philemon Mwaisaka EBS, SS.*

Mr. Philemon Mwaisaka is a career Permanent Secretary, having served in the Ministries of Transport & Communications, Supplies & Marketing, Tourism & Wildlife, Co-operative Development, Agriculture and Health. He has served severally as District Commissioner and was formerly the Principal of Kenya Utalii College. He was also a Director of the Industrial and Commercial Development Corporation. Mr Mwaisaka holds B.A. Hons degree from the University of Nairobi in Government & Sociology; he has also studied Public Administration at the University of Birmingham. He is a trustee of Wildlife Clubs and New Life Homes. Mr Mwaisaka is the Convener of the Public Service and Leadership Thematic Team.

*Commissioner Dr. Florence Omosa*

Florence is a Decision Scientist and Institution Strengthening Expert. She has served as a lecturer at the University of Nairobi, and as deputy director of the ISGM program—as well as a senior regional Organizational Development and systems analyst expert of USAID/East Africa. In addition, she has served as a consultant with various regional and international organizations on decision making and institutional development. Dr Omosa holds a PhD and

MSc in Decision Sciences both from the London School of Economics and Political Science and an MBA (Finance) and B.Com (Accounting) both from the University of Nairobi. She is the Convener of the Representation of the People & the Legislature Thematic Team.

**ANNEX II**

**Commissioners and Staff of CIC**

*Chairperson*

Mr. Charles Nyachae

*Vice – Chairperson*

Dr. Elizabeth Muli

*Commissioners*

Comm. Mrs. Catherine Mumma

Comm. Dr. Florence Omosa

Comm. Dr. Ibrahim Ali

Comm. Mr. Kibaya Imaana Laibuta

Comm. Mr. Philemon Mwaisaka EBS,SS

Comm. Prof. Peter Wanyande

Comm. Mr. Kamotho Waiganjo

*Secretary /Chief Executive Officer*

Amb. Peter O. Ole Nkuraiya, CBS

*Administration*

Lily Koros, *Director, Management Services*

Kennedy Malinda, *Supply Chain Management*

Khalid Salim, *Head of Communications*



Mugita Gesongo, *Head of Monitoring and Evaluation*  
 Bernard Cherutich, *Ag. Head, Finance and Accounts*  
 Brian Ikol, *Legal Services*  
 Timothy Kariuki, *Head of Planning*  
 Evans Nyabuti, *Internal Audit*  
 Joseph Yamo, *Senior Accountant*  
 James Kamucha, *Head of Transport*  
 Fred Oromo, *Snr. Supply Chain Management Officer*  
 Kikanae Topati, *Personal Assistant to the Secretary/Chief Executive Officer*  
 Hassan Abdi, *Accountant II*  
 Pauline Kamurutu, *Accountant II*

#### Programmes

Esther Kodhek, *Director of Programmes*  
 Elizabeth K. Obiero, *Principal Programme Officer, Institutional Strengthening*  
 James Wagalla, *Principal Programme Officer, Institutional Strengthening*  
 Ruth Muthui, *Senior Programme Officer*  
 Valerie Nangidi, *Senior Programme Officer*  
 Sophia Sitati, *Senior Programme Officer*  
 Victor Odhiambo, *Senior Programme Officer*  
 Abdirazak Abdi, *Senior Programme Officer*  
 Christine Njeru, *Senior Programme Officer*  
 Doreen Muthaura, *Senior Programme Officer*  
 Mary Goretti Orwa, *Senior Programme Officer*  
 Edith Cheramboss, *Senior Programme Officer*  
 Jeremiah Nyakundi, *Personal Assistant to the Chairperson*  
 Caroline Gaita, *Personal Assistant to Comm. Laibuta*

In addition, The Commission is supported by a dedicated team of officers who play an important role in ensuring that the Commission's mandate is

#### ANNEX III

##### Update on CIC Judicial Intervention

S/No.	Parties and Case Reference	Subject Matter/Issue	CIC Role & Representation	Status
1.	Milton Mugambi Imanyara & others v AG & others & CREAW & another v CIC & Others  Petition Civil Appeal No. 74&82 of 2012 (Consolidated)	In the matter of construction, interpretation and determination of date of the next general elections	Petitioner   Letangule & Co. Advocates	Judgment issued by Court of Appeal on 31st July, 2012. Court ruled that:  (i) The date of the next general elections remains 4th march 2013.  (ii) President and PM lack constitutional mandate to dissolve parliament fix elections date.  (iii) The death of the grand coalition cannot trigger dissolution of Parliament to allow for elections.  (iv) Only IEBC has constitutional mandate to fix and conduct elections.  (v) CREAW, one of the appellants lacks <i>locus standi</i> to participate in the appeal.
2.	FIDA-K & Others v AG & others  Constitutional Petition No. 102 of 2011	In the matter of the recommendation by the JSC of persons for appointment to the offices of Judges of the Supreme Court under the Constitution of Kenya. 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.	Amicus Curiae  1.Njoroge Regeru Advocates 2.Judy Thongori & Co Advocates 3.Azania Legal Consultants	Judgment issued 25th August 2011. Petition rejected. Appeal pending hearing before Court of Appeal
3.	Japeth Kiio v ODM & Others  Constitutional Petition No. 107 of 2011	Case on Sec. 2 and Sec 15 of the Political Parties Act and interpretation of the provisions of Article 77(2) of the Constitution, the prohibition on state officers to hold office in a political party.	Interested party	Hearing date to be issued
4.*	Dr. Timothy Njoya, TISA, Youth League & Others	Interpretation of the Constitution to determine: whether all State Officers, including MPs, are under an obligation to pay tax as per Article 210 as read with 201 and 230 of the Constitution; whether	Interested Party	Case coming up for submissions September.

S/No.	Parties and Case Reference	Subject Matter/Issue	CIC Role & Representation	Status
	Constitutional Petition No. 137 of 2011	the Executive or the transitional clauses saves or exempts the MPs from payment of tax; whether Government could legally settle the tax burden of MPs using public resources or tax payer's money.	No representation	
5.	CIC v AG & Others  Constitutional Petition No.145 of 2011	Clarification of the procedure for enactment of legislation for implementation of the Constitution (arising out of the AG's unconstitutional conduct in the finalization of two Bills, namely the Contingencies Fund and County Emergency Funds Bill, 2011 and the National Government Loans Guarantee Bill 2011 without consulting CIC).	Petitioner  Njoroge Regeru Advocates	Case overtaken by events because the Public Finance Management Act repealed the Contingencies fund and county emergency funds Act and the national government loans guarantee Act.
6.	Republic v IEBC  Judicial Review Misc. App. 94 Of 2012	IEBC delimitation of constituency and wards boundaries case.	Petitioner  No representation	Judgment issued 9th July 2012.  The court reviewed some civic boundaries and also ruled that:  i) There is need to develop a legal framework for the creation and determination of sub-locations to ensure population parity can be achieved.  ii) Parliament should address the issue of County boundaries for accuracy of information as to the location of sub-locations in counties.
7.*	Patrick Njuguna, Augustino Neto, Charles Omanga and others v AG & others.  Constitutional Petition No. 21 of 2012	Advisory Opinion and the Interpretation of Articles 10(1) & (2) Articles 73, 75 and 80 of the Constitution and the charges on the Kenyan situation in the International Criminal Court regarding eligibility of Hon. Uhuru Kenyatta and Hon. William Ruto to run for Office of the Presidency and the implication of persons charged with serious crimes taking up appointive or elective office in view of Chapter Six of the Constitution.	Interested Party  No representation	Hearing on 27th September, 2012
8.*	Consortium for the Empowerment and Development of Marginalized Communities & others v AG & others  Petition No. 385 of 2012	Alleged Contravention constitutional provisions and the Kenya National Commission of Human Rights Act 2011 by failing to give fair and equitable representation to the minority and marginalized communities in the shortlisting of candidates for appointment of Chairperson and members of the Kenya National Commission on Human Rights.	Respondent  No representation	Hearing on 24th September, 2012
9.*	Andrew Okiya Omtatah Okoiti, & others v AG & others	Application for Interpretation of President's executive powers under Sec. 22 and Sec. 23 of the former Constitution of Kenya in respect of Presidential immunity under Sec. 14 of the former Constitution and		

S/No.	Parties and Case Reference	Subject Matter/Issue	CIC Role & Representation	Status
	Constitutional Petition no. 351 of 2012	Articles 131 and 132 of the Constitution of Kenya	No representation	
10.	CIC v AG & others  Constitutional Petition No. .... of 2011	Contravention of Section 34(9) of the Elections Act of the provisions of Article 81, 90, 91, 97, 98, 100, 129 to 148 and 177 of the Constitution	Petitioner  Kilonzo & Co. Advocates	Awaiting allocation of hearing date. (TBC)
11.	CIC v Ag and others.  Constitutional Application No. 1 of 2011	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. Under Article 163(6) CIC is seeking the meaning of nine articles and Section 21(2) of the transitional clauses.	Petitioner  I.Njoroge Regeru Advocates	Application withdrawn and court file closed due to passage of time leading to the issues raised in the case being overtaken by events.
12.	Centre for Rights Education & Awareness (CREW) & six others V AG & others  Constitutional Application No. 208 of 2012 and Judicial Review No. 207 of 2012 (Consolidated)	Petition and Judicial review application question the constitutionality of the appointment or deployment by the President of 47 County Commissioners	CREAW  No representation	The court delivered its judgment on 29th June 2012, held as follows:  i) The President has no power to appoint or deploy County Commissioners.  ii) Even if the President had had such power the appointments or deployments violated Article 10 and 27 of the Constitution.  iii) The purported deployment of County Commissioners by Gazette Notice No. 6937 of 23 <sup>rd</sup> May 2012 was therefore unconstitutional, null and void.
13.	Daniel Kipchirchir Sang' v AG & 4 others  High Court Petition No. 237 of 2011	Application contesting removal of members of the Parliamentary service Committee to comply with Constitution.	Respondent  Ojiambo & Co. Advocates	Petition withdrawn by applicant.

## ANNEX IV

## Development Partners

The Commission acknowledges and appreciates the material, technical and financial support from the following development partners:

- Government of Japan
- The Royal Netherlands Government
- International Development Law Organisation (IDLO)
- International Rescue Committee (IRC)
- GIZ - Deutsche Gesellschaft für Internationale Zusammenarbeit
- United Nations Office of the High Commissioner for Human Rights
- Danish International Development Agency (DANIDA)
- Swedish International Development Cooperation Agency (SIDA)
- United Nations Development Programme (UNDP)
- United Nations High Commissioner for Refugees (UNHCR)
- United States Agency for International Development (USAID)
- World Wide Fund for Nature (WWF)
- SUNY-Kenya
- Department for International Development (DfID)



FIRST QUARTERLY REPORT OF 2012  
JANUARY TO MARCH 2012

## FOREWORD

This quarter marks one year since the Commission for the Implementation of the Constitution commenced operations and eighteen months since the Constitution took effect. The status, challenges and potential impediments of the Constitution implementation process were well captured in the four quarterly reports for the year 2011.

The period under review started on a slow note in the legislative arena for the first time since the promulgation of the Constitution. The timeline for the enactment of legislation as stipulated in the Fifth Schedule has been missed. As at the time of going to print, the County Government Bill, 2012 had not yet been enacted. The President declined to assent to the Bill because of unconstitutional provisions introduced on the floor of the House. The Bill was sent back to the National Assembly with a memorandum proposing amendments to ensure the Bill is consistent with the Constitution.

During this quarter Parliament also invoked its Constitutional Powers under Article 261(3)b to extend the timeline for enactment of the National Land Commission Bill 2011, the Land Bill, 2012 and the Land Registration Bill, 2011 to 26<sup>th</sup> April, 2012. The Bills which were due for enactment by 26<sup>th</sup> February, 2012. In the view of CIC, to the extent that such extension of time will both provide opportunity for enhanced public participation and give parliament greater opportunity to scrutinize bills, we welcome the extension. It has always been CIC's view that even as we seek to ensure compliance with the Fifth schedule timelines, this must not be at the expense of either quality of the laws or public participation in Constitution implementation.

The period also saw the High Court weighing in on the outstanding matter of the Election date. The IEBC acting within its constitutional mandate and taking into account the High Court ruling declared March, 4<sup>th</sup> 2013 as the date for the next General Election, and this remains the election date unless it is changed through constitutionally acceptable means.

Of concern to CIC is the apparent slow down in the Constitution implementation process. Despite having laws in place relevant institutions such as the Office of the Inspector General, the National Police Service Commission, the Independent Police Oversight Commission and the Ethics and Anti-Corruption Commission are not yet fully operational. This apparent slow down of reforms especially in the penultimate stages is a set back in the implementation process.

Despite the challenges, thus far the implementation of the Constitution remains generally on course. We must however continue to be alive to and avoid the danger of the process being derailed, particularly in the current political environment, by a failure to remain true to what we ourselves have undertaken, namely, to safeguard the Constitution for future generations

Sovereignty belongs to the people of Kenya and it is incumbent upon each and every one of us to play our individual and collective roles towards the full and faithful implementation of the Constitution.

SIMON NYACHAE,  
*Chairperson.*

## EXECUTIVE SUMMARY

This report is the first quarterly reports for the year 2012 by the Commission for the Implementation of the Constitution (CIC) to the Parliamentary Constitutional Implementation Oversight Committee (CIOC) and the public to inform them on the progress being made in the implementation of the Constitution of Kenya 2010.

The report focuses on the status of implementation of the Constitution with emphasis on the achievements, challenges faced and potential impediments in the implementation of the Constitution, as well as activities projected for implementation in the second quarter of 2012. Some of the challenges that were highlighted in 2011, 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, remain.

This report also makes recommendations on how to overcome the challenges and potential impediments to ensure implementation of the Constitution is on track. By preparing and publicizing this quarterly report, the CIC aims to keep all stakeholders apprised on how the progress in implementation of the Constitution to ensure the Commission is accountable to the people of Kenya in line with the national principles and values set out in the Constitution. This first quarterly report of 2012 contains six main parts.

The first part summarizes the context of operation for the quarter and links this report to the previous reports. The second part gives an overview of Commission-wide activities and the engagements with various stakeholders and interest groups. The third part discusses the progress made under the eight thematic areas, and in particular, progress made on enactment of various laws and policies necessary for implementing the Constitution. The section also highlights the challenges faced, the recommendations for action and the activities to be carried out in the second quarter.

The fourth part leads a discussion on the present challenges and impediments CIC is facing in implementing the Constitution. The fifth part focuses on key recommendations for keeping up the momentum in implementation. Finally, the Annexes give a snapshot of the status of submission of quarterly reports by Ministries and government agencies, an update of status of Commissions that are to be set up under the Constitution, status of enactment of implementing laws and the advisory opinions CIC has rendered on the elections date question and on the principle of two-thirds gender limit in elective and appointive bodies.

### 1. INTRODUCTION

This report is CIC's first scorecard for the year 2012. The report aims to inform all partners and stakeholders about the progress being made in the implementation of the Constitution of Kenya 2010.

As in past editions, this report addresses the status of implementation of the Constitution including the achievements in the implementation, challenges faced in the course of implementing the Constitution, potential impediments and recommendations on how to address these challenges, and activities projected for implementation in the second quarter of 2012. The report also gives an update of progress made by the Commission at institutional level.

### 2. OVERVIEW OF CIC ACTIVITIES

#### 2.1 Commission-wide Activities

Commission wide activities for this quarter included stakeholder engagements, public advisory opinions, study tours and institutional development activities.

#### 2.1.1 CIC Engagements With Stakeholders

In line with its mandate CIC continues to engage with stakeholders in the Constitution implementation process. Some of the stakeholders CIC engaged with are: CIOC, the Youth, the Attorney General, Caucus for Persons with Disability, Civil Society and the Private Sector. The following is a summary of issues deliberated upon with stakeholders.

### ► The Young People of Kenya Forum

One of the key missions of CIC is to actively engage the different categories of the people of Kenya, based on age, gender, professions, social groups for the implementation of the Constitution with a focus on elections. The overall goal of such engagements is for the people of Kenya to learn and understand what the electoral system, process and its outputs should ideally look like after the Constitution of Kenya is fully implemented. Specifically, the focus is to ensure that each and every Kenyan is able to visualize and understand the new dispensation in as far as the electoral system and process is concerned, understand what implementing the new electoral system and process means, know his/her rights and responsibilities in the new dispensation and is ready to play his/her part in implementing the Constitution.

In pursuance of the above objectives, CIC held a youth forum between the 3<sup>rd</sup> to the 8<sup>th</sup> of January 2012 at the KCB Leadership Centre in Karen, Nairobi, with five participants from each of the 47 counties within the age bracket of 18–25 years. The aim of the forum was for the participants to develop a long-term strategy on how CIC can actively and constructively engage the young people of Kenya across the country in order to ensure full and effective implementation of the Constitution.

The specific focus on the target age group was based on the fact that the youth (persons aged between 18–35 years) represent the largest voting bloc in the country (at 60% of the country's population as per the 2009 census). Hence, it is important that the youth understand what is expected of them in the constitution implementation process. In addition, it was deemed important to specially target that category of Kenyans as they have the energy and passion to drive the country towards a new and more inclusive dispensation. The value of inclusivity that is desired for the new Kenya was evident in the diversity of the youth who were invited to the forum. Participants reflected diversity and balance in gender, religious beliefs, socio-economic backgrounds, as well as the inclusion of persons with disabilities. A highlight of the forum was a presentation made by a group of participants with hearing impediments, who challenged their fellow participants to treat persons with disabilities with respect, and to avail equal opportunities to them. The youth from different counties, who also represented the diverse ethnicities of the country were able to interact and learn from each other.

The forum was designed in the form of a think-tank, where participants were required to critically think about their perceptions of self and their roles as social beings in a Kenya that is changing towards a new dispensation. The think-tank design consisted of: plenary presentations, plenary question and answer sessions, group work sessions and individual reflections. The plenary sessions focused on presentations on virtuous leadership, the sovereignty of the people of Kenya and presentations on the importance of the youth's engagement in the electoral process. The individual reflection session focused on the questions, *"Who am I and what is my role in the new Kenya."*

The think-tank format of the forum was especially important in that it encouraged the participants to self-reflect on their knowledge and skills, impart vital information on their sovereignty as outlined in Article 1 of the Constitution and engage participants in collective and individual brainstorming of how to communicate to their peers and communities in understanding their rights and responsibilities under the new dispensation.

By the end of the forum the following had been achieved:

- The 230 youth, majority of whom had not previously read or known of the provisions of the Constitution, were broadly familiar with the Constitution;
- The youth understood that they are part and parcel of the Constitution implementation process and have a special role to play in it, and thus, should not leave it to the unknown 'someone else'.
- The participants understood how the Constitution, if implemented correctly, can impact the youth population, helping it create productive, satisfying lives.
- Through the different representations of the socio-cultural diversity of the participants and their consequent interaction with each other, the youth demonstrated their ability and desire to engage the different diversities of Kenya irrespective of ethnic, religious or socio-economic backgrounds.
- Through the special focus on the importance of youth involvement in the electoral process, the participants recognized that the next election is a potential tipping point event in the life of the new dispensation of Kenya, which must be carried out correctly, both by government officials and the people of Kenya as a whole.

Through the focus on the sovereign power of the people of Kenya, the youth understood that it is up to the people of Kenya to hold all implementing agencies, including the CIC, accountable to them by the standards set out in the Constitution so as to ensure the successful implementation of the Constitution.

Going forward, CIC intends to draw from the vision and hopes of the Kenyan populace, and use insights gained during the forum to develop a long term model for engaging young people in the Constitutional and governing process

### ► Meeting with the CIOC

CIC participated in a working retreat hosted by the CIOC from 11<sup>th</sup> to 12<sup>th</sup> January 2012. The purpose of the retreat was to look at legislation and actions required of Parliament within the first eighteen months of promulgation of the Constitution. The meeting formed a technical team comprising the CIC, KLRC, Office of the Attorney General and the Parliamentary Service Commission to discuss the way forward regarding the process of development of private members' bills. The technical team agreed on the following issues:

Procedure to be followed in the processing of private members' bills

The National Assembly has a distinct and independent role to play in the process of implementation of the Constitution. However, CIC must also play its role to ensure the contents of every bill are in line with the letter and spirit of the Constitution before it is tabled in Parliament, and indeed at every stage of the process. Taking cognizance of the primary responsibility of members of parliament to enact legislation including private members' bills and the role of CIC to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution, the technical committee agreed that CIC should be allowed to check the constitutionality of every bill that impacts on implementation of the Constitution, without limiting that function to legislation required under legislation required in the Fifth Schedule to the Constitution.

The way forward regarding the status of enactment of legislation required to be in place within the first eighteen months of promulgation of the Constitution

The meeting adopted tentative timelines for enactment of legislation that should be in place by February 2012 and August 2012.

Update on operationalization of Chapter Fifteen Commissions

While noting the progress made in enactment of legislation and setting up of Chapter Fifteen Commissions, the CIC expressed concern that some legislation although being priority had not been enacted and some Chapter Fifteen Commissions had not yet been set up. (*See Annex I for status of operationalization of Chapter Fifteen Commissions*) CIC urged CIOC to fast track the finalisation of:

- Amendments to the Parliamentary Service Commission
- Setting up of the National Police Service Commission
- Gender and Equality Commission, subject to the determination of the Court Case.

► Meeting with the Independent Electoral and Boundaries Commission

On the 27th of February 2012, CIC held an introductory meeting with the newly appointed commissioners of the Independent Electoral and Boundaries Commission. The objective of the meeting was to discuss how best the CIC and the IEBC can work together pursuant to Section 5 (6)(d) of the Sixth Schedule to the Constitution, and particularly with regard to preparations being made for the next election. The meeting also discussed the holding of regular meetings between the two Commissions and the role of IEBC in the determination of election dates.

CIC also attended a policy dialogue meeting hosted by the IEBC to discuss ways through which non-state actors could be involved in ensuring that the next general elections are peaceful, free and fair.

► Participation of Diaspora Kenyan's in the electoral process

The Office of the Prime Minister is engaged in a process which seeks to ensure that Kenyans in the Diaspora exercise their right to vote. CIC is currently working with the team which comprises representatives from the Office of The President, office of The Prime Minister, the Ministry of Justice National Cohesion and Constitutional Affairs, Ministry of Foreign affairs, Ministry of State for Immigration and Registration of Persons, Ministry of Finance, the Independent Electoral and Boundaries Commission and the Article 59 Commissions, in the development of policies to facilitate the voter registration and eventual voting for Kenyans in the Diaspora in compliance with Article 82(1)(e) of the Constitution.

► Development and Review of Material for Civic Education

In the exercise of its monitoring and oversight mandate, CIC is also working with the Ministry of Justice, National Cohesion and Constitutional Affairs in the development of material that will be used in Civic Education including a Curriculum, Communication Guide and a simplified Constitution. These will be used for civic education scheduled to be conducted throughout the country.

► Meeting With the Disability Caucus On The Implementation Of The Constitution

The Constitution provides for the protection and promotion of the rights of persons with disabilities as an affirmative action and non-discrimination measure. In this context, the CIC held a meeting with the Disability Caucus on the Implementation of the Constitution. The Caucus is a coalition of organizations of and for persons with disabilities. The primary purpose of the meeting was to explore ways through which the CIC and the Caucus can work together to ensure that the Constitution is fully and faithfully implemented and that rights and opportunities for persons with disabilities are realized and safeguarded.

The Caucus presented a written memorandum of ways in which they can engage with CIC. The meeting discussed the working modalities between the two organizations and proposals for inclusion of persons with disabilities in the political and electoral processes. The Caucus raised concerns about the implementation of Article 100 of the Constitution on legislation for the representation of marginalized groups in the electoral process.

Regarding the rights of persons with disabilities in the electoral process, the following key issues were highlighted:

- The register of voters to include persons with disabilities and indicate the type of disability for ease of assistance;
- Budgeting for reasonable accommodation;
- Special measures to be put in place for persons with mental and intellectual disability;
- Accessibility of voting materials and facilities; and
- The use of assistive and new technologies.

The meeting was very productive and CIC plans to continue having such meetings with other stakeholders and interest groups to explore to ensure that rights and benefits for all Kenyans as provided in the Constitution are safeguarded.

► Presentation to the American Chamber of Commerce Kenya

The CIC Chairperson was invited to grace the monthly luncheon of the American Chamber of Commerce and Industry in Kenya. The Chamber comprises of persons from the USA with business interests in Kenya. CIC took the opportunity to apprise the business community of the benefits to the community in the Constitution and the important role the business community has in the Constitution implementation process.

► Meeting with the Attorney General

The CIC held a meeting with the Attorney General on 7<sup>th</sup> March, 2012 regarding translation of the Swahili version of the Constitution of Kenya. The meeting was necessitated by the need to have a common understanding of Article 7 of the Constitution in view of the fact that the Government has been sued by the Chief Whip of the National Assembly, Hon. Johnstone Muthama over the translation of the English version of the Constitution of Kenya to Kiswahili. Furthermore, a number of people have requested Swahili versions of the Constitution. Article 7(2) of the Constitution provides that the national language is both Kiswahili and English.

The meeting was called to determine whether the Kiswahili version of the Constitution has been developed. The AG proposed that the CIC should to take the lead on how the Government will ensure compliance with Article 7 of the Constitution. The meeting agreed that there was need to start a mechanism of getting the Constitution translated into Kiswahili. and that CIC together with its Constitution implementing partners should consider facilitating the development of legislation to implement Article 7 of the Constitution.

► Study Tour to Indonesia

A delegation from CIC led by the Vice- Chairperson Dr. Elizabeth Muli, visited the Republic of Indonesia on a study tour between 20<sup>th</sup> and 23<sup>rd</sup> March 2012. The team visited the Constitutional Court of Indonesia, the Provincial Government of Jakarta and the Secretariat of the House of Representatives. The choice of Indonesia was based on the fact that the country has made tremendous progress in reforming its systems to ensure economic benefit to its citizens.

Some of the lessons learned from the study tour are that:

- To ensure access to justice, the Constitutional Court charges no fees to lodge any petition on constitutional matters and filing of human rights petitions.
- The Indonesian judicial system is structured in a manner that ensures that the tribunals established under various laws fall within the judicial structure, allowing for a linkage between the quasi-judicial institutions and the formal judicial system. This facilitates review and appeal of decisions of the tribunals.
- A legal framework on Alternative Dispute Resolution was established in 2003 by the Supreme Court of Indonesia. The Supreme Court issued regulations concerning mediation procedures in courts. The Regulations are based on the civil procedure law which obligates presiding judges to try and settle the disputes amicably.
- The principle of enfranchisement of all citizens, in particular migrant workers and students, has led to the introduction of a system for diaspora voting for the President in Indonesian embassies. The vote-counting system is designed to include diaspora votes such that



votes cast in Malaysia and Singapore are included in one of the two electoral districts in the capital, Jakarta, and all other diaspora votes to the second Jakarta district.

- Decentralization of government, as a crosscutting issue, has multitude of stakeholders. It requires close coordination and consensus building among central government agencies, and between central and regional governments.
- Any technical assistance for decentralization policies should be flexibly designed and process oriented.
- Irrespective of the urgent need for assistance, interventions during rapid economic, political, and administrative transitions may become irrelevant and ineffective, with outputs and outcomes short lived and not sustainable.
- In times of institutional and administrative changes, the identification of the proper implementing agency is a precondition for successful implementation and should be reconfirmed before the fielding of experts or staff. If unclear mandates continue to exist, broad agreement is needed on the most appropriate implementing agency and how the various stakeholders can support implementation.
- There should be long-term approach to capacity building so as to have better chances of success in a fluid policy environment.

The visit was informative and the team picked valuable lessons on how Indonesia has undertaken governance and institutional reforms to spur economic growth and development.

#### 2.1.2 Advisory Opinions

In keeping with its mandate to monitor the implementation of the Constitution, CIC issued two Public Advisory Opinions: one on the IEBEC Delimitation of Boundaries Report and the other on the Announcement of the Election Date.

With respect to the election date pronounced by the IEBEC, CIC was quite categorical that Sections 14, 16, 17, and 19 of The Elections Act empower the IEBEC to publish in the Gazette and in the electronic and print media of national circulation a notice on the holding of the general elections at least sixty days before the holding of those elections. Further, the CIC asserted that IEBEC's actions are buttressed by the ruling of the Constitutional Division of The High Court. In issuing the judgment, the Court affirmed that the IEBEC is the body constitutionally mandated to pronounce the date of the first General Elections under the Constitution.

Therefore CIC is fully persuaded that in deciding the date of the first General Elections under the new Constitution, IEBEC acted entirely within the parameters of the Constitution.

In the matter of the Boundaries Report, CIC expressed concerned over the apparent interference with the Boundaries Report as it was bound to amount to interference with the independence of IEBEC, an independent constitutional commission. CIC stood firmly opposed to attempts by Parliament to impose its preferences on the IEBEC as this would amount to influencing the IEBEC, in violation of the letter and spirit of the Constitution. (See the *Advisory on the Electoral Boundaries Report and Advisory on Election Date in Annex II and III respectively*).

#### 2.1.3 Public Interest Litigation

In line with its mandate, CIC monitors implementation of the Constitution and endeavours to promote and protect constitutionalism, rule of law and the sovereignty of the people by appropriate legal measures. To this end, CIC has been involved in various cases involving the implementation of the Constitution. The cases are at different stages of determination as shown below

Constitutional Petition No. 65 of 2011

##### *Case for Determination of the Date for the Next General Elections*

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

The petitioners moved to Court to have a number of perceived grey areas around the date for the first General Elections under the new Constitution interpreted and determined by the Court. The Court heard the matter, considered the issues in contention and held that:

- (i) The High Court had jurisdiction to determine the case;
- (ii) The first elections under the Constitution may be lawfully held:
  - (a) In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement between the President and Prime Minister in accordance with section 6(b) of the National Accord and Reconciliation Act, 2008; or
  - (b) Upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by Legal Notice No. 1 of 2008 as 15th January 2008. The term therefore expires on 14th January 2013. The elections shall be held within sixty days of 15th January 2013.
- (iii) The President has no power under the Constitution to dissolve Parliament.
- (iv) The body mandated under the Constitution to fix the date for the election is the IEBEC.
- (v) An amendment to the Constitution affecting the term of the President cannot be effected into law without a referendum.
- (vi) By virtue of Section 6 and 7 of the Sixth Schedule, the terms and conditions of service of Members of Parliament are saved until the end of the current term of the National Assembly or upon dissolution of the National Coalition.

A civil society organisation, the Centre for Rights, Education and Awareness for Women has appealed against the High Court decision. (See the Press summary of the judgement on the case on the date of the general elections in Annex IV)

Pending a ruling on the matter by the Court of Appeal. The High Court decision is valid and the reference point for determination of the election date. The IEBEC acting on the basis of the Court ruling set 4<sup>th</sup> March, 2012 as the date for the first general elections under the new Constitutional dispensation.

Constitutional Petition No. 102 of 2011

##### *Case for the appointment of at least one third women to the Supreme Court*

*[(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) other petitioners filed in the High Court a petition to seek the correct interpretation, full tenor, meaning and effect of Article 27 of the Constitution and the proper approach to the interpretation of the Constitution. It was contended that with two women and five men in the Supreme Court, the percentage composition of Court was 28.57% female and 71.43% male, which was 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 upholding the JSC recommendation. FIDA-Kenya filed an appeal against the Court decision. A decision is pending.

1. Constitutional Petition No. 145 of 2011

*Case to Clarify the Procedure for the Preparation of Legislation to Implement the Constitution.*

*[In the matter of Article 2(1), (2) and (4) of the Constitution and in the matter of Articles 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 Sections 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)].*

The CIC filed a Constitutional reference objecting to the Attorney-General'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 sought to restrain the Speaker of the National Assembly (named as the 2<sup>nd</sup> Respondent from dealing with the two Bills in any way connected with debate on and enactment of the Bills). The court issued interim orders restraining the Attorney General and others from taking further steps in connection with the enactment of the two Bills until the hearing of the application. However the Court order was ignored and the two Bills passed by Parliament and assented to.

The matter is still in Court.

Constitution Petition No. 137 of 2011

*Case to Determine Whether MPs Should Pay Tax*

*[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 and others 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 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 has been forwarded to the Chief Justice to appoint a three Judge bench and to issue further directions.

2.1.4 Institutional Development Activities

In CIC's strategic outcome, result area one is to have a strong and well functioning secretariat. CIC has been working to strengthen its Secretariat. To this end it has undertaken a number of measures to continuously strengthen the Secretariat.

A significant step for CIC in this quarter was the relocation to new offices. CIC moved to its more spacious offices at Parklands Plaza. The new physical Address for CIC is:

Parklands Plaza,  
Chiromo Lane, off Muthithi Road  
Westlands  
NAIROBI

In human resource development CIC has recruited a number of senior staff. CIC has also advertised for senior management and middle level management positions. The recruitment of staff will significantly improve its technical capacity.

CIC embraces the policy of continuous professional development and took six of its Research Officers for a five days course on Legislative Drafting at the Kenya School of Law from 26<sup>th</sup> – 30<sup>th</sup> March, 2012. Plans are also underway to train all staff in procurement processes in the next quarter to ensure familiarization with the Public Procurement and Disposal laws and regulations.

On the financial front, to facilitate better operations the CIC has sought assistance from the Treasury for a budget framework that will ease CIC operations.

2.1.5 Audit of Laws, Policies, administrative procedures and progress of implementation.

The CIC recognizes the important roles that state actors and non-state actors play in accelerating implementation of the Constitution. The contribution of Government Ministries in the implementation process, service delivery, advocacy democracy and good governance is widely acknowledged. Hence, a comprehensive, collaborative and coordinated approach is essential to an efficient and effective constitution implementation. Concerted efforts by all the implementers are required to avoid duplication and inefficiency. CIC, with support from the Office of the Head of Civil Service finalized and released the Process Circular for Ministries and State Organs to State Implementers.

The Circular aims to provide guidance to state implementers on their role in the implementation process. Further, the Commission continues to hold interactive sessions at ministries, state corporations and constitutional commissions to set out the modalities of working together to implement the Constitution and apprise the people of Kenya through quarterly reports.

The Circular requires state organs to submit quarterly reports at least three weeks before the end of each quarter. CIC developed a reporting template to facilitate a well coordinated reporting structure. CIC sends out reminder letters to all ministries, state corporations and agencies to submit quarterly reports. The quarterly reports are analyzed comprehensively by each Thematic Area in the CIC and identified for follow up and further engagement with the relevant state organs. However, the receipt of reports by ministries has been intermittent.

CIC commends ministries and state organs that have been steadfast in their submission of reports. It is of great concern to CIC that some state organs do not submit their status reports within the prescribed time. This goes against the principles of accountability and transparency embodied in the letter and spirit of the Constitution; and national values and principles of governance as set out in Article 10 of the Constitution. Further Section 27 of the CIC Act is categorical that all state organs should cooperate with CIC in the discharge of its mandate. State organs that fail to submit their reports are in breach of this provision of the law. CIC may have to consider appropriate legal action pursuant to Section 27 of the Commission for the Implementation of the Constitution Act, Act No. 9 of 2010

*Section 27 of the CIC Act,  
Duty to Cooperate*

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

- (a) respond to any inquiry made by the Commission;
- (b) furnish the Commission with periodic reports as to the status of implementation of the Constitution in respect of the question raised;
- (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) Any 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 two hundred thousand shillings, or to imprisonment for a term not exceeding one year, or to both.

State Organs that submitted the first quarterly reports on the progress on the implementation of the Constitution include:-

2. Parliamentary Service Commission;
3. Teachers Service Commission ;
4. Central Bank of Kenya;
5. Kenya Revenue Authority;
6. National Housing Corporation;
7. Ministry of Lands;
8. Office of the Vice-President;
9. Ministry of Cooperative Development and Marketing;
10. Ministry of Trade;
11. Ministry of Industrialization;
12. Ministry of Water and Irrigation;
13. Ministry of State for Public Service;
14. Ministry of Environment and Mineral Resources;
15. Ministry of State for Provincial and Internal Security (APS);
16. Ministry of Information and Communication;
17. Ministry of Medical Services;
18. Ministry of Public Health and Sanitation;
19. Ministry of Gender, Children and Social services;
20. Ministry of Housing
21. Ministry of Water and Irrigation;

In summary, the reports submitted highlight the following issues:

(a) Familiarization with the Constitution

Most agencies have availed hard and soft copies of the Constitution to their staff. However, it has been reported that field officers are sometimes unable to access soft copies versions due to poor internet accessibility.

State agencies have also undertaken workshops, seminars and other interactive sessions to sensitize their staff on their role in the implementation of the Constitution. Inadequate funds are however hampering the efforts of some ministries and agencies.

(b) Extent of Integration of Implementation of the Constitution in Performance Contracts

In this result area most agencies have set up internal working teams, committees and task forces to spearhead implementation. Reports also indicate that the agencies have incorporated Constitution implementation in Performance Contracts.

The Ministry of State for Public Service reports starting implementation and has deployed technical staff to all 47 counties in line with Chapter 11 on devolved government to assist in the supervision of projects across the country.

(c) Identification and Audit of Laws, Policies and Administrative Procedures

All the Ministries set down the various laws, policies and administrative procedures that need to be audited and amended or enacted to ensure effective implementation of the Constitution. In particular the following laws were identified for enactment or revision-

- National Land Commission Bill, 2012
- Land Bill and the Land Registration Bill, 2012
- The Physical Planning Act, Cap 286
- The Survey Act, Cap 292
- The Cooperative Societies Act
- Restrictive Trade Practices Monopolies Price Control Act
- Landlord and Tenant Bill
- Exports Processing Zones Act
- Trade Descriptions Act
- Weights and Measures Act
- Trading in Prohibited Goods Act
- Trademarks Act
- The Consumer Protection Bill,
- Trade Development Bill,
- The Kenya Institute of Business Training Bill,
- The Advertisements Bill,
- Micro and Small Enterprises Bill,
- The Freedom of Information Bill and the Data Protection Bill.

(d) Status of Development of Change Management Strategy

While most ministries are still in the familiarization stage to fully understand their roles in the new dispensation, some agencies such as the Ministry of Cooperative Development and Marketing set up a Constitution Implementation Unit and developed a five year staffing plan as well as a detailed scan on the Ministry's capacity for implementation of the of Results Based Management (RBM).

## 2.2 THEMATIC ACTIVITIES

Thematic teams of the CIC have, in the first quarter of 2012, undertaken key implementation activities towards realization of the mandate of the Commission. This section provides a summary of the thematic teams' activities during the quarter. For each thematic area the report highlights the achievements and includes updates on the status of Bills or enactment of laws, summaries of engagement with stakeholders, donor support and a synopsis of the planned activities for the second quarter of 2012. The thematic reports also highlight the challenges faced in the last quarter.

### 2.3 Activities under the Citizenship and Human Rights Thematic Area

The New Year was marked with renewed energy towards ensuring finalization of the review of the bills under the thematic area. Although CIC under this thematic area seeks to expedite the review of the bills, the primary concern however, is to ensure that the bills once enacted are not only compliant with the letter and spirit of the Constitution but are also sensitive to the needs of the beneficiaries. It is in this regard, that the CIC Human Rights Thematic Area was compelled in certain circumstances to reopen dialogue on key issues relating to certain bills.

The following bills were also processed within the quarter:

- Births and Deaths Registration Bill 2012
- Identification and Registration of Citizens Bill 2012
- Refugee Bill 2012
- Marriage Bill 2012
- Matrimonial Property Bill 2012
- Family Protection Bill 2012
- Freedom of Information Bill 2012
- Data Protection Bill 2012
- Consumer Protection Bill 2012

#### ► Status of Development of Bills

##### (a) Immigration Related Bills:

1. The Identification and Registration of Persons Bill 2012;
2. The Births and Deaths Registration Bill 2012;
3. The Refugee Bill 2012

The Identification and Registration of Persons Bill 2012; the Births and Deaths Registration Bill 2012 and the Refugee Bill 2012 were developed and forwarded to CIC by the Ministry of State for Immigration and Registration of Persons together with the bills for the fifth schedule in July 2011. On receipt of the bills, CIC under the human rights thematic area embarked on an internal review of the bills.

In this regard, initial stakeholder consultations were organized in November 2011. The consultations, which were characterized by a stakeholder forum was also undertaken in recognition of the fact that although the Taskforce on Citizenship and Related Provisions had held stakeholder consultations in the development of the bills, the Taskforce did not hold consultations once the draft bill was prepared.

One of the key outputs of the stakeholder forum, was the formation of a technical committee comprising representatives from CIC, the Ministry of State for Immigration and Registration of Persons, the office of the Attorney General and the Kenya Law Reform Commission. The Committee was mandated to deliberate upon the provisions of each of the clauses in the three bills and build consensus, taking into account the stakeholder recommendations. The technical committee held a working retreat on 19<sup>th</sup> – 20<sup>th</sup> January 2012 and deliberated upon the provisions of the bills in accordance with its mandate. The three bills were circulated to stakeholders for their review.

##### *The Identification and Registration of Persons Bill 2012; and Births and Deaths Registration Bill 2012:*

During the review, the technical committee upheld the recommendation by stakeholders on the need for a comprehensive registration system. The committee consented to the formulation of a coordinated, accurate and credible system of registration for all persons. This would necessitate the cross-referencing, integration and harmonization of existent registration schemes and from a legislative aspect, amalgamation of the Identification and Registration of Persons Bill 2012; Births and Deaths Registration Bill 2012. As a way forward the committee recommended that CIC should engage with the Ministry of State for Immigration and Registration of Persons for policy direction on the same.

CIC held a meeting with the Ministry of Immigration on 21<sup>st</sup> March 2012, to deliberate on the consolidation of the two bills, which was agreed upon, and a team constituted to consolidate the two bills subject to the stakeholder consultations and the recommendations from the meeting.

##### *Refugee Bill 2012:*

The technical committee also deliberated the provision of the Refugee Bill 2012, and although the bill did not have controversial issues, CIC is keen on ensuring that the three bills are processed together. Among the key concerns raised by stakeholders on the Refugee Bill included the need for clarity on the principles of *Non-refoulement* of asylum seekers, refugees and their families as well as Revocation and Cancellation of refugee status. Following the initial forum, a few of the stakeholders from Non-Governmental Organizations that work with refugees have also held consultations on the bill and forwarded comments on the Refugee Bill, which are being incorporated accordingly.

The revised drafts of the three bills will be subjected to a final stakeholder forum, to be held in the next quarter. This will be followed by an internal plenary and roundtable for final review.

##### (b) Family law bills:

1. Marriage Bill 2011;
2. Matrimonial Property Bill 2011;
3. Family Protection Bill 2011

The pressure to finalize and enact the family law bills continued to mount even as stakeholders, particularly the faith-based organizations, raised concerns over certain provisions in the bills that they considered contentious requiring further consultations. In order to address the range of concerns CIC resolved to hold additional forums in order to subject the bills to further stakeholder consultations. The CIC thematic team held a retreat for the technical committee on 5<sup>th</sup> – 6<sup>th</sup> January 2012. The technical committee which was constituted following the initial stakeholder consultations in October-November 2011 as highlighted in the last report comprised representatives from the Office of the Attorney General, Kenya Law Reform Commission, 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, FIDA and CIC. The technical committee was mandated to review the bills in view of the recommendations and proposals arising from the stakeholder forum.

The revised bills were subjected to a further stakeholder review forum on 9<sup>th</sup> – 10<sup>th</sup> February 2012. The forum deliberated upon fundamental issues to which the technical committee had not reached a consensus. These included among others provisions relating to:

- Polygamous marriages: While the participants acknowledged the polygamous nature of some of the marriage systems, the push towards legislating for a system that will subsequently ensure implementation of monogamous marriages was evidenced by the arguments put forward including reference to the Protocol on the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) Article 6 which provides that "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected."
- Payment of Dowry: The debate relating to payment of dowry was based on whether the law should provide for dowry payment as a compulsory measure. This was in light of the fact that article 45 of the Constitution recognizes marriages concluded under traditional system of which payment of dowry is one such recognized customary practice.
- Presumption of Marriage: The participants debated upon the presumption of marriage provision arguing that recognition of cohabitation as a system of marriage where two parties have cohabited for two years and acquired the reputation of being husband and wife, as being contrary to religious teachings of marriage as a sacred covenant that can only be accorded by taking the vows of marriage.
- Divorce: Among the key arguments put across with regards to the issue of divorce was the fact that the bill provided for a simplified court procedure for divorce and the grounds for divorce have been increased, which would encourage and increase the number of divorce applications. Participants also acknowledged the importance of the conciliatory body in assisting to settle marital disputes. However, they debated whether the parties to the marriage should be compelled to go to such a conciliatory body, or whether the same should be optional where parties to a marriage are in disagreement.
- Protection of Family "members" against domestic violence: The participants also debated upon the scope of persons or members of the family that should be covered in the protection against domestic violence.

The family law Bills have since been revised and circulated to stakeholders to review and ensure that their concerns have been incorporated. As highlighted above, CIC has scheduled county visits to be undertaken in the next quarter prior to the finalization of review of the Bills, following which an internal plenary and roundtable will be held for final review. The county visits, will seek to address and ensure consensus on the concerns raised by the different interest groups.

(c) Ratification of Treaties Bill

As enumerated in the report of the last quarter, the Ratification of Treaties Bill is currently awaiting the second reading before parliament. CIC will monitor parliamentary deliberations on the Bill once the same is tabled for Parliamentary debate.

(d) Freedom of Information Bill 2012 and Data Protection Bill 2012

CIC having received the Freedom of Information Bill and the Data Protection Bill from the Ministry of Information and Communication held an internal review of the bills before organizing technical forums for stakeholders to review the bills. The bills were subsequently revised in line with the stakeholder recommendations and a technical committee retreat was held on 5<sup>th</sup> – 6<sup>th</sup> December 2011 to incorporate all the comments. The revised bills were circulated for stakeholder review and a final stakeholder forum to deliberate on the bills held on 23<sup>rd</sup> – 24<sup>th</sup> January 2012.

The forum reviewed the Freedom of Information Bill 2012. On the Data Protection Bill 2012, stakeholders felt they required more time to fully understand the complexities relating to the Bill. In this regard it was agreed that an explanatory memo would be developed and circulated to the stakeholders, providing clarity on principles of data protection, thus assisting in their review of the Data Protection Bill 2012. The Ministry of Information and Communication developed the explanatory memo which provided the following:

- The Data Protection Bill seeks to elaborate on Article 31 of the Constitution of Kenya and especially Article 31(c) which provides that "every person has the right to privacy, which includes the right not to have (c) information relating to their family or private affairs unnecessarily required or revealed"
- The Bill relates to privacy with regards to particular aspects of personal information/data which relates to "any information about an individual whose identity is apparent, or can reasonably be ascertained from the information." In this regard the Bill generally focuses on principles relating to collection, including limitations of and exemptions to the collection principle. It also addresses use, disclosure, storage and security of, as well as access to such personal information.
- The Bill also provides for the implementation mechanism and the institutional framework that will oversee the data protection principles. That is, the Freedom of Information Commission established under the Freedom of Information Act. The Bill therefore provides for the powers of the Commission in relation to Data Protection.

The explanatory memorandum was circulated to stakeholders together with the Data Protection Bill and a stakeholder forum was held on 2<sup>nd</sup> March 2012, to review the Bill. The Bill is currently being redrafted subject to the stakeholder comments and is scheduled for an internal plenary for final review after which it will be forwarded to the Attorney General for onward transmission to Cabinet.

(e) Consumer Protection Bill 2011

The Consumer Protection Bill is among the requisite laws for enactment in order to ensure constitutional implementation and CIC continues to engage with Honourable Jakoyo Midiwo, who is the mover of the Bill, and other stakeholders in its review. As part of its development process, CIC held an initial stakeholder forum in December, 2011 to review the issues arising from the Bill. The stakeholders raised key concerns relating to the Bill and it was clear that the Bill needed further consultation. The Bill was revised to incorporate the views of the stakeholders and a follow up stakeholder forum was held on 26<sup>th</sup> – 27<sup>th</sup> January 2012. The two day forum was characterized by extensive contributions and it was apparent from the input that the Bill still needed more work, including the cross-referencing with other related laws such as the Sale of Goods Act, Competition Act and Standards Act, among others.

To facilitate the review, a technical team with members drawn from Parliament, the Kenya Law Reform Commission, Office of the Attorney General, Ministry of Finance, Ministry of Trade, Ministry of Industrialization, Kenya Bureau of Standards (KEBS), Consumer Information Network, Commission on Administrative Justice, Competition Authority, KEPSA, KARA, CMA and the CIC was constituted and tasked to undertake sector-specific reviews to facilitate accurate linking of the Bill to other laws. The technical team held a retreat from 21<sup>st</sup> – 23<sup>rd</sup> March, 2012 to finalise the Bill. Among the key proposals included:

- The Bill should provide for general principles which will guide the different sectors in their development of regulations to govern the respective sectors.
- CIC would liaise with Hon. Midiwo in order to ensure that the Bill is introduced as a Government Bill and not a Private Member's Bill. This is because the Consumer Protection Bill is a money bill in line with Article 114 of the Constitution of Kenya 2010.
- Permanent Secretaries within the different sectors in the government should be brought together to develop a plan of action towards implementation of Article 46 of the Constitution and the Consumer Protection Bill.

(f) Development of Legislation on Public Participation

Public participation is one of the key Constitutional values and principles which CIC seeks to ensure is entrenched in law and respected by state and non-state actors. Effective participation by citizens in matters affecting them is the best and ultimate mechanism for ensuring the implementation of



letter and spirit of the Kenyan constitution. As highlighted in the previous report, CIC has been working with Civil Society Organizations in the development of the policy and Bill on public participation. One of the key concerns is the need to ensure that the development process for the Bill is logical, beginning with research on the concept of public participation, discussion of the different theories and experiences, development of a policy statement and eventually a Bill on public participation.

In order to give effect to the principle, both the CIC and the Civil Society Organization agree on the need for the Bill to be developed under the leadership and policy guidance of a Government ministry. CIC and the Civil Society Organizations are currently in consultation with the Ministry of Justice, National Cohesion and Constitutional Affairs on the same and it is in this regard that a stakeholder forum scheduled for February 2012 was rescheduled to allow for the consultations.

► Other Thematic Activities for the First Quarter of 2012

a) Elaborating a Roadmap for the implementation of Socio-Economic Rights:

As highlighted in the last report, CIC held meetings with different government ministries and the Prime Minister on the establishment of a mechanism that will facilitate coordinated and joint planning of different sectors to ensure optimum and prudent use of resources for better service delivery. With a focus on ensuring progressive realization of socio-economic rights, CIC had written to the Prime Minister and to the President seeking meetings with both offices. CIC anticipates as a key output of these meetings, the establishment of an inter-ministerial team that will set the standards for effective realization of socio-economic rights.

b) Development of a Guide for the Implementation of Human Rights.

CIC under the human rights thematic area continued to work on the development of the implementer's manual to guide implementers on how to integrate human rights in laws and policies, and to apply a rights approach in administrative procedures. Among the key activities undertaken within the reporting period was the development of a plan of action towards finalization of the manual.

A sample presentation of the implementers guide detailing the right to health and the right to privacy was developed to provide a general overview of what to expect from the final output. Development of the implementers guide will be done in consultation with other players including an editorial team drawn from different sectors that will review the implementation guide during its development. The first draft of the guide is expected to be finalized by May 2012.

► Engagement with Other Bodies

*Participation at the United Nations Commission on Status of Women meeting*

CIC participated in the 56<sup>th</sup> Session of the Commission on the Status of Women (CSW) which took place between 27<sup>th</sup> February and 9<sup>th</sup> March 2012 at the United Nations Headquarters in New York. CSW, which is the principal global policy-making body dedicated exclusively to gender equality and advancement of women, is mandated to prepare recommendations and reports to the UN Security Council on promoting women's rights in political, economic, civil, social and educational fields. CSW also makes recommendations to the Council on urgent problems requiring immediate attention related to women's rights.

The theme for the 56<sup>th</sup> session was *"the empowerment of rural women and their role in poverty and hunger eradication, development and current challenges."* Participating in the session was key to the mandate of CIC and particularly for the human rights thematic area which is charged with ensuring effective implementation of all the rights including those of historically marginalized groups.

► Donor support/Engagement of consultants.

The thematic area continued to receive donor support for some of its activities from GIZ and IDLO.

► Challenges faced by the Citizenship and Bill of Rights Thematic Area

One of the key challenges faced by the thematic team was the failure by some of the stakeholders to fully engage with the review process. As a result, some of the concerns raised by different interest groups were not reflective of ongoing broader stakeholder deliberations on the bills. This was experienced particularly in regards to the review of the Family law bills as well as the Freedom of Information Bills.

► Addressing the Challenges - Recommendations

CIC recommends that a broader cross-section of stakeholders be more engaged in the development and review process of all the bills, at both the Ministries and the CIC levels. This can be done through participation at stakeholder forums as well as accessing CIC's interactive website to obtain the different drafts of the bills, during the various stages of review.

► Activities planned for the second quarter.

The activities planned for the second quarter of 2012 include:

- Finalize review of the Freedom of Information Bill 2008 and the Data Protection Bill 2009;
- Finalize review of the Births and Deaths Registration 2011; Identification and Registration of Persons 2011; Refugee Bill 2011;
- Finalize review of the Marriage Bill 2011; Matrimonial Property Bill 2011; Family Protection Bill 2011;
- Develop the first draft of the Guide for Implementers;
- Continue activities towards the development of standards on socio-economic rights;
- Finalize review of the Consumer Protection Bill; and
- Continue activities relating to the development of the Bill on Public Participation.

## 2.4 Activities under the Land and Environment Thematic Area

The Land and Environment thematic area mandate is derived from Chapter Five of the Constitution, which provides the framework and principles for managing Lands and Environment. The thematic area involves monitoring, facilitating, coordinating and overseeing the implementation of Chapter Five. The thematic area covers activities related to the following Government ministries: the Ministry of Lands, 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.

► Engagements on Land Legislation

In the period under review, the land and environment thematic team embarked on various activities towards ensuring sound legislation related to land through broad public participation and stakeholder input. Some of these activities include:

a) Internal Review of the Land Bill 2012, and the Land Registration Bill 2012, and the National Land Commission Bill.

The thematic team led several activities aimed at meticulously reviewing the Land Bills to ensure compliance with the letter and spirit of the Constitution. These included consultative engagements with civil society, county representatives, and relevant state agencies involved in land matters. The consultations revealed several contentious issues that required further deliberations to ensure Article 68 and Article 67 of the Constitution are robustly implemented as envisaged in Chapter Five.

## b) County Visits

CIC participated in visits to various counties to gather views on the proposed Land Bill 2012 and the Land Registration Bill 2012. This process of public engagement is in line with the national values and principles of governance set out in Article 10 of the Constitution. The first county consultative forums took place in over eight counties between 15<sup>th</sup> and 19<sup>th</sup> January 2012.

Specifically, the forums were aimed at:

- Discussing how land should be allocated to avoid irregular compulsory acquisition and subsequent allocation to third parties.
- Considering the recommended minimum and maximum acreages of land to be held by any person or groups of persons.
- Discussing whether any dealings with property rights under a lease held in trust for others should be a controlled transaction.

*The CIC Chairperson addressing participants at a stakeholder forum on Land Bills in Narok County*

The views generated from participants were collated, analysed and used to enrich the Land Bill and Land Registration Bill.

## ► Engagement with Stakeholders

The CIC participated in a parliamentary retreat on the Land Bills in Mombasa. The aim of the retreat was to agree on a set of principles to guide the Land Bills and ensure timely implementation. CIC also held a retreat on January 25<sup>th</sup>- 28<sup>th</sup> to carefully examine the Land Bill and the Land Registration Bill and resolve any outstanding issues. Additionally, CIC participated in a technical meeting with members of the Parliamentary Committee on Land and Natural Resources and members of Civil Society on the 31<sup>st</sup> to 2nd of February, 2012 to address the contentious issues in the Bills and finalize the Bills.

The Commission held a Roundtable meeting with the KLRC, the Officer of the Attorney General and Ministry of Lands on 3<sup>rd</sup> of February, 2012 to sign off on the proposed Bills before submitting them to the Attorney General for publication and transmission to Parliament. On February 24<sup>th</sup>, Parliament, cognizant of the need to thoroughly analyze the bills and have all parties heard voted to extend the February 27 deadline set in the Constitution legislation timeline by 60 days to pass the key Land Bills. Additionally, CIC has been working with Kenya Law Reform Commission and Law Society of Kenya to examine and address issues for the attention of the Parliamentary Committee on Land and Natural Resources.

## ► Consultants engaged to finalise Land Bills

The CIC in fulfilling its mandate engaged two consultants to undertake a critical analysis of the Land Bill, the Land Registration Bill and the national Land Commission Bill and assess the technical soundness of the Bills. The consultants examined the constitutional provisions related to land to ensure they were fully reflected in the Bills. The consultants were supported by IDLO and the WWF.

## ► Challenges

CIC has noted a worrying trend emerging in the Executive arm of Government that has the effect of technically defeating the deadlines set in the Constitution for enactment of laws. The Ministry of Lands illustrated this when they submitted the three Bills related to lands within the stipulated timeframe, but the Ministry continued working on the draft bills and continually replaced each version with a subsequent revised version to the extent that it became almost impossible to determine the version that represented the final position of the Ministry. It also became impossible to enact the land legislations within the stipulated timeframe.

Continued reviewing of content may enrich a Bill and although such improvement is welcome, once the Attorney General has forwarded the bill to the CIC, any subsequent proposed changes incorporated into the Bill should be done in collaboration with the CIC technical team. This will minimize unnecessary delays and confusions in preparation of Bills.

## ► Proposed activities for the second quarter

- Conduct a stakeholder's forum on the Community Land Bill to assess the extent it conforms to the letter and spirit of the constitution.
- Conduct County visits to ensure broad and robust public participation on the Community Land Bill.
- Hold consultative meetings with the Ministry of Lands on the Land Policy to ensure conformity with the Constitution.
- Harmonize the existing policies, legislations, and administrative procedures in the environment and natural resources sector.

## 2.5 Activities under the Public Service and Leadership Thematic Area

The Public Service and Leadership thematic area continues to oversee matters relating to Chapters Six and Thirteen of the Constitution of Kenya, 2010. Chapter Six of the Constitution focuses on Leadership and Integrity which is applicable to all State officers and with necessary modifications to public officers. In this Chapter, the principles of leadership and integrity are spelt out together with expectations of State Officers in the conduct of their affairs. These principles should guide conduct in electing or appointing State Officers. Chapter Thirteen provides the guiding values and principles in the Public Service. It is also in this Chapter that the Public Service Commission is established and given its powers and functions. Staffing of the county governments and protection of public officers are also spelt out in this Chapter. Both chapters ultimately detail the overall expectations of State officers who work in State offices and public officers at both county and national levels of government.

## ► Development of Legislation/Policies/Administrative Procedures

## a) Public Service Commission Bill, 2012

During this quarter, a roundtable meeting was held on 26<sup>th</sup> January 2012, between the Ministry of State for Public Service, the Public Service Commission, the Kenya Law Reform Commission, Attorney General's office and CIC to finalize the review of the Public Service Commission Bill, 2012. Following the roundtable meeting, the Bill was forwarded to the Attorney General office for final drafting and onward transmission to the Cabinet and publication.

## b) Leadership and Integrity Bill, 2012

The Leadership and Integrity Bill addresses the leadership and integrity values of public service which should be enacted within two years. This Bill will hold State Officers accountable in the discharge of their duties. The Ministry of Justice, National Cohesion and Constitutional Affairs organized a two day workshop at the Kenya School of Monetary Studies on 5<sup>th</sup> and 6<sup>th</sup> February, 2012 in which CIC participated to review the Bill. The Public Service thematic area team has been reviewing the draft Bill as posted on the Ministry's website as CIC waits receipt of the final Bill from the Ministry. Once the Bill is received, the thematic team will secure dates for stakeholders' engagement and public participation to ensure that the Bill adheres to the letter and spirit of the Constitution.

## c) Public Service Management Bill, 2012

The Public Service Management Bill deals with all matters relating to public officers including values and principles. This Bill was identified as a priority Bill to be enacted by August 26, 2012 because of the integral role that the Public Service plays in the formation of County governments. The line Ministry expects to develop the Public Service Management Bill within the given timeframe. CIC has been in correspondence with the Ministry

of State for Public Service regarding the development of the Bill. The Ministry reports that it has formed an inter-ministerial committee comprised of members from different institutions and ministries to develop the Bill. CIC will continue to consult with the Ministry of State for Public Service and the relevant stakeholders in the development of the Public Service Management Bill.

► Donor Support/Engagement of Consultants

The thematic team is in the process of securing the services of a consultant to assist in the review of the Leadership and Integrity Bill, 2012.

► Challenges

The thematic area encountered delay in submission of Bills by Government Ministries. Although CIC and key implementing partners developed a schedule of timelines to review legislation in order to effectively engage relevant stakeholders and the public, CIC is yet to receive the draft Leadership and Integrity Bill.

► Addressing the Challenges-Recommendations

The line ministries should observe agreed timelines to ensure timely and adequate reviewing of Bills. This will avoid last minute rushes and allow exhaustive and extensive public consultation in good time.

There is need for the appointment of the chairperson and members of the Ethics and anti-Corruption Commission as a matter of extreme priority. This will then allow for consultations in the review of the Anti-Corruption and Economic crimes Act and the Leadership and Integrity Bill, 2012.

► Activities planned for the second quarter

The thematic team has planned the following activities for the second quarter of 2012:

*Public Service Management Bill*

Once CIC receives the draft Bill from the Ministry of State for Public Service and given that the Public Service Management Bill should be enacted within two years, the thematic team will review the Public Service Management Bill in the next quarter with stakeholder participation in the review process, to ensure it adheres to the letter and spirit of the Constitution.

*Leadership and Integrity Bill*

CIC is currently awaiting the official copy of the Leadership and Integrity Bill from the Attorney General's office.

The thematic team plans to undertake consultative engagements with the relevant stakeholders and the public to review the Leadership and Integrity bill.

*Guidelines on recruitment of Public Officers*

The thematic area will include continued engaging with the Ministry of State for Public Service with regards to vetting of public officers. CIC developed guidelines on the recruitment process for all public officers at national and county levels of government. The draft guidelines have been forwarded to the relevant Commissions and the Ministry of State for Public Service for their review and input.

*Policy, Legislation and Institutional Framework for the National Value System for Kenya*

The Public Service and Leadership thematic area will also entail a review the Policy, Legislation and Institutional Framework for the National Value System for Kenya. The framework was developed by the Taskforce on National Cohesion under the Ministry of Justice, National Cohesion and Constitutional Affairs.

*Anti-Corruption and Economic Crimes Act*

The thematic team was scheduled to review the Anti-Corruption and Economic Crimes Act this quarter, however, this exercise was postponed pending appointment of the Ethics and Anti-Corruption Commission. This will allow comprehensive consultations between CIC, the Ministry of Justice, National Cohesion and Constitutional Affairs and the Ethics and Anti-Corruption Commission amongst other stakeholders in the review process.

## 2.6 Activities under the Representation of the People and the Legislature Thematic Area

The objective of the Representation of the People and the Legislature thematic team is to ensure that the policies, laws, systems, structures and administrative procedures reviewed or developed 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.

Ultimately, the thematic area hopes to have all the people of Kenya, including leaders, respect the rule of law, upholding national values and living by the Constitution. This will enable the people of Kenya to live in the new dispensation of a united, peaceful and prosperous Nation.

► Status of Development of Bills/Policies/Administrative Procedures

*The Campaign Financing Bill, 2012*

The Campaign Financing Bill, 2012 seeks to prescribe limits to funding of elections and referenda campaigns by providing for the management, spending, regulation and transparent accountability of funds during the nomination process, election campaigns, elections and referendum.

CIC began its internal review of the Bill with a committee meeting on the 19th of December 2011. On the 22nd of February 2012, CIC held a stakeholder forum with representatives from Political Parties. Also present at the forum was the office of the Registrar of Political Parties. The purpose of the forum was to obtain views and recommendations on the provisions of the Campaign Financing Bill, which would be considered by CIC in its further review of the Bill. The CIC Commissioners then held a plenary meeting on 1st of March 2012 to further deliberate on the provisions of the Bill. This was followed by a roundtable meeting on the 5th of March 2012 in which representatives from the Office of the Attorney General, KLRC, the IEBC and the Office of the Registrar of Political Parties further discussed the Bill. CIC will hold a second roundtable meeting with implementing partners before formally releasing the final version of the Bill to the Attorney General for publication for subsequent introduction for debate in Parliament.

► Challenges

- Parliament's interference in the delimitation of ward boundaries, which is a power vested on the IEBC under Article 89 of the Constitution.
- Some Kenyans challenging IEBC's authority to set the first election date yet this is a power given by the ruling of the High Court.

► Activities for the second quarter

- Development of a long-term strategy for and the inception of the engagement of the Kenyan youth in the Constitution implementation process

- Education sector – the thematic team will initiate preparations for working with the Ministry of Education in order to implement the new Constitution.
- Review of bills to continue as per the schedule produced from the Naivasha meeting with CIOC in January 2012.
- The thematic team will continue to monitor, facilitate, coordinate and oversee the implementation of the electoral system and process, including the preparations for the realization of Article 105 of the Constitution.

## 2.7 Activities under the Executive and Security Thematic Area

The Executive and the National Security Organs play a critical role in the implementation of the Constitution. As state organs, they are bound by the Constitution and can only exercise their authority as prescribed in the Constitution in Article 2(1) and (2). The national values and principles of governance, such as upholding the rule of law, ensuring participation of the people, transparency and accountability, are binding on the Executive and national security organs when they apply the Constitution and make or implement public policy decisions. Before the first general elections under the new Constitution, the Executive must put in place measures to ensure it complies with Article 129(2) which requires the Executive to exercise authority in a manner that promotes service to, and the welfare and well-being of the people of Kenya.

It is an enormous task assigned to the Executive in so far as implementation of the Constitution is concerned. The generation, formulation and implementation of public policies, legislation and administrative measures required to implement the Constitution is, substantially, the responsibility of the Executive.

During the period under review, the thematic team requested the various offices under Chapter Nine and Fourteen of the Constitution to submit their implementation plans indicating the progress on implementation of the Constitution, which indicated a measure of progress in the implementation process.

### ► Status of Development of Bills/Policies/Administrative Procedures

#### *Executive*

##### a) The Office of the President

During the quarter, the thematic team made several attempts, unsuccessfully, to secure appointments with the Office of the President to discuss among other matters, the implementation of the Constitution generally and in particular, measures being put in place to align the Office of the President and the Cabinet Office to Chapter Nine of the Constitution. Further, neither the Office of the President nor the Cabinet Office submitted progress reports on the implementation of the Constitution. This raises concerns on actualization of the principles of transparency and accountability by the Office of the President and the Cabinet Office. The requirement for CIC to make periodic progress reports to Parliament is a Constitutional requirement and the Constitution binds all state organs including the Executive in Chapter Nine.

##### b) Assumption of the Office of the President Bill

Pursuant to Article 141(4) of the Constitution, Parliament is obligated to enact the legislation providing for the procedure and ceremony for the swearing-in of a President after election. The Fifth Schedule to the Constitution requires that the legislation relating to the Assumption of Office of the President be formulated and enacted within two years after coming into force of the Constitution.

The thematic team received the Assumption of Office of the President Bill from the Kenya Law Reform Commission on the 23<sup>rd</sup> January, 2012. The Commission undertook review of the Bill and subsequently held a roundtable meeting on the Bill on 7<sup>th</sup> February, 2012. In attendance was the Office of the Attorney-General, KLRC, and representatives from the Cabinet Office. The Assumption of Office of the President Bill was forwarded to the Attorney-General on 7<sup>th</sup> February, 2012 for finalization and onward transmission to the Cabinet. The Bill is yet to be published. The Bill should be prioritized and published without further delay, to allow for timely preparations and avert unnecessary confusion at the swearing in ceremony of the President after the elections.

##### c) The Cabinet

As with the Office of the President, several efforts to seek audience with the Cabinet Office were unsuccessful. CIC sought input from the Cabinet Office on measures put in place by the Cabinet to operationalise the values and principles of the Constitution, and transitional arrangements being put in place for purposes of devolution.

##### d) The Office of the Attorney General

The Office of the Attorney General is yet to submit a report to CIC indicating the progress made in the implementation of the Constitution.

##### e) Director of Public Prosecutions

The Office of the Director of Public Prosecutions requires major reforms to conform to the letter and spirit of the Constitution. The fact that the Constitution de-linked this important office from the Office of the Attorney-General is, in itself, a significant shift. As such, the Commission considers it critical to monitor facilitate and oversee implementation of Article 157 of the Constitution, and in particular, the functions and powers of the Director of Public Prosecutions. Importantly, the administrative measures put in place to guide the relationships with the Inspector-General of the National Police Service, the Office of the Attorney General, Parliament, the Independent Policing Oversight Authority (IPOA), Constitutional Commissions, Ethics and Anti-Corruption Commission (EACC), National Police Service Commission (NPSC), Kenya National Human Rights Commission (KNHRC), amongst others are central to the DPP's implementation process. Despite frequent efforts, CIC has not been successful in securing an appointment with the Office of the DPP nor in receiving a status report on implementation of the Constitution.

Entrenching the values and principles under the Constitution in the exercise of powers and discharge of the functions of the DPP is an integral aspect of implementation of the Constitution and need to be prioritized.

#### *Security*

The national security organs are: National Intelligence Service, Kenya Defence Forces and National Police Service. The National Security Council, though not a security organ *per se*, is established by Part I of Chapter Fourteen, of the Constitution, which provides for security organs. The following ministries are directly responsible for implementation of Chapter Fourteen:

- Office of the President.
- Ministry of State for Provincial Administration and Internal Security.
- Ministry of State for Defence.
- Ministry of Foreign Affairs.
- Administration Police Service.
- Kenya Police Service.



## a) The Kenya Defence Forces

CIC received the draft Kenya Defence Forces Bill, from KLRC. The Commission invited public views on the Bills through the *Sunday Nation* and *Sunday Standard* Newspapers, dated 11th March, 2012. CIC particularly sought views of members of the Kenya Defence Forces, including retired officers, military and human rights experts, on how best to reform the Defence Forces in line with the letter and spirit of the Constitution.

CIC has sought appointments with the Kenya Defence Forces regarding the implementation of Chapter Fourteen of the Constitution and in particular, the implementation of Articles 239(6), 240 and 241 of the Constitution. The Commission awaits a confirmation of an appointment from the Kenya Defence Forces.

The Ministry of State for Defence has neither submitted an implementation report nor has it confirmed an appointment with the CIC despite several attempts to secure one. .

## b) National Intelligence Service

The Commission received National Intelligence Service Bill towards the end of the first quarter. Plans are underway to review with Bill and undertake stakeholder consultations. In the meantime, the Bill has been uploaded to the CIC website for public review and feedback. The Bill is due for enactment by August 2012.

## c) National Police Service

In their reports, the Administration Police Service (APS) and Kenya Police Service(KPS) indicated that they are in the process of reviewing the existing administrative measures, including standing orders, to align them to the letter and spirit of the Constitution and the National Police Service Act, 2011. They are also in the process of operationalizing the National Police Service Act, 2011 as they await the appointment of the Inspector-General.

Both the KPS and APS identified a number of existing legislation that require to be amended to align to the letter and spirit of the Constitution and also to enable the National Police Service effectively administer and enforce the law. The Commission has since communicated the proposed amendments to the relevant Ministries, the Attorney-General and the Director of Public Prosecution, among others for further necessary action.

The Commission also notes that most of the abuse and/or claw-back to the gains made by the Constitution are perpetrated through subsidiary legislation or administrative measures. These subsidiary laws and policies are subjected to little or no scrutiny. It is therefore important that State organs, departments and agencies identify unconstitutional provisions in existing Acts as well as subsidiary legislation, for purposes of amendment, review or reform to align them to the letter and spirit of the Constitution.

The KPS is in the process of establishing the Internal Affairs unit for purposes of accountability and in line with the National Police Service Act, 2011. According to the KPS report, a delegation comprising of both the representatives of Administration Police Service and National Police Service travelled to the United Kingdom on a benchmarking study tour to learn from the UK internal affairs model.

Upon review of the Standing Orders CIC has recommended to the National Police Service and the Ministry of Internal Security and Provincial Administration the review of standing orders and subsidiary legislation to align them to the Constitution, the National Police Service Commission Act and the National Police Service Act.

The thematic team will follow up with the Ministry and National Police Service in the second quarter of 2012 regarding the development of new administrative measures necessary to operationalise the National Police Service Act and implement the Articles of the Constitution that relate to the Service.

## d) National Police Service Commission

There has been a delay in the recruitment and appointment of chairperson and members of the National Police Service Commission, which inevitably slows down the implementation of Article 246 of the Constitution. The names of nominees to the Commission are currently before Parliament for approval.

## ► Activities planned for the second quarter

The Executive and National Security thematic area will include the following activities for the second quarter:

- Audit existing administrative measures including, policies and guidelines on legality/constitutionality and identify issues for stakeholder deliberation.
- 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.
- Conduct County visits to hold forums with county-based stakeholders on the Bills under Chapter Nine and Fourteen of the Constitution.
- 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.
- Finalize the review of the National Security Council Bill and National Intelligence Bill

## ► Donor Support/Engagement with Consultants

During the first quarter, the Commission received support from IDLO in form of technical support to review the Kenya Defence Bill. The consultant undertook comparative analysis of the various existing laws on Defence Forces, related laws from other jurisdictions and international best practice. The reports shall be instrumental in the process of review of the Kenya Defence Forces Bill and related service orders and subsidiary legislation.

## ► Challenges and Impediments

Lack of cooperation from the Office of the President and/or (Cabinet Office) is a major impediment. Implementation of Chapters Nine and Fourteen of the Constitution are considered essential ahead of the general elections. The thematic team considers these meetings very important and awaits confirmation of the appointment by the Office of the President (Cabinet Office).

The Office of the President, the Cabinet Office, the Ministry of State for Defence have not submitted their implementation plan or progress on implementation for the period under review. This hinders the performance of the Commission's functions with regard to monitoring the implementation of the Constitution on the part of the Office of the President (Cabinet Office). In the same vein, lack of cooperation by the Kenya Defence Forces impedes progress on Chapter Fourteen and the Kenya Defence Forces Bill.

Delay in the submission of some of the Bills required for implementation of Chapter Fourteen of the Constitution by the Attorney-General in consultation with the Ministry of State for Provincial Administration and Internal Security.

According to the Fifth Schedule to the Constitution, the National Security Council Bill and National Intelligence Service Bill ought to be enacted by 26 August, 2012.

## 2.8 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. Under this thematic area, CIC addresses enactment and/or amendment of legislation and policy, as well as development or review, and formulation of administrative procedures required to ensure effective and timely implementation of the Constitution. The various activities undertaken by the team during this quarter are as follows:

### ► Development of legislation/policies/administrative procedures

#### a) Teachers Service Commission Bill, 2012

The team reported last year that following the CIC plenary held on 23<sup>rd</sup> November 2011, the Teachers Service Commission Bill was submitted to KLRC to incorporate a number of amendments to the Bill that had been agreed upon. After the amendments, a roundtable meeting was held at CIC offices on 23<sup>rd</sup> January 2012 and thereafter, the Bill was submitted to the Office of the Attorney-General for onward processing towards enactment.

#### b) Kenya Law Reform Commission Bill, 2012

CIC received the draft Kenya Law Reform Commission Bill from KLRC on 26<sup>th</sup> January 2012. The Bill seeks to reconstitute the Commission as a body corporate and give KLRC independence in the carrying out of its functions. A stakeholder's consultative forum was held on 8<sup>th</sup> February 2012 to facilitate public participation in accordance with Article 10(2)(a) of the Constitution. On 8<sup>th</sup> March 2011, the Bill was brought before a consultative plenary for deliberation and was finalized on 6<sup>th</sup> March 2012 following roundtable discussions with the Office of the Attorney-General and KLRC at Jacarada Hotel, Nairobi.

### ► Challenges faced by Judiciary and Constitutional Commissions Thematic Area and Addressing the Challenge – Recommendation

The thematic team did not face any major challenges this quarter.

### ► Activities planned for second quarter

The thematic team will work with:

- The Office of the Attorney General, KLRC and the Judiciary to review the Magistrates' Court Act, Appellate Jurisdiction Act, Criminal Procedure Act, Civil Procedure Act and Judicature Act and make recommendations for amendment and/or repeal;
- The Judiciary and/or JSC to review the Rules of the Court (the Chief Justice Rules, the Supreme Court Rules, the Court of Appeal Rules, the Industrial Court Rules, the Environment and Land Court Rules and any rules for subordinate courts); and
- Constitutional Commissions to ensure respect for the letter and spirit of the Constitution.

## 2.9 Activities under the Devolved Government Thematic Area

The Devolved Government Thematic Area has, during this quarter, entailed activities required to ensure the passage of the devolution bills which have a deadline of 18 months from promulgation of the Constitution. The thematic team finalized the review of the Bills on devolved government, namely, the County Government Bill 2012, the Transition to Devolved Government Act 2012, the Intergovernmental Relations Act 2012, and the Public Finance Management Bill 2012. In reviewing the Public Finance Management Bill 2012 the Devolution thematic team worked in collaboration with the Public Finance Management thematic team. This is because some aspects of the Public Finance Management Bill deal with financial management of County level governments.

### ► Status of development of legislation/policies/administrative procedures

Progress in the thematic area in the first quarter of 2012 was realized by the successful development and finalization of the above devolution legislations in time. There was great effort to process these Bills ahead the eighteen month deadline of 27<sup>th</sup> February 2012.

*Commissioners Prof. Wanyande and Mr. Mwaisaka with public officers during a county visit (indicate where photo was taken)*

#### a) The County Government Bill, 2011

The County Government Bill, 2011 seeks to give effect to devolved governance provisions in the Constitution and specifically Chapter Eleven, by detailing county governments' powers, functions, and responsibilities to deliver services and for other connected purposes.

The Bill was finalized by CIC on 18<sup>th</sup> November 2011 and submitted to the Attorney General the following day, 19<sup>th</sup> November, 2011. There was a post Cabinet review of the Bill by CIC after which it was forwarded to the Attorney General's office on 13<sup>th</sup> January 2012. The Bill was tabled and passed in Parliament on 23<sup>rd</sup> February 2012 and was submitted for Presidential assent. However, the President declined to assent to the Bill because he objected to provisions in the bill relating to the handling of national security which amounted to restructuring the provincial administration system. Parliament had introduced a provision into the Bill creating a county equivalent of national security. The President in his refusal to assent to the Bill argued, in a memorandum to the Speaker of the National Assembly, that there could be no such equivalent structure at the county level since the security function was the responsibility of the national government. The President also argued that the restructuring of the provincial administration in light of the changes made by the Constitution was the responsibility of the national government and has not yet been done. The President requested parliament to reconsider the Bill in light of his arguments on the two issues.

CIC reviewed the President's memorandum on the Bill and was in agreement with the President's decision. Furthermore, CIC still retains the responsibility to review the Bill after any amendments by parliament in response to the issues raised by the President. This will be done to ensure that the final bill is consistent with the letter and spirit of the Constitution

The Bill is still with Parliament And CIC is concerned that Parliament has taken too long to respond to the issues raised by the President. This raises anxiety over the state of devolution in the country.

#### b) The Transition to Devolved Government Act 2012

The Transition to Devolved Government Act 2012 sets out provisions to give effect to section 15 of the Sixth Schedule to Constitution. It provides a framework for transitional arrangements to devolved government and for connected purposes. CIC reviewed and submitted the Bill to the Attorney General on 16th January 2012. The Attorney General forwarded the Bill to the Cabinet thereafter. The post-Cabinet Bill was returned to CIC on 27th January for review. The review was carried out by CIC and thereafter an advisory opinion on the Bill was submitted to the Attorney General on 31st January 2012. The Bill was enacted into law on 27th February 2012. CIC will soon undertake a post-Parliament review of the Bill alongside other devolution laws to ensure that it does not contain inconsistencies or unconstitutional provisions.

The Transition to Devolved Government Act 2012 establishes the Transition Authority which will undertake the country's transition to devolved government as provided under section 15 of the Sixth Schedule of the Constitution. Further, as part of its functions under the Act, the Transition Authority shall carry out the phased activities specified in the Fourth Schedule of the Act.

The transition process is crucial in determining the success of the devolved government structure and CIC is monitoring the transition process closely. The Commission will remain focused and steadfast in ensuring that legislation that gives effect to devolution remains consistent with the letter and spirit of the Constitution thus establishing and guaranteeing devolution even in uncertain and tumultuous times. CIC is however concerned that the Transition Authority is yet to be established and urges that this be accorded the priority it deserves.

c) The Intergovernmental Relations Act 2012.

The Intergovernmental Relations Act 2011 establishes a framework for consultation and co-operation between National and County governments and between county governments. It establishes mechanisms for dispute resolution between and within the two levels of government.

CIC reviewed and submitted the Bill to the Attorney General on 16th January 2012. It was forward to the Cabinet and returned to the CIC on 27th January for a post- Cabinet review. The review was carried out by CIC and an advisory opinion on the Bill's conformity with the Constitution was submitted back to the Attorney General on 31<sup>st</sup> January. CIC monitored the Bill after it was tabled before Parliament and the Commission is now awaiting to review the finalised Act for any inconsistencies or unconstitutional provisions.

d) The Public Finance Management Bill 2012.

The Public Finance Management (PFM) Bill 2012 deals with effective and prudent management of public finance at national and county government levels. The object of this Bill is to ensure that public finances are managed at both the national level and the county level in accordance with the principles set out in Chapter Twelve of the Constitution and that public officers responsible for managing those finances are accountable to the public through Parliament and County Assemblies.

The PFM Bill was reviewed and submitted to the Attorney General on 7<sup>th</sup> February 2012. It was forwarded to the Cabinet on 15<sup>th</sup> February and returned to CIC on 17<sup>th</sup> February for a post cabinet review. The review was carried out by CIC and an advisory opinion submitted to the Attorney General on the same day, that is, 17<sup>th</sup> February. The Bill was published on 23<sup>rd</sup> February for tabling in Parliament.

CIC is monitoring developments on the Bill in Parliament. The Commission is concerned that Parliament is taking too long to enact this Bill, given its importance in effecting devolution as envisaged in the Constitution. CIC urges that the Bill be enacted as soon as possible.

► Stakeholder engagements

a) Consultative meetings with government agencies

CIC attended a number of consultative meetings on devolution. On 5<sup>th</sup> March, the thematic team met with the Parliamentary Committee on Local Authority at the invitation of the Committee. The Committee sought CIC's input into the report the Committee was preparing to table in parliament on the County Government Bill 2011. The report would be used to guide debate in Parliament on the amendments that the president recommended in his memorandum on the Bill.

The thematic area attended a meeting with The Institute for Social Accountability (TISA) on matters relating to the coordination of civic education on devolution. The meeting held on 12<sup>th</sup> March initiated broad stakeholder dialogues on county implementation activities.

b) Media talk shows

The thematic area teams participated in a number of live television talk shows as part of a panel to articulate issues on devolution. This activity sought to give members of the public a better understanding of the constitutional issues relating to devolved government including the challenges expected in implementation.

► Challenges in the thematic area

There is a legal gap in the devolution framework at the national level. All the bills developed so far on devolution have addressed the county level government and the relations between counties and the national level. However, no bill expressly provides for the national level government. CIC has raised this issue with the Executive and recommended the development of a national government bill to address the gap. CIC awaits a response from the Executive on this matter.

Another challenge is the misunderstanding of what devolved government involves. There is a tendency by many people and public institutions to equate devolution with county governments only. This perhaps explains why the national government bill has not been prepared as part of the devolution bills.

There is also a general misunderstanding of Chapter Eleven. In particular many institutions do not understand that the two levels of government, namely national and county governments, will only come into place after the first elections under this Constitution.

► Proposed activities for the second quarter of 2012

- Audit all legislation passed with a view to establishing any inconsistencies/contradictions in the individual Acts, with other Acts and with the letter and spirit of the Constitution, as well as any additional legislation required to effect devolution.
- Audit civic education materials developed by civic education providers Including CSOs, NGOs and the Ministry of Justice National Cohesion and Constitutional Affairs.
- Hold consultative meetings with ministries on their transition to devolved government work plans.
- Develop civic education materials on devolved government.
- Monitor transition activities.
- Work with ministries to review administrative procedure necessary for effecting devolution.
- Monitor violations of the Constitution with regard to devolution.
- Sensitize counties through workshops on matters relating to devolution.

## 2.10 Activities under the Public Finance Thematic Area

The Public Finance Thematic Area is responsible for guiding and coordinating all activities aimed at implementing Chapter Twelve of the Constitution. Since the commencement of the activities of CIC in January 2011, the Public Finance thematic team has undertaken numerous steps to facilitate, monitor and coordinate all stakeholders involved in the generation and development of a Constitution-compliant legal and institutional framework for public finance management.

The Ministry of Finance has played a leading role in the formulation of the public financial management legislation and as previously been pointed out, the Treasury released a draft Bill in November 2011. The Bill as conceptualized sought to consolidate issues relating to public finance, county public finance and intergovernmental fiscal relations.

► Status of development of legislation/policies/administrative procedures

a) CIC internal review of the PFM Bill 2012

In furtherance of discussions on the PFM Bill, the CIC held a retreat in January 2012 with the aim of consolidating and affirming the issues that had been proposed during an earlier retreat in Mombasa. It was also important to confirm the constitutional ramifications of the proposals made in Mombasa and ensure their compliance with both Chapters Eleven and Twelve of the Constitution.

b) Review of Public Finance Management Bill

*PFM Bill Roundtable:*

The numerous discussions and stakeholder consultations set the stage for the conduct of the roundtable meeting on this bill. The roundtable was conducted on the 31<sup>st</sup> January 2012 and brought together officers from the Ministry of Local Government, Ministry of Finance, KLRC, Parliamentary Budget Office, Office of the Prime Minister and the Office of the Auditor General.

During the meeting, the Treasury and the Ministry of Local Government presented common positions agreed upon between them which streamlined the discussions and avoided stalemates. From the outset, the core concern that informed the deliberations at the roundtable was the need to create an effective public finance architecture which recognizes devolution as a fundamental part of public finance management.

*Post Roundtable Technical Meeting*

Based on the need to sign off the views that were raised during the deliberations at the roundtable, it was deemed useful to have a technical committee review the issues and factor them into the Bill. In attendance were select number of officials from the Treasury, Ministry of Local Government, the Officer of the Attorney General, Parliamentary Budget Office and the KLRC. Significantly, the technical committee went through the entire Bill and strove to ensure that the views expressed and factored into the Bill appreciated the spirit of devolution and the revamped system of public finance as enunciated under Chapter Twelve.

c) Submission of the Bill to the Office of the Attorney General

Following the stakeholder engagements and the roundtable technical meeting, the PFM Bill was submitted to the Office of the Attorney General on 7<sup>th</sup> February 2012 for editing.

d) Cabinet Meeting

The Cabinet met and discussed the Bill on the 17<sup>th</sup> February, 2012 and sent it back to CIC to confirm the Cabinet's recommendations. Upon CIC's approval of the contents of the Bill, the same was sent to the AG for publication in the Kenya Gazette and onward transmission to Parliament for debate.

It is noteworthy that in terms of priority and the need to provide for an all inclusive infrastructure for managing public finance at national and county levels, the Bill ought to have been passed by the 26<sup>th</sup> of February 2012. Unfortunately, the Bill has not been enacted before the deadline and a formal extension of time was not sought before the expiry of the deadline. This may bring the legality of the law enacted outside the timeline into question.

The PFM law has a two year timeline, albeit with county government financial management provisions have an 18 month timeline. As such, it was agreed that the Bill be fast tracked for possible enactment by the 27<sup>th</sup> February, 2012 deadline. The Bill is still under discussion in Parliament.

► Activities planned for the second quarter

During the first quarter, a lot of the thematic areas efforts went into ensuring that the PFM bill was finalized. The nature of views, discordance in the views of the Executive, the interests of Kenyans, and the need to appreciate both Chapter Eleven and Twelve of the Constitution called for the dedication of the thematic area in ensuring that need expedience does not overshadow Constitutional soundness.

As such, other activities that had been slotted for the first quarter will be moved move to the next quarter. They include:

- Review of the Controller of Budget Bill – the Controller of Budget submitted their final views on the Bill in the first quarter thus paving the way for the conduct of the requisite roundtable meeting on the Bill.
- Review of the Public Audit Bill –the Auditor General and the Treasury are in the process of reviewing the Public Audit Act and CIC will be involved in the second quarter once a draft Bill is ready for deliberations.
- Review of the Public Procurement and Disposal Act – the Public Procurement and Oversight Authority is consolidating views to ensure conformity with Constitutional provisions on public procurement. CIC is engaged in review of the draft Bill which will be concluded in the next quarter.
- Review of the Central Bank Act and the Kenya Revenue Authority Act – both institutions are reviewing the existing Acts and will share with the CIC their consolidated views to enable review of the laws.

### 3. CHALLENGES, IMPEDIMENTS IN THE IMPLEMENTATION OF THE CONSTITUTION

#### 3.1 Challenges and Impediments in Implementation

► Irregular amendment of Bills by the Executive and Legislature

Some Bills which had been approved by the CIC and the implementing partners (the office of the Attorney General, the KLRC and the line Ministry) at final roundtable meeting and forwarded for publication, were amended without reference to CIC. CIC has resorted to issuing Advisories to the Office of the Attorney General 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 Bills and some provisions required by the Constitution were omitted from the Bills. This trend is disconcerting and CIC calls upon implementing partners, at all levels, 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. The Land Bills have been notorious in this respect.

► Deliberate attempts to mislead the public on key constitutional issues

The tendency by some politicians to mislead the public on some aspects of implementation is a challenge. The most recent example is the debate on the election date. The announcement of 4<sup>th</sup> March 2013 as the election date was followed by a debate in which some politicians accused the IEBC of overstepping its mandate. The accusations and attacks on the IEBC has the potential of undermining the authority of not just IEBC but also other independent and constitutional offices.

► Delay in operationalizing key constitutional offices

Failure to appoint members to key institutions and Commissions and delay in the appointment of the Registrar of Political Parties as per the Political Parties Act, 2011;



► Disregard for CIC's mandate and public participation

The publication of important Bills affecting the Nation without fulfilling the Constitution's requirements of public participation and review by the Commission presents a challenge. For example, the Cabinet approval of the Companies and Insolvency Bills and subsequent publication of the Bills without subjecting the Bills to the Commission's review and other relevant stakeholders input.

The Commission considers the aforementioned proposed laws essential in safeguarding and guaranteeing the implementation of the rights enshrined in Chapter Four of the Constitution, such as, Article 40 among other relevant principles and values of the Constitution. The Commission is of the view that all Bills under formulation, whether referred to under the Fifth Schedule to the Constitution or derived from other Articles of the Constitution, should be submitted to the Commission for review to verify their conformity to the letter and spirit of the Constitution prior to publication.

► Deliberate attempts to disregard the Constitution implementation process and mandate of the CIC

The tendency by some partners in the process of preparing bills to overlook some aspects of the process undermines the implementation efforts. CIC has observed that some bills are presented to Parliament without the involvement of CIC and in some cases without even the knowledge of CIC. This happens when those generating the bills and sometimes even the Office of the Attorney General fail to inform CIC about the status or even existence of such Bills.

► Deliberate attempts to disrespect, misinterpret and/or underplay the mandate of CIC

There are cases in which bills are submitted to Parliament after Cabinet review before they are vetted by CIC as required by the process that was agreed on by all the stakeholders involved in processing Bills before tabling in parliament

► Late submission of Bills

Despite raising this challenge in previous CIC reports, some implementing partners persist in not meeting deadlines agreed for processing of bills.

#### 4. ADDRESSING THE CHALLENGES AND IMPEDIMENTS TO CONSTITUTIONAL IMPLEMENTATION

► Adherence to the agreed timelines and processes of enactment of laws

CIC recommends that every implementing partner respects the process of developing bills as agreed upon, including respecting deadlines. This will ensure that the minimum required levels of stakeholder engagements are undertaken and all legislation enacted comply with the letter and spirit of the Constitution.

► Increased coordination in the Executive

There is need for increased coordination especially within and from the Executive to ensure that relevant processes in the preparation of bills are undertaken timely.

► Political leadership

Political leaders should exercise leadership at all time to ensure that the implementation process is on track. Any disagreements with decisions taken by constitutionally mandate bodies should be referred to the appropriate judicial authorities for determination to ensure constitutionality is upheld.

► Operationalisation of key constitutional offices

Appointment of the chairperson and members of the Ethics and Anti-Corruption Commission and other key constitutional offices and Commissions should be finalised as a matter of extreme priority.

#### ANNEX I

##### Update On Chapter 15 Commissions

	<i>Name of the Commission</i>	<i>Status of Enactment and Formation</i>	<i>Way Forward</i>
A.	Kenya National Human Rights Commission	Law enacted and the existing Commission is the successor of the previous KNHRC	Legislation has been enacted and new Commissioners to be appointed on expiry of the terms of the current Commissioner's terms
B.	National Land Commission	Legislation has not been enacted	A. Bill passed first reading in Parliament and was referred to Departmental Committee on Land for scrutiny and public participation B. Bill is scheduled to be enacted by 26 <sup>th</sup> April 2012.
C.	Independent Electoral and Boundaries Commission	Legislation has been enacted and Commissioners have been appointed	
D.	Parliamentary Service Commission	Existing Act has not been amended	Amendments should be enacted by 26 <sup>th</sup> August 2012 CIOC to help facilitate the fast tracking of the amendments
E.	Judicial Service Commission	Legislation has been enacted and Commissioners have been appointed	
F.	Commission for Revenue Allocation	Legislation has been enacted and Commissioners have been appointed	
G.	Public Service Commission	Legislation has not been enacted	legislation by 26th February 2012. Commissioners to be appointed on expiry of the terms of the current Commissioner's terms
H.	Salaries and Remuneration Commission	Legislation has been enacted Commissioners have been appointed	
I.	Teachers Service Commission	Legislation has not been enacted	Bill has been finalized by AG and is awaiting approval by Cabinet before publication and tabling in Parliament New Commissioners to be appointed on expiry of the terms of the current Commissioner's
J.	National Police Service Commission	Legislation has been enacted, appointment of Commissioners on-going	Parliament approved the nomination of Ms. Amina R Masoud as the Chair of the NPSC and Esther Chui-Colombini, Ronald Musengi,

	<i>Name of the Commission</i>	<i>Status of Enactment and Formation</i>	<i>Way Forward</i>
			James Atema, Mary Auma Owuor and Muia Shadrack Mutia as members of the Commission. CIOC to follow up on the cause of delay in the selection process
K.	Commission on Administrative Justice	Legislation has been enacted and Commissioners have been appointed	
L.	National Gender and Equality Commission	Legislation has been enacted Appointment of Commissioners had been halted by the Courts	Appointment of Commissioners was put on hold on 15th November 2011 pending the hearing and determination of HCCC Petition No. 243 of 2011- Community Advocacy and Awareness Trust & 8 others v National Gender and Equality Commission & 5 others filed on 14th November 2011 which sought to challenge the appointment of Ms. Winfred Osimbo Lichuma as chairperson of the National Gender and Equality Commission. The High Court dismissed the petition on 14th March 2012.
	Ethics and Anti-Corruption Commission	Legislation has been enacted	Parliament approved the nomination of Mr. Mumo Matemu as the EACC Chairperson, and Prof. Jane Onsongo and Irene Keino as members of the Commission on 10th December 2011 CIOC to follow up on the cause of delay

## ANNEX II

## CIC's Advisory To The Public On The IEBC Delimitation of Boundaries Report

The mandate of the Commission for the Implementation of the Constitution (CIC) is, among others, to monitor, facilitate, coordinate and oversee the implementation of the Constitution of Kenya (CoK) 2010. In addition, CIC, along with other constitutional commissions, has as its objects:

- (i) Protecting the sovereignty of the people;
- (ii) Securing the observance by all State organs of democratic values and principles; and
- (iii) Promoting constitutionalism (Article 249 (1)).

It is in this context that CIC is concerned by what appears to be an attempt by Parliament to direct the Independent Electoral and Boundaries Commission (IEBC) with regards to the Boundaries Report.

## The Role of IEBC

Article 88 of the CoK 2010 establishes IEBC as an independent commission and provides, inter alia, that in the exercise of its functions, it is not subject to the direction or control of any person or authority and is only subject to the Constitution and the law.

The constitution gives the IEBC various functions and powers including the delimitation of constituency and ward boundaries as well as the determination of the names and boundaries of constituencies and wards, and in the case of wards, their number [Article 89 (8)]. The process by which this function and power is exercised is generally set out in Article 89 of the constitution and in the IEBC Act NOTING HOWEVER THAT any of the provisions of the Act that contradict the constitution are void to the extent of that contradiction. One of the key responsibilities of the IEBC in the process of determining the boundaries is to consult interested parties [Article 89 (7) (a)]. Other than the public, one of the key interested parties in this process is of course Parliament. Ultimately however, the constitutional responsibility of determining the boundaries and gazetting the same is granted to the IEBC.

IEBC must however ensure that its final report complies fully with the provisions of the constitution so that it is not open to challenge on the basis of unconstitutionality. CIC, in exercise of its mandate under Section 5(6) of the 6<sup>th</sup> Schedule and its general function of oversight over the implementation of the constitution is reviewing the IEBC report and continues to engage with IEBC in this regard to ensure that the letter and spirit of the constitution are respected. Ultimately however, CIC cannot direct the IEBC on the final content of the report. That responsibility lies with the IEBC.

In the event however that IEBC were to gazette boundaries that conflict with the provisions of the constitution, Article 89 (10) of the Constitution provides that a *person may apply to the High Court for review of a decision of the Commission*. This is a right available to the people of Kenya, including members of Parliament.

## The Role of Parliament

Article 2 of the CoK 2010 provides that

1. The Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government and
2. No person may claim or exercise State authority except as authorized under this Constitution

Article 94 of the Constitution states that the role and power of Parliament is, among others, to make laws and to alter county boundaries and that this authority is derived from the people. The alteration of Boundaries is to be carried out according to Article 188 which states:

(1) The boundaries of a county may be altered only by a resolution:-

- recommended by an independent commission set up for that purpose by Parliament; and
- passed by-  
the National Assembly, with the support of at least two-thirds of all of the members of the Assembly; and  
the Senate, with the support of at least two-thirds of all of the county delegations.

The Constitution also grants Parliament an oversight role over State organs. However, this oversight power, particularly over independent Commissions is limited by the constitution and cannot be exercised to defeat their constitutionally guaranteed independence. Parliament, in the exercise of its oversight role cannot take over the functions of any constitutional organ, particularly an independent Commission. To this extent, with respect to the Boundaries report, Parliament cannot take over the functions of IECB, of determining the boundaries and number of constituencies and wards. What Parliament can do in this regard, is to make recommendations to IECB. IECB is the final authority on the extent, if any, to which it will adopt the recommendations of Parliament.

Any attempt by Parliament to impose its preferences on the IECB would amount to directing IECB and would therefore be a violation of the letter and spirit of the Constitution. It would purport to legitimize interference by Parliament with the constitutional independence of other State organs.

Once again CIC reiterates its commitment to discharge its mandate fully and faithfully and to ensure that the Constitution is implemented in letter and spirit. CIC would like to appeal to the owners of the Constitution, the people of Kenya, to remain vigilant and be committed to the implementation of the Constitution. It is the responsibility of the people of Kenya to hold accountable all persons and State organs, including CIC, to their responsibilities with regard to the implementation of the Constitution.

C. A. NYACHAE,

*Chairperson.*

### ANNEX III

#### *CIC Advisory to the Public on the Setting of the Election Date by the Independent Electoral and Boundaries Commission (IEBC)*

In the discharge of its mandate to oversee the process of implementation of the Constitution of Kenya, 2010, The Commission for the Implementation of the Constitution (CIC) finds it appropriate to issue this advisory to the people of Kenya as regards the setting by The Independent Electoral And Boundaries Commission (IEBC) of the date for the first elections under the Constitution of Kenya, 2010.

In giving this advisory, CIC is concerned, not with the political interests and preferences surrounding the election date debate, but with the constitutional and legal issues that underlie the setting of that date.

IEBC is established under Article 88 of The Constitution of Kenya, 2010, and is an independent Constitutional Commission within the meaning of Chapter 15 of the Constitution. In terms both of Article 88(4) of The Constitution and Section 4 of The Independent Electoral and Boundaries Commission Act, 2011, IECB is inter alia "responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution".

In terms of Sections 14, 16, 17, and 19 of The Elections Act, IECB shall publish a notice of the holding of the election, in the Gazette and in the electronic and print media of national circulation, in the case of a General Election, at least sixty days before the holding of the elections.

As regards the first General Election under the Constitution of Kenya, 2010, IECB on Saturday 17<sup>th</sup> March 2012, made public its decision to hold the said Election on 4<sup>th</sup> March 2013.

In the considered view of CIC, and in the context of the public debate generated by IECB's announcement, two questions fail to be determined:-

- Is IECB the constitutional organ mandated to set the date of the General Election; and
- If so, has IECB set the date within the parameters of the Constitution and the Law.

Both these questions were canvassed and interrogated comprehensively in the judgment handed down by the Constitutional Division of The High Court (Lenaola, Ngugi and Majanja JJ) in Constitutional petition no.65 of 2011 consolidated with petitions nos. 123 of 2011 and 1855 of 2011.

In its judgment on the question, "when shall the first General Elections be lawfully held?", the constitutional Court ruled:

"the first General Elections under the Constitution can only be lawfully held as follows:-

- ✓ In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement between the President and the Prime Minister in accordance with Section 6(b) of The National Accord and Reconciliation Act, 2008
- ✓ Within sixty days from the expiry of the terms of the National Assembly, on 15<sup>th</sup> January, 2013"

On the question, "which body under the Constitution is entitled to fix the election date, the Court concluded:

"(i) In light of the authority and powers conferred by Article 88 to the IECB to conduct and supervise elections, it is the IECB that will fix the election date for the first elections under the Constitution.

THE IECB IS an independent body and in line with its mandate, it shall fix a date once it is satisfied the conditions and arrangements that ensure a free and fair election have been met but within sixty days of either of the two events referred to.

(ii) Having found that the first elections under the Constitution shall be held within sixty days from the end of the expiry of the National Assembly as provided or upon dissolution of the National Coalition, we hold that it is the responsibility of IECB, to fix any date within the sixty days thereafter."

The Constitution of Kenya, and specifically Article 165, gives the High Court jurisdiction to hear and determine any questions with respect to the interpretation of the Constitution, unless therefore, a decision of The High Court is reversed or varied either by the Court of Appeal or the Supreme Court, such decisions remain the authoritative and binding constitutional and legal position.

In the instant case, it is the unequivocal view of CIC that IECB, in Terms of the judgment of the Constitutional Court, is the organ constitutionally mandated to set the election date.

CIC is fully persuaded that, in the discharge of the mandate, IECB acted entirely within the parameters of the Constitution, as stated by the Constitutional Court.

The date set by IECB is therefore the constitutionally valid date for the first General Elections under the Constitution. It is to be recognized that this date may change if:-

- ✓ The Court of Appeal or The Supreme Court reverses or varies the judgment of The High Court; or
- ✓ In accordance with the Court's ruling, the President and the Prime Minister, by a written agreement, dissolve the Grand National Coalition; or
- ✓ The Constitution is amended to expressly set a different election date.

In the absence of any of the above events taking place, it behoves all Kenyans, including all other constitutional organs and offices, to respect IECB and its mandate.

Article 2 of The Constitution of Kenya, 2010, states that, "This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of Government". Further, by virtue of Article 3 of The Constitution, "Every person has an obligation to respect, uphold and defend the Constitution".

CIC therefore calls upon all Kenyans to uphold the Constitution of Kenya, 2010, in particular by according respect to both the Judiciary in its constitutional role of interpreting the Constitution, and to IEBC, in the discharge of its mandate, as the Election Management Body, including, the mandate to set the date for the first General Election under the Constitution of Kenya, 2010.

CIC takes this opportunity to reaffirm its commitment in ensuring that the Constitution of Kenya, 2010 is implemented fully and faithfully, in letter and spirit.

C. A. NYACHAE,  
CHAIRPERSON.

Commission for the implementation of the constitution

ANNEX IV

*Judgement on the Date of the General Elections*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI MILIMANI LAW COURTS CONSTITUTIONAL PETITION NO. 65 OF 2011  
CONSOLIDATED WITH PETITIONS NOS 123 OF 2011 AND 185 OF 2011

BETWEEN

JOHN HARUN MWAU ..... 1ST PETITIONER

MILTON MUGAMBI IMANYARA ..... 2ND PETITIONER

PROFESSOR LAWRENCE GUMBE ..... 3RD PETITIONER

MARTIN MUTHOMI GITONGA ..... 4TH PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION ..... 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ..... 3RD RESPONDENT

PRESS AND PUBLIC SUMMARY

ON THE DATE OF THE FIRST ELECTIONS UNDER THE CONSTITUTION

This is not a copy of the certified judgment. The following explanatory note is provided to assist the public and the media in reporting this case and is not binding on the High Court or any other Court.

After hearing the petitioners in the three consolidated petitions on 15th and 16th December 2011 the High Court (Hon. Justices Isaac Lenaola, Mumbi Ngugi and David Majanja) delivered its judgment on 13th January 2012. The Court dealt with seven issues that were framed for determination. The following is a summary of the findings on each issue by the Court.

Whether this court had jurisdiction to determine the matter.

The jurisdiction to determine this matter is founded on two grounds. First, failure to hold the first elections on a date fixed in accordance with the provisions Constitution would be a threat to the Constitution and therefore any party is entitled to move the court under Article 258(1) for appropriate relief. Secondly, the Supreme Court in Constitutional Application No. 2 of 2011 directed the court to determine the petitions before it having been satisfied that the High Court has jurisdiction.

When shall the first elections under the Constitution be lawfully held.

The date of the first elections under the Constitution is determined by reference to section 9 and 10 of the Sixth Schedule as follows;

- (a) In the year 2012, within sixty days from the date on which the National Coalition is dissolved by written agreement between the President and Prime Minister in accordance with section 6(b) of the National Accord and Reconciliation Act, 2008; or
- (b) Upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by Legal Notice No. 1 of 2008 as 15th January 2008. The term therefore expires on 14th January 2013. The elections shall be held within sixty days of 15th January 2013.

Does the President have power or authority to dissolve Parliament under the Constitution?

Following the repeal of the former Constitution and together with it section 59 thereof and in the absence of a specific provision entitling the President to dissolve Parliament, the President has no power under the Constitution to dissolve Parliament.

Which body under the Constitution has the Constitutional responsibility to fix the date for the first elections.

The body entitled under the Constitution to fix the date of the first elections within sixty days of the expiry of the term of the National Assembly or upon dissolution of the National Coalition by written agreement between the President and the Prime Minister in accordance with section 6(b) of the National Accord and Reconciliation Act, 2008 is the Independent Electoral and Boundaries Commission.

Can an amendment to the Constitution affecting the term of the President be proposed, enacted or effected into law without a referendum being held under the Constitution.

In accordance with Article 255 of the Constitution, an amendment to the Constitution affecting the term of the President cannot be effected into law without a referendum.

Does the unexpired term of the existing members of Parliament include terms and conditions of service.



The terms and conditions of service of Members of Parliament are governed by the National Assembly Remuneration Act (Chapter 5 of the Laws of Kenya) and Parliamentary Pensions Act (Chapter 196 of the Laws of Kenya) which are saved by virtue of section 6 and 7 of the Sixth Schedule upto the end of the term of the National Assembly or upon dissolution of the National Coalition.

Who should bear the costs of the petitions as consolidated?

The award of costs in matters concerning enforcement of fundamental rights and freedoms protected by the Bill of Rights under Article 22 and 23 and enforcement of the Constitution under Article 258 is in the court's discretion and in this particular case the court orders each party to bear its own costs.

DATED AT NAIROBI THIS 13TH DAY OF JANUARY 2012

ANNEX V

*Summary of Submission of Quarterly Reports By Implementing Agencies*

<i>List of Ministries</i>	<i>Submitted</i>	<i>Not Submitted</i>
Office of the President		X
Cabinet Office		X
Ministry of State for Defence		X
Ministry of State for Provincial and Internal Security	X	
State House		X
Office of the Prime Minister		X
Ministry of Planning, National Development and Vision 2030	X	
Ministry of State for Public Service	✓	
Office of the Vice President	✓	
Ministry of Home Affairs	X	
Ministry of Immigration and Registration of Persons	X	
Ministry of National Heritage and Culture	X	
Others		
Ministry of Agriculture	X	
Ministry of Cooperative Development and Marketing	✓	
Ministry of Development of Northern Kenya and other Arid Lands		X
Ministry of East African Community		X
Ministry of Education		X
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
Ministry of Housing	✓	
Ministry of Industrialization	✓	
Ministry of Information and Communications		
Ministry of Justice, National Cohesion and Constitutional Affairs	X	
Ministry of Labour		X
Ministry of Lands	✓	
Ministry of Livestock Development		X
Ministry of Medical Services	✓	
Ministry of Gender, Children and Social Development	✓	
Ministry of Nairobi Metropolitan Development		X
Office of Deputy Prime Minister and Ministry of Finance		X
Office of Deputy Prime Minister and Ministry of Local Government		X
Ministry of Public Health and Sanitation	✓	
Ministry of Public Works		X
Ministry of Regional Development Authorities		X
Ministry of Roads		X
Ministry of Special Programmes		X
Ministry of Tourism		X
Ministry of Transport		X
Ministry of Trade	✓	
Ministry of Water and Irrigation	✓	
Ministry of Youth and Sports		X
The National Assembly	✓	

STATE PARASTATALS

<i>List of State Organs that have submitted reports</i>	
Central Bank of Kenya	✓
Kenya Revenue Authority	✓
National Housing Corporation	✓

COMMISSIONS

<i>List of Commissions that have submitted</i>	<i>Status</i>
Parliamentary Service Commission	✓
Teachers Service Commission	✓

Key

X Not submitted as at 31<sup>st</sup> March 2012

✓ Submitted

## ANNEX VI

*Schedule of Enactment of Legislation for Implementation of the Constitution of Kenya, 2010*

<i>Legislation/Bill</i>	<i>Status of Enactment</i>	<i>Remarks</i>
<b>STATUS OF ENACTMENT OF LEGISLATION UNDER THE FIFTH SCHEDULE TO THE CONSTITUTION AND THE AGREED SCHEDULE OF BILLS TO BE ENACTED BY 26<sup>TH</sup> AUGUST, 2011</b>		
The Industrial Court Act, 2011	Enacted in August 2011	
The National Police Service Act	Enacted in August 2011	
The Urban Areas and Cities Act	Enacted in August 2011	
The Environment and Land Court Act, 2011	Enacted in August 2011	
The National Gender and Equality Commission Act, 2011	Enacted in August 2011	
The Ethics and Anti-Corruption Commission Act, 2011	Enacted in August 2011	
The Elections Act, 2011	Enacted in August 2011	
The Kenya Citizenship and Immigrations Act, 2011	Enacted in August 2011	
The Commission on Revenue Allocation Act, 2011	Enacted in August 2011	
The Power of Mercy Act, 2011	Enacted in August 2011	
The Vetting of Judges and Magistrate Act, 2011	Enacted in August 2011	
The Judicial Service Act, 2011	Enacted in August 2011	
The Independent Electoral and Boundaries Commission Act, 2011	Enacted in August 2011	
The Supreme Court Act, 2011	Enacted in June 2011	
The Independent Offices (Appointment) Act, 2011	Enacted in August 2011	
The Kenya National Human Rights Commission Act, 2011	Enacted in August 2011	
The Commission on Administrative Justice Act, 2011	Enacted in August 2011	
The Political Parties Act, 2011	Enacted in August 2011	
The Salaries and Remuneration Commission Act, 2011	Enacted in August 2011	
The Independent Policing Oversight Authority Act, 2011	Enacted	
The National Police Service Commission Act, 2011	Enacted	
<b>LAWS ENACTED UNCONSTITUTIONALLY</b>		
The Contingencies Fund and County Emergency Funds Act, 2011	Enacted unconstitutionally	
The National Government Loans Guarantee Act, 2011	Enacted unconstitutionally	
<b>STATUS OF ENACTMENT OF LEGISLATION UNDER THE FIFTH SCHEDULE TO THE CONSTITUTION AND THE AGREED SCHEDULE OF BILLS TO BE ENACTED BY 26<sup>TH</sup> FEBRUARY, 2012</b>		
The Transition to Devolved Government Act, 2012	Enacted in February 2012	
The Intergovernmental Relations Act, 2012	Enacted in February 2012	
The County Government Bill	Enacted in February 2012	Referred back to Parliament by the President for amendment to comply with the Constitution
The Land Registration Bill	Before Parliamentary Committee on Land and Natural Resources	On 24 <sup>th</sup> February, Parliament voted to extend the timeline to pass the Bill by 60 days to allow more time for stakeholders to scrutinize the Bill
The Land Bill	Before Parliamentary Committee on Land and Natural Resources	On 24 <sup>th</sup> February, Parliament voted to extend the timeline to pass the Bill by 60 days to allow more time for stakeholders to scrutinize the Bill
The National Land Commission Bill 2011	Before Parliamentary Committee on Land and Natural Resources	On 24 <sup>th</sup> February, Parliament voted to extend the timeline to pass the Bill by 60 days to allow more time for stakeholders to scrutinize the Bill
The Public Financial Management Bill	Before Parliament for debate	
The Intergovernmental Fiscal Relations Bill	Merged with PFM Bill Awaiting Parliamentary Debate	
The County Government Finance Management Bill	Merged with PFM Bill Awaiting Parliamentary Debate	
The Public Service Commission Bill, 2011	Forwarded to the Attorney General for publication	
The Teachers Service Commission Bill, 2011	Forwarded to the Attorney General for publication	
The Campaign Financing Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
<b>STATUS OF ENACTMENT OF LEGISLATION UNDER THE FIFTH SCHEDULE TO THE CONSTITUTION AND THE AGREED SCHEDULE OF BILLS TO BE ENACTED BY 26<sup>TH</sup> AUGUST, 2012</b>		
The Assumption of Office Of President, 2012	Forwarded to the Attorney General for publication	
The National Intelligence Service Bill, 2011	Undergoing CIC Internal Review And Stakeholder Consultations	
The National Security Council Bill, 2011	Undergoing CIC Internal Review And Stakeholder Consultations	
The National Coroners Service Bill, 2010 & 2011	Undergoing CIC Internal Review And Stakeholder Consultations	
The Kenya Defence Forces Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
The Private Security Industry Regulation Bill, 2012	Undergoing CIC Internal Review	

<i>Legislation/Bill</i>	<i>Status of Enactment</i>	<i>Remarks</i>
	And Stakeholder Consultations	
The Leadership and Integrity Bill, 2012	Forwarded to the Attorney General for publication	
Public Service Management Bill, Article 235	-	
Public Officers Vetting Bill	-	
The National Government Bill (Proposed)	-	
The Miscellaneous Acts (Amendment) Bill	-	
Public Officers Vetting Bill	-	
Affirmative Measures Bill	-	
<b>OTHER BILLS FOR IMPLEMENTATION OF THE CONSTITUTION</b>		
The Kenya Law Reform Commission Bill, 2012	Forwarded to the Attorney General for publication	
The Ratification of Treaties Bill, 2011	Awaiting Parliamentary Debate	
The Independent Communications Commission Of Kenya Bill, 2010	Undergoing CIC Internal Review And Stakeholder Consultations	
The Constitution Of Kenya (Amendment) Bill, 2011	Undergoing CIC Internal Review And Stakeholder Consultations	
The Freedom Of Information Bill, 2008	Undergoing CIC Internal Review And Stakeholder Consultations	
The Data Protection Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
The Matrimonial Property Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
The Family Protection Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
The Controller Of Budget Bill, 2011	Undergoing CIC Internal Review And Stakeholder Consultations	
The Identification And Registration Of Kenya Citizens Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
The Births And Deaths Registration Bill, 2011	Undergoing CIC Internal Review And Stakeholder Consultations	
The Refugee Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
The Marriage Bill, 2012	Undergoing CIC Internal Review And Stakeholder Consultations	
The Consumer Protection Bill, 2011	Undergoing CIC Internal Review And Stakeholder Consultations	

## ANNEX VII

*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 the 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 re-spected, 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

Prof. Peter Wanyande

Prof. Wanyande is the Convener of the Devolved Government Thematic Team.

Dr. Ibrahim M. Ali

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

Dr. Elizabeth Muli

Vice-Chairperson

Dr. Muli is the Convener of the Executive and Security Thematic Team.

Mr. Philemon Mwaisaka, EBS, SS

Mr. Mwaisaka is the Convener of the Public Service and Leadership Thematic Team.

Imaana Kibaaya Laibuta

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

Ms. Catherine M. Mumma

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

Dr. Florence Omosa

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

Mr. Kamotho Waiganjo

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

QUARTERLY REPORT FOR THE PERIOD

APRIL TO JUNE 2012

ABBREVIATIONS AND ACRONYMS

ALGAK	Association of Local Government Authorities of Kenya
APSEA	Association of Professional Societies in East Africa
CBK	Central Bank of Kenya
CIC	Commission for the Implementation of the Constitution
CIOC	Parliamentary Constitutional Implementation Oversight Committee
CREAW	Centre for Rights, Education and Awareness
CSOs	Civil Society Organisations
EAC	East African Community
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
NCAJ	National Council on the Administration of Justice
NCIC	National Cohesion and Integration Commission
NGOs	Non-Governmental Organisations
NORAD	Norwegian Development Agency
PFM	Public Finance Management
WWF	World Wildlife Fund

FOREWORD

The Commission for the Implementation of the Constitution (CIC or the Commission) is mandated to report to the Parliamentary Constitution Implementation Oversight Committee, the Head of State, the Prime Minister and the people of Kenya. This report presents the developments between April and June 2012 marked by a number of milestones in the constitution implementation process. These include the enactment of three land laws: the National Land Commission Act, the Land Act and Registration of Land Act. These laws will change the landscape of land administration and management in Kenya. The Commission and other stakeholders in the constitution implementation have moved the process forward through preparation of legislation, policies and other administrative procedures.



We can confidently report that progress, especially on the legislative front, has been tremendous. Significantly, the Office of the Prime Minister, hosted a special roundtable on the implementation of the Constitution at which different stakeholders made commitments that will move the efforts forward. It is anticipated that a follow up roundtable will be convened to evaluate progress in fulfilment of the commitments by different stakeholders.

We have and continue to undertake all necessary measures to ensure that the rights and benefits bestowed on the people of Kenya through the Constitution are realized through the full and faithful implementation. Unfortunately, there have been a number of challenges and potential impediments to the implementation of the Constitution. One of the glaring challenges to the implementation process is the irregular appointment of county commissioners. The appointments were challenged in court, declared, unconstitutional, nullified and flagged as an alarming danger with potential to reverse the gains introduced by the Constitution. Another challenge was numerous proposals by the National Assembly to use the Statute Law (Miscellaneous Amendments) Bill to amend crucial provisions of the Elections and Political Parties Acts: to waive the educational requirements for serving and previous elected officials in contravention of Articles 27 (on non-discrimination), 116(3) and 10 (which prescribes democratic ideals violated in this process); to allow candidates seeking elective office to stand for one or more elective offices, which conflicts with Article 201 (prudent use of public funds, which multiple candidature would misuse through consequent wasteful by-elections); and to legalize party hopping by current members of Parliament despite clear prohibitions on the same by Article 103 and Section 40 of the previous Constitution under which the MPs were elected. Evidently, the proposed amendments were clearly not intended for law reform, but rather to secure the personal interests of some of the current Members of Parliament.

In response, we have been steadfast in pointing out the violations through official channels of communication as the first step and where necessary, through the media and judiciary, in order to alert the people of Kenya to any attempted deviations from the Constitution.

As we move closer to the next general elections, which are the first under the new Constitution, vigilance on remaining consistent with the Constitution is paramount. Now more than ever, our eyes must be fixed on the ultimate goal of full and faithful implementation of the Constitution.

Charles Nyachae,  
Chairperson.

#### EXECUTIVE SUMMARY

The adoption and subsequent promulgation of the Constitution of Kenya 2010 came with rejuvenation of hope in the rule of law, an assurance that rights and freedoms would be protected and promoted, and a promise of good governance. The realisation of this promise however largely depends on the participation of the Kenyan people in the process of implementation of the Constitution. In order for the people to participate effectively in the implementation process, it is essential that they internalize the principle of constitutionalism and recognise how application of the Constitution impacts their day-to-day lives. Moreover, there is the ever-present danger of the process of implementation being hijacked by people who are interested in maintaining the status quo. This calls for constant vigilance from Kenyans to protect their right to full participation in governance and to ensure faithful implementation.

Through past reports, members of the public have been brought increasingly up to date on the progress and as a result, they are engaged in monitoring the constitution implementation process. The level of awareness on the Constitution among the public has observably improved as demonstrated by the levels of participation in recent public forums organized by the Commission. Nonetheless, more work needs to be done in raising public awareness. Moreover, despite the early electoral campaigns and the International Criminal Court (ICC) issues taking centre stage in media coverage, the public seems to have trained its attention on pushing for consistent implementation of the Constitution. Indeed, local media stations can play a pivotal role in mainstreaming vigilance on constitution implementation in their programs. The relevant government agencies and the public should occasionally be invited for discussion on issues relating to constitution implementation.

Despite the challenges faced in the second quarter, the Commission was able to make significant progress and draw critical lessons, key among which were: the importance of monitoring of constitution implementation process as a mainstream activity. In addition, there is value in building both vertical and horizontal networks in constitution implementation.

This report presents a detailed exposition of the implementation of the Constitution in the second quarter of 2012 to enable the public to appreciate the progress and implications thus far, giving them a stronger platform for continued and effective participation in implementation of the Constitution. Specifically, this report highlights the preparation of legislation, policies, and administrative procedures; the achievements, challenges and impediments in implementation during this period; and the mechanisms employed in addressing these challenges and impediments. Ultimately, the report aims to strengthen citizen vigilance as the key anchor for constitutionalism.

#### INTRODUCTION

This Report covers the activities of the Commission for the Implementation of the Constitution (hereinafter "CIC" or the "Commission") for the second quarter (April to June) 2012. It is the sixth report in the series.

The main part of the Report presents the activities of the Commission (both Commission-wide activities and activities under the eight thematic areas); the challenges and impediments to constitutional implementation; and recommendations on how to improve the implementation process. Various annexes compliment the main report. In particular Annex VI and Annex VII provide an update on the status of enactment of constitutional implementation laws, including information on pending bills and all the legislations that have so far been enacted.

#### Overview of CIC Activities

##### Commission-wide Activities

The Commission's work is structured along thematic areas for efficient and effective delivery on its mandate. In addition, the Commission continues to organize and participate in Commission-wide activities. These include; stakeholder engagements, public advisory opinions, study tours and institutional development activities.

#### CIC Engagements with Stakeholders

##### ► Prime Ministers Roundtable on the Implementation of the Constitution

The Office of the Prime Minister in partnership with the Ministry of Justice, National Cohesion and Constitutional Affairs and the Commission successfully hosted a special roundtable meeting on implementation of the Constitution. The objective of the roundtable meeting was to review the progress made in implementation, identify the lessons learned and discuss important areas of focus in moving forward. The meeting identified the following thematic issues for deliberation:

- Entrenching constitutionalism;
- Elections;
- Realisation of socio-economic rights; and
- Devolution;

During the roundtable meeting, in-depth discussions were held in five working groups on each of the issues identified. Devolution was discussed in two working groups. The working groups made commitments towards the full implementation of the Constitution under the thematic issues discussed. (A matrix of commitments made by participants is contained in Annex V.)

► Meeting with the Speaker to the National Assembly on By-Elections

On the 21<sup>st</sup> of February 2012, the Kangema constituency seat fell vacant due to the demise of the Member of Parliament, Hon. John Michuki. Ordinarily, the Speaker of the National Assembly would have declared the seat vacant and issued writs within sixty days of seat falling vacant. However, the Speaker was unable to issue the writs because the National Assembly and Presidential Elections Act (Chapter 7 of the Laws of Kenya) had been repealed by the Elections Act, 2011 and the Elections Act had no provision to regulate the conduct of by-elections before the first general elections under the new Constitution. The Speaker therefore convened a meeting to explore ways of resolving the matter.

During the meeting it was considered that Section 2 (1) of the Sixth Schedule to the Constitution suspends the application of Chapter Seven and Chapter Eight of the Constitution, until after the first elections under the Constitution are held. However, in conducting the first general elections under the Constitution, Chapter Seven, which deals with electoral processes and Chapter Eight, which deals with election of the National Assembly and the Senate, shall apply.

The meeting proposed that an amendment of Section 112 of the Elections Act would resolve the dilemma and provide direction on how to conduct by-elections during the remainder of the term of the 10<sup>th</sup> Parliament where the need arose, prior to conducting the first general election under the Constitution. Subsequently, Miscellaneous Amendment Bill amended the Elections Act, 2012 paving way for the Kangema by-elections and others, which may arise before the next general elections.

► County Visits

The Commission visited twelve counties to deliberate on issues relating to the family unit and family protection in general, and the provisions of the Marriage Bill 2012, Matrimonial Property Bill 2012 and the Protection against Domestic Violence Bill 2012 (Family Protection Bill 2012) in particular.

The public forums were convened pursuant to CIC's mandate to monitor, facilitate, coordinate and oversee the development of legislation, policies and administrative procedures required to implement the Constitution and to ensure public participation and uphold the sovereignty of the people. The report on the county visits is detailed below in the Thematic Area on Bill of Rights and Citizenship.

► Public Engagement Forum in Kajiado County

Throughout the Constitution Implementation process, the Commission recognizes the sovereignty of the people and endeavours to carry out public and stakeholder consultations to ensure that the principle of public participation is upheld. On 1<sup>st</sup> May 2012, the Commission convened a forum to engage with people of Kajiado County at Oloitoktok. The overall objective of the forum was for CIC to interact with the people of Kajiado County in critically discussing and appreciating the constitution implementation process. Specifically, the Commission sought to:

- i) Educate the local citizens broadly on constitutional issues and specifically address issues that directly affect their daily lives;
- ii) Provide an understanding of the devolved government structure;
- iii) Provide an understanding of the transition to devolved government process and procedures;
- iv) Provide an understanding of the citizen's role in the constitution implementation process and how they can engage with both the national and county governments in informing decisions and demanding accountability from the leadership.

The public engagement forum was successful as the objectives were realized and lessons learnt by the Commission in terms of an informed insight into the people's understanding of the Constitution thus far. It also highlighted areas for improvement in future engagements with the public.

► Meeting with key Stakeholders on the Swahili Version of the Constitution

As a follow up to the meeting convened by the Attorney General, the Commission convened a meeting with key stakeholders to deliberate on ways to ensure implementation of Article 7 of the Constitution, which declares Swahili the national language of Kenya. The Commission noted the need to expedite the mechanisms of producing a Swahili version of the Constitution and the bi-lingual publication of legislation, policies and administrative procedures. The meeting included key stakeholders such as the Kenya Law Reform Commission (KLRC), National Council for Law Reporting, Ministry of Justice, National Cohesion and Constitutional Affairs, State Law Office and the Institute of Kiswahili Research at Kenyatta University.

The meeting recognized that the matter is of national importance and recommended that the office of the Prime Minister should convene a high level meeting of all Ministers and other stakeholders towards charting a way forward. CIC will obtain a copy of the proceedings of the Conference organized by the Institute of Kiswahili Research, which captured the views of stakeholders who participated in the Constitution making process.

► Panel of the Wise Meeting on Strengthening Political Governance for Peace, Security and Stability In Africa

The African Union (AU) Panel of the Wise, with the support of the AU Commission, and in collaboration with the Nairobi-based African Leadership Centre, held a workshop on 27<sup>th</sup> to 29<sup>th</sup> April 2012, to generate concrete recommendations on the status of implementation and relevance of the AU instruments relating to democracy, governance and the rule of law. The AU Panel of the Wise is one of the key components of the AU's peace and security architecture.

The purpose of the meeting was to explore opportunities for strengthening the democratization process in Africa to ensure that the commitments made by member states in AU instruments are upheld and implemented. The Commission was invited to the forum and the Chairperson represented the Commission at the workshop.

► Benchmarking Tour to Canada

CIC scheduled a visit with the Canadian government as a model study on devolved government. Canada has a federal system and a parliamentary government. The Executive branch of government is composed of the Queen (represented by the Governor General), the Cabinet and the administration. Its role is to operate, implement and enforce all the laws created by the legislative branch. The *Legislative branch* consists of the Queen (the House of Commons and the Senate). The House of Commons is the major law-making body composed of elected representatives. The Senate has Senators appointed by the Governor General upon the Prime Minister's recommendation. The Senate votes on legislation passed in the House of Commons. All laws must pass through the Senate. The *Judicial* branch of government is made up of courts at the national, provincial and territorial levels.

Among the key issues of interest to the CIC were:

1. The relationship between the bicameral parliamentary system and regional assemblies;
2. Planning and execution of the human rights based approach in public service and in leadership;
3. Organization and regulation in the Executive and the security sector to achieve accountability and respect for the rule of law;

4. Devolved government; and,
5. Public finance management.

The CIC delegation held consultative meetings with Elections Canada, Privy Council on Intergovernmental Affairs, Council of Ministers of Education, Ministry of Aboriginal Affairs, Ontario Women's Directorate and the Municipal Council in Toronto.

*Key lessons for Kenya from the Canada visit:*

- For the devolution system to operate effectively, each institution must understand and play its role.
- Some of the primary ways that the government can manage citizen expectations of the constitution implementation process are through:
  - a) Enhancing the public's understanding of the Constitution through realistic and objective civic education on the laws, administrative structures and what is expected to be achieved; and
  - b) Continued engagement with the public on the constitution implementation roadmaps, achievements, obstacles and challenges.
- There is need to ensure that we do not create conditions by which devolved government units exercise exclusively control over their territories.
- Confidence in the electoral system can be built by ensuring that the values of *participation, fairness and transparency*, among others are observed and adhered to.
- Intergovernmental relations between the devolved governments should be formalized to avoid disruptions. To do so, Kenya should look to other countries' experiences of formalization.
- As a way of regulating campaign finances, it is essential that Independent Electoral and Boundaries Commission (IEBC) work closely with the political parties and candidates to determine the spending limits during campaign periods.
- IEBC should work closely with persons with disabilities and other marginalized groups to understand challenges they face during voting in order to enhance access to voting.

► **Inter- Agency Study Tour to Brazil**

The CIC together with the Parliamentary Committee on Constituency Development Fund, the Constituency Development Fund Board and the Local Authority Transfer Fund participated in a benchmarking visit to Brazil, to further their understanding of the operation of devolution, transition to devolved government and the implementation of socio-economic rights. Brazil has 3 levels of government: federal, state and municipal.

Lessons learnt on devolution from study tour include:

- Effective operation of devolved government system requires all levels of government and key institutions to work in harmony and in a cooperative relationship, with each playing its role effectively and complementary to others;
- There should be consultation and transparency in government activities;
- Citizen participation and public oversight should be encouraged;
- Decisions should be made within the legal framework;
- National values that support the new dispensation and the reforms envisaged by the Constitution should be promoted;
- Social and economic policies and programs that are relevant to the prevailing environment should be developed;
- Social inclusion and income redistribution should be enhanced;
- The Government should enhance investment opportunities for its citizens;
- Government policies and actions should encourage and promote growth;
- It is essential to develop a culture of legislating and constitutionalising national issues that are considered important; and
- The Government should avoid arbitrary changes in decisions and actions merely for political reasons.

**Advisory Opinions**

The Commission's role of monitoring of implementation of the Constitution involves monitoring the different actors as they implement the Constitution. This entails pointing out any infractions of the Constitution to the offending party and sometimes informing members of the public of the infraction. This is done through the Commission's advisory opinions in the print media and on the CIC website.

In the second quarter, the Commission issued three advisory opinions on matters that were of public interest. These included opinions on sitting Members of Parliament changing their sponsoring parties before their term is over; -the proposed amendments to the Elections Act 2011; and the appointment of county commissioners. (Copies of the Advisory Opinions are contained in Annex I and II).

**Audit of Laws, Policies and Procedures**

The Executive plays a central role in the implementation of the Constitution. Through the Commission's intervention, the Head of Public Service issued a circular on implementation of the Constitution in April 2011, providing guidance to all in the Public Service on steps to be followed to ensure the full implementation of the Constitution, including how to engage with the Commission.

As part of its monitoring mandate, the Commission has developed a reporting toolkit for submission of reports by state organs and agencies. We have revised the reporting tool to standardize reports and facilitate more comprehensive reporting by Ministries and Institutions.

Since the issuance of the circular and the Commission's direct engagement with different actors in the Executive, independent offices and other Commissions, the reporting and feedback received have been impressive. The Commission has commenced an analytical review of the reports for purposes of compiling a detailed report on the implementation activities of different state organs. The report will go a long way in putting the implementation agenda in perspective and mapping a structured way forward in the constitution implementation process.

**Public Interest Litigation**

In line with its mandate CIC monitors implementation of the Constitution and endeavours to promote and protect constitutionalism, rule of law and the sovereignty of the people. CIC has been involved in various cases on the implementation of the Constitution. The cases are at different stages of determination.

a) Constitutional Petition No. 65 of 2011

*Case for Determination of the Date for the Next General Elections*

*(In the matter of the construction, interpretation and determination of the actual date of the next general elections – between Milton Mugambi Imanyara & others (Petitioners) and the Attorney-General and others)*

The petitioners moved to Court to have a number of perceived grey areas around the date for the first general elections under the new Constitution interpreted and determined by the Court. The Court considered the issues and gave judgment to the effect that the IEBC had the legal authority to set the date for the first general election.

However, a civil society organisation, the Centre for Rights, Education and Awareness for Women appealed against the High Court decision. The Court of Appeal is scheduled to give its judgement on 30<sup>th</sup> July. Pending the Court of Appeal decision, the High Court decision is valid and the reference point for determination of the election date. The IEBC set 4<sup>th</sup> March 2013 as the date for the first general elections under the new Constitution.

b) Constitutional Petition No. 208 of 2012 and Judicial Review No. 207 of 2012 (Consolidated)

*Case for the appointment of County Commissioners*

*(In the matter of the Appointment to the Offices of County Commissioners under the Constitution of the Republic of Kenya (Between Centre for Rights Education & Awareness (CREAW) and others and the Attorney General and others)*

The Petitioners, CREAW and six others questioned the constitutionality of the appointment or deployment by the President of 47 county commissioners and sought a judicial review of the action. The President had appointed the 47 county commissioners – 10 women and 37 men – by Gazette Notice 6604 of 11 May 2012. The suit challenging the appointment was filed on 17 May. The first Gazette notice was then revoked by a subsequent Gazette Notice 6937 of 23 May, which replaced the words “appointment” with “deployment” and “appoint” with “assign.”

The court in delivering its judgment on 29<sup>th</sup> June 2012 held that:

- i) The President had no power to appoint or deploy county commissioners as was purported by Gazette Notices 6604 and 6937, and therefore these appointments/deployments were in contravention of the Constitution, thus null and void
- ii) Had the President had the power to make such appointments or deployments, the appointments or deployments violated Articles 10 and 27 of the Constitution on the two-thirds principle.

c) Constitutional Petition No. 94 of 2012

*Case to Clarify the Procedure for the Preparation of Legislation to Implement the Constitution*

*(In the matter of Article 89 of the Constitution and in the matter of the delimitation of constituency and ward boundaries and in the matter of the Independent Electoral and Boundaries Commissions Act, 2011 and in the matter of the National Assembly and Constituencies and County assembly wards order, 2012 (legal notice no. 14 of 2012) and in the matter between Republic versus the Independent Electoral and Boundaries Commission)*

The IEBC conducted a constituency and ward boundaries delimitation exercise in 2011 and release its report in the first quarter of 2012. The report was challenged, leading to filing of over 120 cases. The Chief Justice Dr. Willy Mutunga appointed five judges of the High Court to hear and determine the cases. The cases came up for hearing on 4<sup>th</sup> June 2012. The petitioners challenged the jurisdiction of the five-person Bench to hear and determine the cases as per Article 89(10) of the Constitution. In addition the Court's was asked to interpret Article 89(10) of the Constitution and give directions on whether the word “review” in the Article refers to judicial review of the IEBC's decisions on boundaries.

The Court determined that:

- i) The five-judge bench constituted by the Chief Justice was constitutional and adhered to the provisions of Article 89(10) of the Constitution and had jurisdiction to hear the cases;
- ii) “Review” under Article 89(10) of the Constitution refers to judicial review and therefore, where IEBC will be found to have overstepped authority conferred on it by the Constitution the Court would issue appropriate orders.

The court's decision on jurisdiction and on review paved way for the regional hearings and determination of the 120 cases.

The court is scheduled to deliver all judgments by 9<sup>th</sup> July 2012.

d) Constitution Petition No. 137 of 2011

*Case to determine whether MPs should Pay Tax*

*(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 and others sought the Court's interpretation of Articles 210, 201 and 230 of the Constitution along with its transitional clauses on whether Members of Parliament as state officers were exempt from paying tax and whether the Executive had the power to exempt any state officer from paying taxes. In addition, they sought the courts opinion on whether the Government using public resources to meet Members of Parliament tax burden would be unconstitutional. Finally, they sought judgement on whether the Members of Parliament opting to derail or frustrate debate or passage of bills intended to implement the Constitution in response to Kenya Revenue's Authority demand for tax payment was unconstitutional and illegal.

The matter was forwarded to the Chief Justice to appoint a three Judge bench and to issue further directions.

***Institutional Development Activities***

In line with its strategic outcome results CIC has continued to strengthen its Secretariat. To this end, it has initiated a various measures to continuously bolster the Secretariat. This includes hiring of more staff members when required and sponsoring staff for continuing professional development.

► Training in Socio-Economic Rights



The Commission sponsored training for two staff members at the Geneva Academy of International Humanitarian Law and Human Rights on professional training in Economic, Social and Cultural Rights. The Geneva Academy is part of the Graduate Institute of International and Development Studies and the University of Geneva. The Academy has offered the course over the last four years through teaching that blends traditional seminar-type lectures and guest speakers with practical exercises and first-hand experience on issues such as the work of the United Nations Committee on Economic, Social and Cultural Rights.

The trainings are targeted for human rights advocates, national human rights institutions and government representatives. They are aimed at supporting the work of professions with advanced experience on socio-economic rights by providing technical skills on how to approach monitoring of socio-economic rights, how to present data effectively, and how to build advocacy strategies, which make use of the mechanisms of the relevant UN bodies.

The topics covered in the course included:

- State obligations for the economic, social and cultural rights (ESC rights)
- The role of the Committee in monitoring economic and social and cultural rights
- The work and methods of Socio-Economic Rights Special Procedures
- The World Health Organization and the right to health
- The role of national human rights institutions in monitoring ESC rights
- Litigating ESC rights at the national and regional levels
- Mechanisms of holding non-state actors accountable
- Using indicators to monitor ESC rights
- Monitoring and data collection
- Data visualization and advocacy methods for communicating ESC rights
- Human rights impact assessments
- Analyzing budgets to monitor ESC rights

The training comprised of 15 participants, three of whom were from Kenya. The Commission sent two researchers to institute. The five-day training comprised of lectures and a case study, which was geared towards putting into practice the lessons learned from the lectures. The participants had a chance to meet with one of the Committee members of the Committee on Economic, Social and Cultural Rights. The participants also attended a Committee session on its consideration of the Ethiopia Country Report regarding Ethiopia's implementation of its obligation under the Covenant on Economic and Socio Cultural Rights.

#### THEMATIC ACTIVITIES

CIC thematic teams continue the drive implementation of the Constitution. In the second quarter of the year, the thematic teams successfully concluded critical implementation activities towards realization of the mandate of the Commission. This section provides a summary of the various activities undertaken by the thematic areas during the reporting period. For each thematic area, the report gives an update on the status of bills or enactment of laws, engagement with stakeholders, donor support and highlights the challenges and achievements of the quarter. It also provides a synopsis of the planned activities for the third quarter of 2012.

##### Activities under the Bill of Rights and Citizenship Thematic Area

The Citizenship and Bill of Rights thematic area derives its mandate from Chapters Three and Four of the Constitution of Kenya and is geared towards ensuring effective implementation of the Bill of Rights as provided in Chapter Four of the Constitution as well as the human rights principles reiterated in all the chapters of the constitution. The broad objective of the thematic area is to monitor, facilitate and oversee the integration of human rights and its principles in all State policies, laws and administrative procedures by implementers in all sectors.

##### Status of Development of Bills

- a) Immigration Related Bills:
1. The Identification and Registration of Persons Bill 2012;
  2. The Births and Deaths Registration Bill 2012;
  3. The Refugee Bill 2012

##### *The Identification and Registration of Persons Bill 2012; and Births and Deaths Registration Bill 2012:*

The Identification and Registration of Persons Bill 2012 and Births and Deaths Registration Bill 2012 are among the five bills that were forwarded to CIC. They are all aimed at reforming the registration of persons and immigration systems. As highlighted in previous reports, a stakeholder meeting that had been held to review the bills proposed the amalgamation of the Identification and Registration of Persons Bill 2012 and Births and Deaths Registration Bill 2012 into a single law to consolidate the registration system.

Following a meeting held between CIC and the Ministry of Immigration in the last quarter, it was resolved that the Ministry of Immigration would consolidate the two bills and the policies before forwarding them to CIC for an audit and onward transmission to Cabinet. The Ministry is currently working on consolidating the bills.

##### *The Refugee Bill 2012:*

CIC is keen on ensuring that the Refugee Bill is processed together with the bill consolidating the registration system. The Refugee Bill 2012 will therefore be reviewed together with the consolidated bill on the registration system, which is scheduled to be undertaken in the third quarter.

The revised drafts of the bills will be subjected to a final stakeholder review, to be held in the next quarter. This will be followed by a CIC internal plenary and roundtable for final review.

- b) Family Law Bills:
1. Marriage Bill 2011;
  2. Matrimonial Property Bill 2011;
  3. Protection Against Domestic Violence Bill 2011

In the first quarter of this year, CIC under the thematic area facilitated a number of technical and stakeholder consultations on the Family Law Bills. The stakeholder consultations elicited various concerns particularly by faith-based organizations over some of the provisions in the bills resulting in the need for further consultations. In this regard, CIC scheduled county visits to be undertaken in the quarter under review before finalization of the review process of the bills.

The county visits which were undertaken between 11th and 14th June 2012 were organized to give members of the public in the different counties, an opportunity to deliberate on the provisions of the bills, while also giving them a chance to raise their concerns and recommendations so as to achieve a consensus on the concerns raised by the different interest groups. In conducting the county forums CIC partnered with the Commission on Administrative Justice, National Commission on Gender and Equality, Ministry of Gender, Children and Social Development and the Ministry of State for Immigration and Registration of Persons. Due to resource constraints, the teams covered 12 of the 47 counties, which were chosen ensuring among other factors, regional balance and representation from different religious groups and ethnic communities. The group was divided into 5 teams, which covered Lamu, Kilifi, Garissa, Makueni, Kitui, Siaya, Vihiga, Nandi, Kericho, Nakuru, Meru, Muranga and Nyandarua counties. Final consultations are scheduled to be held in Nairobi in August 2012 at the KIA with the top leadership of the faith-based institutions and traditional elders to be drawn from different communities with unique practices on marriages.

#### *Marriage Bill 2012*

Under the Marriage Bill 2012, the issues for discussion related to the most appropriate way to devolve the services of the institutions providing marriage services such as the Registrar of Marriages. Other issues were, how to determine valid and invalid customary marriages for purposes of registration, the kind of evidence to be produced to recognize valid customary marriages; the handling of informal unions (cohabitation), among other things. The teams also sought views from the public on methods and evidence that should be produced prior to dissolution of customary marriages by the registrar of marriage. Also discussed extensively was the consequence of abolishing dowry; and polygamy and polyandry vis-à-vis the constitutional principle of equality.

Recommendations from members of the public included ensuring that institutions mandated with registration of marriages are decentralized to the lowest level. It was also proposed that the Sheikhs should also be allowed to facilitate registration of marriage due to their proximity with the members of the public.

#### *Matrimonial Property Bill 2012*

With regards to the Matrimonial Property Bill 2012, the team sought to establish the public understanding of matrimonial property and whether it should include ancestral/ community land and inheritance. Furthermore, whether property acquired during marriage should be registered jointly to the spouses, how property acquired before marriage should be treated by the spouses, whether there is need for prenuptial agreements, and the statutory restrictions that should be imposed to ensure that matrimonial property is not given out as security for a loan without the consent of both the spouses.

Recommendations included joint registration of matrimonial property, which covered any moveable and non-moveable property acquired by either spouse to a marriage; recognition of the cultural view that ancestral property is held in trust for future generations; exclusion of properties acquired before marriage from the definition of matrimonial property; among others. Interesting suggestions were also made on possible formulae to be used in determining ownership of matrimonial property in polygamous marriages.

#### *Protection against Domestic Violence Bill 2012*

The team sought views from the public on the persons who qualify to be in a domestic relationship and therefore should be protected against domestic violence, as well as on the best way to ensure family protection against domestic violence. Other issues discussed related to the institutions that should be involved in addressing domestic violence apart from the police, the protection measures that the government should adopt to address domestic violence and whether there is need to establish safe homes or shelters fully equipped with integrated services for the victims of domestic violence. This also raised the issues of a specific fund to help deal with issues of domestic violence. There was interest in how the benefits of the Bill would be equally accessed and enjoyed in all counties.

The communities highlighted the need for the Kenyan society to shun domestic violence and for protection against domestic violence, and the value of contextualizing interventions to the different circumstances and environments (urban, rural, cultural, religious etc). A holistic approach, which draws from the strengths in religion, community culture was emphasized. Some were of the opinion that the Bill should be limited to the protection of the nuclear family (the spouse and the children) while other extended members of the family and persons living with the family, including house-holds, could seek protection from other laws including the Penal Code, the labour laws etc. Others were of the view that the list of members proposed for protection under the bill should include brothers and sisters and other members of the extended family in line with the customary situations.

#### c) *Ratification of Treaties Bill*

The Ratification of Treaties Bill still awaits the second reading before Parliament. As mentioned in the report for the previous quarter, CIC will continue to monitor parliamentary debates on the Bill.

#### *Freedom of Information Bill 2012 and Data Protection Bill 2012*

CIC received the Freedom of Information Bill 2012 and Data Protection Bill 2012 from the Ministry of Information and Communication in the first quarter. The Ministry also developed an explanatory memo to enable stakeholders to appreciate the complexities relating to the Data Protection Bill 2012. CIC under the Bill of Rights and Citizenship thematic area facilitated a stakeholders' forum to deliberate on the provisions of the two bills.

In the second quarter, CIC held an internal plenary meeting to review the bills and made further proposals for incorporation during the processes of incorporating stakeholder recommendations. The bills await a final review meeting before they are forwarded to the Attorney General for onward transmission to Cabinet.

#### d) *Consumer Protection Bill 2011*

The Consumer Protection Bill is among the laws listed in the Fifth Schedule of the Constitution, for enactment within four years in order to give effect to Article 46 of the Constitution. The Bill was brought to the attention of CIC when it was brought to Parliament in December 2011 as a private member's bill moved by Hon. Jakoyo Midiwo. Upon discussion with the MP, it was agreed that the CIC proceed to facilitate discussions with stakeholders on this bill.

CIC has facilitated various stakeholder and technical review forums on the Bill. The Bill in its initial form had only covered a few sectors. The Bill should provide general principles on consumer protection, which will guide different sectors in developing regulations to govern the sectors. The Bill needs to ensure creation of protection mechanisms for consumers by all sectors. The Bill elicited interest from the finance, manufacturing, hospitality, and aviation sectors among others, many of whom asked for ample research to ensure proper linkage with the regulatory and protection systems in their sectors.

#### e) *Development of a framework on Public Participation*

Article 10 (1) and (2)(a) of the Constitution obligates all State organs, State officers and public officers to apply the principle of public participation in making policies, enacting laws or interpreting laws and the Constitution.

Public participation aims to bridge the gap between the government, civil society, private sector and the general public, building a common understanding on the local situation, and on priorities and programmes. It encourages openness, accountability and transparency and is thus at the heart of inclusive decision-making. Public participation is therefore one of the key constitutional values that CIC is keen to ensure is entrenched.

In order to give effect to the principle, the thematic area has been in consultation with the Ministry of Justice, National Cohesion and Constitutional Affairs and civil society organizations on the development of the most suitable framework for public participation. Clearly, well-developed strategies for public participation will build trust and confidence in the systems, promote accountability, strengthen commitment of all stakeholders towards improved governance, and directly limit the potential for corruption and bad leadership. A technical forum is scheduled for September 24<sup>th</sup> – 27<sup>th</sup> 2012, aimed at creating an environment that will facilitate dialogue that will provide guidance on the most suitable framework for public participation.

► Other Thematic Activities for the Second Quarter

a) Elaborating a Roadmap for the implementation of Socio-Economic Rights:

CIC has previously held meetings with different government ministries and the Prime Minister on the establishment of a mechanism that will facilitate coordinated and joint planning of different sectors to ensure optimum and prudent use of resources for better service delivery while also ensuring progressive realization of socio-economic rights.

As CIC continues to wait for a meeting with the President on the establishment of an inter-ministerial team that will set the standards for effective realization of socio-economic rights, the Commission continues to engage with implementers on the progressive realization of socio-economic rights. At the Prime Minister's roundtable meeting held on 27<sup>th</sup> June 2012 to discuss the status of implementation of the Constitution, one of the roundtable meetings comprised of in-depth discussions on theme on realization of Socio-Economic Rights.

The roundtable brought together some of the key actors in realisation of socio-economic rights, including Ministers and Permanent Secretaries of the Ministries of Education, Housing, Health, Planning and Agriculture, and the Kenya National Commission on Human Rights (KNCHR) as panellists. The Ministries of Special Programmes, Gender, Children and Social Development, and Water were participating. Also participating were representatives of the private sector and civil society. Ms. Wambui Kimathi, former commissioner with the KNCHR, moderated the roundtable.

The meeting provided an opportunity for the implementers to share information on progress and achievements as well as challenges. It was encouraging to note that the implementing Ministries are making efforts to apply a rights approach in the delivery of the services in their sectors. One of the glaring challenges was the fact that most had not designed strategies to map the country and determine the best way to facilitate the equitable access to services by Kenyans in all counties.

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

CIC is developing a manual that will guide implementers on the integration of constitutional and human rights principles, such as equality, equity, affirmative action, and public participation in relevant policies, laws and administrative processes. It will also guide on the implementation of specific rights relevant to each of these sectors.

The first draft of the easy-to-read guide has been consolidated and CIC is currently consulting with the implementers across the different sectors to give feedback and ensure that the guide is easy to read and can be utilized in their day-to-day implementation roles. Once the different sectors have reviewed the first draft of the manual, it will be subjected to a technical forum for review and final editing prior to its publication. CIC has scheduled to launch the implementation guide at the end of first quarter of 2013, which will allow for finalization of all the scheduled activities.

c) Engagements with Ministries on the effective implementation of the Constitution

In order to ensure effective implementation of the Constitution by all implementers CIC has divided the 42 ministries and the parastatals under the 8 CIC thematic areas. During this period, the thematic area held a meeting with the Ministry of Public Health and Sanitation and the Ministry of Medical Services and established that the key activities that the ministries of health undertake include:

- i) Development of the Position Papers, which elaborate the Ministries' understanding of their role under the Constitution.
- ii) Development of the Health Policy which is pending cabinet approval.
- iii) Development of the Health Bill 2012, which is yet to be forwarded to CIC for audit.
- iv) Review of existing legislation in the Health Sector.

In addition, the Bill of Rights and Citizenship thematic area audited the reports submitted to CIC by the Ministries clustered under the CIC's thematic area to review the status of implementation of the Constitution. From the audits it was established:

- i) *Ministry of State for Immigration and Registration of Persons* has developed the Kenya Citizenship and Immigration Regulations 2012, which CIC is yet to review. Further the Ministry is currently working on consolidating the Registration of Persons and Identification of Persons Bills into one law. The consolidated bill will be submitted to CIC together with the policies relating to registration as well as the Refugee Policy, which relates to the Refugee Bill 2012.
- ii) *Ministry of Special Programmes* has developed various policies, which are awaiting Cabinet approval. These include the Internally Displaced Persons (IDP) Draft Policy, Disaster Management Draft Policy, Fire Management Policy Disaster Risk Reduction Strategy for Kenya, Gender Mainstreaming Policy and the Disability Mainstreaming Policy. The Ministry is also working on the review of the National Aids Control Act and the HIV/AIDS Bill.
- iii) *Ministry of East Africa Community* has audited the EAC laws and their effect on the laws of Kenya in order to establish conflict of the laws and has developed an audit report. The Ministry has also developed a Status on draft Miscellaneous Amendment Bill.
- iv) *Ministry of Justice, National Cohesion and Constitutional Affairs* is the Ministry in charge of constitutional matters and a partner with CIC on implementation matters including procedures and deadlines for enactment of Bills under the Constitution. The Ministry is also coordinating the national civic education programme on the Constitution and is also the ministry in charge of human rights having spearheaded the development of the National Policy and Action Plan on Human Rights. They are also in charge of Constitutional Commissions. In this regard one of the concerns for the CIC thematic area is the delays in engagement of the commissioners of the KNCHR, EACC and National Cohesion. The Ministry is currently undertaking development and review of the National Anti-Corruption Policy, Legal Aid and Access to Justice Policy, and the National Values Policy.
- v) *Ministry of Foreign Affairs* is currently developing various policies and laws, including the draft Foreign Policy; Gender Policy; Consular Policy; Evacuation Policy; and Administration of Voting Rights for Diaspora Policy. Among the laws under review and development are the Privileges and Immunities Act, the Foreign Relations and Diplomatic Representation Bill, and the International Cooperation Fund Bill. The Ministry is also reviewing its administrative procedures including the Anti-Corruption Policy, Revised Scheme of Service for Foreign Service Personnel, Foreign Service Regulations, Opening of Diplomatic Stations, Appointment of Ambassadors and High Commissioners, Posting Orders for Foreign Service Personnel and the Recruitment Procedures for Lower Cadres.



- vi) *Ministry of Youth Affairs and Sports* is working on the development of the National Policy on Youth Polytechnics and Vocational Sector; Policy on Youth Volunteerism and Community Service, and Policy on Youth Internships and Employment. Laws under review include the National Youth Service Act, the National Youth Council Act, the Youth Fund Act, the Youth Development Act, the Sports Bill, and the Anti-doping Bill.
- vii) *Ministry of State for National Heritage and Culture* is currently developing the Libraries Policy, Language Policy, Records Management Policy, Music Policy and reviewing the National Culture and Heritage Policy. The laws under review by the Ministry are the Kenya Cultural Centre Act, Public Archives and Documentation Service Act, National Museums and Heritage Act, and NGO Coordination Board Act while those under development are the Heritage and Culture Bill, Languages of Kenya Bill and the Kenya Heroes Bill.
- viii) *Ministry of Gender, Children and Social Development* is reviewing the Community Development Policy, National Social Protection Policy, National Gender and Development Policy, National Policy on Persons with Disabilities, National Policy on Older Persons and Ageing, and National Policy on Children. The laws under review are the Persons with Disabilities Act, Female Genital Mutilation and Cut Act, Children Act, Counter-trafficking in Persons Act, Self-help Group Act and the Women's Enterprise Fund Act. The Ministry is also developing the Foster Care and Guardianship Regulations in support of the Children Act.

The thematic area has scheduled continue periodic consultation meetings with the Ministries and parastatals clustered in the thematic sector to monitor progress of implementation and to work in partnership with the Ministries to ensure effective implementation of the

- Constitution Donor support/Engagement of consultants

The thematic area continued to receive donor support for some of its activities from IDLO.

- Challenges faced by the Citizenship and Bill of Rights thematic area

One of the key challenges faced by the thematic area was the lack of involvement in the development of Kenya Citizenship and Immigration Regulations 2012 in contravention of the procedures agreed upon by the CIC, AG, KLRC and the CIOC. As an institution mandated to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution, CIC should be involved in the development of administrative procedures before they are gazetted. This is to ensure that the administrative procedures are compliant with the letter and spirit of the Constitution.

- Recommendations – addressing the challenges:

- CIC will still review the Kenya Citizenship and Immigration Regulations and point out any discrepancies- with the Constitution.
- CIC recommends that institutions such as the Office of the Attorney General should ensure compliance with the letter and spirit of the Constitution including involvement of the CIC in administrative procedures that give effect to the constitutional provisions.
- CIC also calls upon members of the public to scrutinize such regulations that could be used to circumvent or undermine the full implementation of the Constitution.

Activities for the next quarter.

- Plenary and Roundtable meetings on the Freedom of Information Bill 2008 and the Data Protection Bill 2009
- Stakeholder consultations on the revised Registration Bill which consolidates the Births and Deaths Registration 2011; Identification and Registration of Persons 2011, and on the Refugee Bill 2012;
- Stakeholder Consultations and Internal review of the Marriage Bill 2012; Matrimonial Property Bill 2012; Protection Against Domestic Violence Bill 201
- Consultations with implementers on the review of the first draft of the implementation guide on the bill of rights and constitutional principles in the public service
- Stakeholder consultations on the Consumer Protection Bill
- Stakeholder consultations on the development of a framework to give effect to the principle of public participation
- Review of the policy on health
- Preparatory consultations on subsequent meetings with women in marginalized regions (Pokot, Turkana) to discuss inclusion of women and utilization of the gender quotas stipulated in the Constitution.
- Meetings with respective Ministries and their parastatals on effective implementation of the Constitution

### 3.2 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 on managing Land and Environment. The thematic area is tasked with monitoring, facilitating, coordinating and overseeing the implementation of Chapter Five. The following ministries deal with aspects of land and environment issues: the Ministry of Lands, 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. There were several important developments under the land and environment thematic area in the second quarter.

- Status of Policies, Administrative Procedures and Legislation

On April 2012, the President assented to the three key land bills under the Constitution. These are the Land Act, The Land Registration Act and the National Land Commission Act.

The Land Act gives effect to Article 68 of the Constitution, and seeks to revise, consolidate and rationalize land laws. It also provides for the sustainable administration and management of land and land based resources. The Land Registration Act revises, consolidates and rationalizes the registration of titles to land, and gives effect to the principles and objects of devolved government in land registration. The National Land Commission Act details the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; and gives effect to the objects and principles of devolved government in land management and administration.

- Review of Laws, Policies, and Administrative Procedures in the Environment and Natural Resources Sector

The thematic area with the support of IDLO has commissioned an additional consultant to assist the Commission to consolidate and ensure integration of the various policies, bills and administrative procedures from the ministries, departments and parastatals within the environment and natural resources government sector.



This entails liaising with the sector actors to effectively map out their planned initiatives and focus these to ensure coherence in their policies and legislation and conformity with the Constitution. The Consultant will also be responsible to facilitate internal as well as external discussions and debates on the status and future direction of environment and natural resources sector in the country.

► **Retreat on the National Irrigation Board**

The National Irrigation Board held a two-day retreat on re-aligning and re-organizing of the National Irrigation Board under the Constitution of Kenya 2010. The retreat was held in Mombasa. The retreat facilitated brainstorming and development of a proposal for the Irrigation Policy and Irrigation Bill that are currently being developed.

CIC participated in the meeting along with Kenya Law Reform Commission (KLRC) and made a presentation on the approaches and reform initiatives suitable for advancing the irrigation agenda within the new dispensation.

One of the outcomes of the meeting was to establish a special committee to incorporate the recommendations of the meeting and finalize the Bill.

► **Environmental Civil Society Organizations Conference**

The Commission participated in a one-day Environmental Civil Society Organizations' Conference themed, "*Expanding space for environmental civil society in the new constitutional dispensation in Kenya.*" The Conference aimed at helping civil society leaders to engage in a stimulating debate and adopt a practical outlook on the future of natural resource governance in Kenya. The Conference was co-hosted by WWF-Kenya Country Office and National Environment Civil Society Alliance of Kenya with support from NORAD/WWF Norway.

The Conference took note of the opportunities presented by the Constitution of Kenya, which provides a new platform for all sectors to speak and act complementarily in the development and implementation of policies and legislations that address the current challenges. The Conference also stressed the need to create the role of a regulator of wildlife and forests. Presently, the Kenya Forest Services and Kenya Wildlife Society play the multiple roles of regulator and enforcer.

The Commission emphasized the importance of public participation in the development of legislations and laws. Civil Society actors were encouraged to continue their effort to work towards ensuring a proper legal framework for public participation is realized.

► **Minerals and Mining Bill**

CIC has received a draft copy of the Mining and Minerals Bill. The Bill seeks to establish how to govern minerals exploration, prospecting, mining and dealings in Kenya. CIC awaits the official copy of the Bill from the Attorney General before it formally begins to review the Bill for consistency with the Constitution.

Additionally, IDLO is providing support to CIC on a consultancy on the Mining and Minerals Bill to ensure it addresses the key problems related to mining and minerals and that it is consistent with the letter and spirit of the Constitution.

► **Proposed Activities for the Next Quarter**

1. Conduct a stakeholder's forum on the Community Land Bill, the Mining and Minerals Bill, the Wildlife Bill and the Irrigation Bill to assess the extent to which they conform to the letter and spirit of the Constitution.
2. Conduct County visits to ensure broad and robust public participation on the Community Land Bill.
3. Engage citizens in mining areas to understand matters pertaining to environmental safety, equity in resource/revenue sharing, sustainability of resource exploitation and other related issues
4. Harmonize the existing policies, legislations, and administrative procedures in the environment and natural resources sector.

3.3 **Activities under Public Service and Leadership Thematic Area**

Public Service and Leadership thematic area is concerned with matters relating to Chapter Six and Chapter Thirteen of the Constitution. Chapter Six is on Leadership and Integrity whereas Chapter Thirteen is on Public Service. Public officers include State officers who make up the public service and are the key implementers of the Constitution. Public officers are expected to uphold the national values and principles set out in Constitution and develop strategies to ensure realisation of these principles. These include reviewing organizational processes, structures, policies and legal frameworks to identify areas that require amendment so that they conform to the Constitution. The values enshrined in the national values and principles of governance in Article 10, the values and principles of public service in Article 232 and the guiding principles of leadership and integrity in Article 73 of the Constitution are expected to underpin the work and ethics of all public officers

During the second quarter, the thematic area continued to engage with an array of stakeholders in the development and review of key legislation under the Public Service and Leadership thematic area.

► **Development of Legislation, Policies and Procedures**

a) **Public Service Commission Act, 2012**

The Public Service Commission Bill, 2012 was reviewed and finalized during the first quarter of 2012. It was then forwarded to the office of the Attorney General, presented and debated in Parliament and enacted on 18th May 2012. The Act brings into operation the Public Service Commission as contemplated in Article 233 of the Constitution.

b) **Leadership and Integrity Bill, 2012**

The Commission for the Implementation of the Constitution received the Leadership and Integrity Bill, 2012 on 19th June 2012. The Leadership and Integrity Bill is intended to give effect to Chapter Six and establishes mechanisms for the effective administration of Chapter Six principles. The Bill further seeks to promote ethics, integrity and servant leadership among State Officers.

The Bill is under review by the Commission and the Public Service and Leadership thematic area has planned a stakeholders' forum to review the Bill. Following the stakeholder's forum, there will be a plenary session and a round table meeting to finalize the review of the Bill before it is forwarded to the office of the Attorney-General for onward transmission to Cabinet and Parliament.

c) **State Officers Vetting Bill, 2012**

The Association of Professional Societies in East Africa (APSEA) embarked on the development of a State Officers Vetting Bill last year. The Bill has undergone various review process and on 3rd July 2012 APSEA hosted a breakfast meeting to review the Draft State Officer Vetting Guidelines Bill, 2011. CIC is waiting for the Bill to be forwarded for further review and input.

► **Other Thematic Activities under the Public Service and Leadership Thematic Area**

During this quarter, the Public Service and Leadership thematic area began auditing of appointments of members of various institutions. This exercise will highlight the gaps and challenges that exist in appointments, particularly those without clear criteria and guidelines. The Constitution in Article 232(1)(h) requires adequate and equal opportunities for appointment, training and advancement at all levels of the public service, for:

- (a) Men and women;
- (b) The members of all ethnic groups; and
- (c) Persons with disabilities.

a) Public Service Regulations 2012

The Public Service Commission has developed regulations for Public Officers, which were forwarded to CIC on 28th June 2012 for review against the standards of the Constitution. The thematic area is currently reviewing the regulations and will consult with the Public Service Commission in the finalization of these regulations.

► Donor Support/Engagement of Consultants

The thematic area has engaged the services of a consultant in the review of the Leadership and Integrity Bill.

► Challenges Faced by the Public Service and Leadership Thematic Area

Some of the challenges faced by the thematic area are:

- i) Delay in the enactment of the Public Service Commission Bill. Although CIC completed the review of the Public Service Commission Bill on 26th January 2012, the Bill was not enacted until 18th May 2012. There was no reason given for the delay in the enactment of the Bill.
- ii) Delay in the appointment of members of the Ethics and Anti-Corruption Commission. The Ethics and Anti-Corruption Commission was established under the Ethics and Anti-Corruption Commission Act, which was enacted in August 2011. However, to date, no commissioners have been successfully appointed. There have been challenges in the appointment process ranging from gender balance and lack of consultation, to challenging the appointment of some candidates in court. Though the Ethics and Anti-Corruption Commission has continued to function, it is imperative the Commissioners are appointed as soon as possible to bring the Commission into full operation.

► Recommendations – addressing the challenges

There is need to urgently address the delay in appointment of commissioners for the Ethics and Anti-Corruption Commission.

► Activities planned for the next quarter

The thematic area has planned the following activities for the next quarter:

1. *Finalizing and forwarding the Leadership and Integrity Bill, 2012 for enactment.* The thematic area will finalize the review of the Leadership and Integrity Bill, 2012 and forward it to the relevant institution for its enacted before 27th August 2012.
2. *Engaging with the State Corporations.* The thematic area has scheduled a forum in the next quarter to engage with the State corporations. The purpose of the forum is to sensitize State corporations on what is expected of them in the constitution implementation process. CIC will also use the forum to review the mode of engagement with State corporations.
3. *Finalize the review of the Public Service Commission Regulations.* The Public Service and Leadership thematic area will finalize review of the Public Service Commission regulations when the Regulations are forwarded to CIC.
4. *Legislation on Values and Principles in the Public Service (Article 232).* The thematic area plans to continue engaging with the Public Service Commission in overseeing the legislation on values and principles as contemplated in Article 232.
5. *Public Service Management Bill.* The thematic area has been anticipating the Public Service Management Bill and we hope that the Bill will be forwarded to CIC for review in the next quarter.
6. *State Officers Vetting Bill.* CIC will engage with the relevant institutions in the review of the State Officers Vetting Bill after the Bill is forwarded to CIC.

3.4 Activities under the 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.

Ultimately, the thematic area seeks to have all the people of Kenya, including leaders, respect the rule of law, uphold national values and live by the Constitution in a united, peaceful and prosperous nation.

► Status of Development of Bills/Policies/Administrative Procedures

a) The Election Campaign Financing Bill, 2012

The Election Campaign Financing Bill, 2012 seeks to provide limits to funding of elections and referenda. It does this by providing for the management, spending, regulation and transparent accountability of funds during the nomination process, election campaigns, elections and referenda.

CIC began its internal review of the Bill with a committee meeting on December 2011, followed by a stakeholder meeting in February 2012 and a plenary meeting in March 2012. On the 5th of March 2012, CIC, together with representatives from the Attorney General's office, KLRC, IEBC and the office of the Registrar of Political Parties held a roundtable on the Bill. It was agreed that the IEBC and KLRC needed to review and redraft the Bill, after which a second roundtable meeting would be held.

As of end of June 2012, the Commission is still not in receipt of the Bill, which should be enacted by August 2012. Having officially written to the office of the Attorney General to forward the Bill to the Commission, CIC continues to wait for the Bill in order to review it before another roundtable is held and the Bill is published.

b) Article 119: The Right to Petition Parliament

CIC has been expecting to receive this bill from the office of the Attorney General given that its timelines as per the schedule agreed on between CIC, The AG, CIOB and KLRC in Naivasha in January 2012 have passed. CIC has, more than once, written to the AG requesting for the Bill and looks forward to receiving it.

c) The Election Regulations, 2012

CIC awaits the regulations in relation to the Elections Act 2011 and the Political Parties Act, 2011. The Commission will review to check the constitutionality of the regulations ahead of the next general elections.

## d) Other Regulations

CIC looks forward to receiving regulations and administrative procedures, including Standing Orders from Parliament (for national and county assemblies) and the Registrar of Political Parties. These are urgent given that the elections are scheduled for March 2012.

## ► Working with stakeholders and the people of Kenya

Preparations are underway for workshops with representatives of the young people of Kenya in each of the 47 counties to discuss how they can be involved in the implementation of the Constitution of Kenya 2010 and particularly in the next elections. The preparations include developing a framework on how CIC will work with the Ministry of Education and Ministry of public works in the new dispensation.

## ► Challenges

- i) A number of the provisions in the Elections Act 2011 and the Political Parties Act 2011 are unconstitutional. Since last year, CIC has alerted the office of the Attorney General to the same but the issues have not been addressed, nor were they included in the Statute Law (Miscellaneous Amendments) Bill.
- ii) In addition, during the parliamentary discussions of the Miscellaneous Bill, substantive changes to the Acts were introduced without prior consultations with the people of Kenya. This is a disturbing trend of making major amendments to law without public involvement.
- iii) Continued delay in forwarding the Article 119 (Right to Petition Parliament) Bill and the Campaign Financing Bill to CIC. Within the context of the next general elections, the Bill should be enacted by August 2012 so as to meet the timelines set in the Constitution and the Elections Act, 2011.
- iv) Non-responsiveness by some implementers especially on aspects relating to elections and preparations for the new dispensation.
- v) Lack of guidelines on the shape of and hence the framework which will guide the national government in its activities in a devolved system. This is important in guiding the ministries to develop systems that will operate after the next general elections

## ► Activities for the Next Quarter

1. Review of the Campaign Financing Bill;
2. Review of the legislation on the right to petition Parliament required to implement Article 119 of the Constitution;
3. Review of the Public Service Management Bill, which affects the staff to be employed in the Parliamentary Service Commission;
4. Review of policy papers and Bills from the Education Sector;
5. Development of a CIC framework on how to work with ministries to aid the Commission in monitoring and facilitating their implementation of the Constitution;
6. Development of a CIC framework on how to work with the Registrar of Political Parties;
7. Engagement of the Kenyan youth in the forty-seven counties in the constitution implementation process;
8. Working with the Judiciary to put in place a system to bring about the realisation of Article 105 of the Constitution (concluding election petitions within 6 months);
9. Continuing to monitor, facilitate, and oversee the implementation of the electoral system and process, including the preparations for events before and after the next general elections.

## 3.5 Activities under Executive and Security Thematic Area

During the second quarter of the year, the Executive and Security thematic area held consultative meetings with the Executive and National Security Organs to discuss implementation of the Constitution generally and legislation required by the Constitution to implement Chapter Nine and Fourteen of the Constitution specifically. The Following meetings and events took place:

## ► The Executive

## a) Office of the President

The Commission has not received any progress reports on implementation of the Constitution from the Office of the President and Cabinet Office. This lack of information raises concerns as the Office of the President and the Cabinet Office should play the leading role in ensuring full implementation of the Constitution and realization of an effective executive administration that exercises authority in compliance with the Constitution. A failure of the Executive to report on its progress frustrates the Commission's mandate to oversee, facilitate and monitor the implementation process.

There has also been an inordinate delay in the publication and tabling of the Assumption of Office of the President Bill, 2012 which was forwarded to the Attorney General on 7<sup>th</sup> February 2012. This Bill must be enacted in advance of the forthcoming general elections.

The thematic area is also awaiting progress reports from the Office of the President and the Power of Mercy Committee on the implementation of Article 133 on the Power of Mercy and the formulation of the regulations required to operationalise the Power of Mercy Act, 2011.

## b) The Attorney-General

The Office of the Attorney General has not submitted any report on implementation of the Constitution to the Commission. Implementation of the Constitution is a collective initiative and all State organs are obligated to do so.

## c) Director of Public Prosecutions

The Office of the Director of Public Prosecution held meetings to discuss its strategic plan and the proposed the Office of the Director of Public Prosecutions Bill to give effect to Article 157 of the Constitution.

The Commission was invited to attend the meetings. Some of the issues discussed were the necessity of prioritizing the full implementation of Article 157 and other values and principles of the Constitution.

Article 157 of the Constitution guarantees the independence of the Office of the Director of Public Prosecutions and emphasizes the importance of public interest and participation, the interests of the administration of justice and the prevention of abuse of the legal process in the discharge of prosecutorial powers. The Commission shall review the proposed Bill once submitted to ensure that the Bill adequately addresses the constitutional requirements.

## ► Security

Chapter Fourteen of the Constitution provides for national security organs namely; the Kenya Defence Forces, National Intelligence Service and National Police Service.

a) The Kenya Defence Forces

During the second quarter, the Commission met the Kenya Defence Forces regarding the implementation of Chapter Fourteen of the Constitution, and in particular, the implementation of Articles 239(6), 240 and 241 of the Constitution.

Pursuant to Article 239(6), the Kenya Defence Forces developed the Kenya Defence Forces Bill, which provides for the functions, organisation and administration of the Kenya Defence Forces. The Bill was submitted to the Commission for review. The Bill is now awaiting Cabinet approval before publication and tabling before the National Assembly for debate. The Commission commends the Ministry of State for Defence and the Kenya Defence Forces for their cooperation during the review and finalization of the Kenya Defence Forces Bill.

The Commission shall in the next quarter review administrative measures and subsidiary legislation that operationalise the Kenya Defence Forces Bill, once it is enacted, to ensure that the administrative measures conform to the letter and spirit of the Constitution and the Kenya Defence Forces Act, 2012.

The Commission notes with gratitude the role played by serving and retired members of the Kenya Defence Forces in enriching the Bill. The public and civil society actors among others submitted their comments on the Bill online and in various forums held by the Commission to discuss the Bill.

b) National Intelligence Service

The Commission is in the process of reviewing the National Intelligence Service Bill, which gives effect to Articles 239(6) and 242 of the Constitution. The Commission appreciates the cooperation afforded by the National Security Intelligence Service in the review of both the National Intelligence Service and National Security Council Bills. The two Bills are now awaiting finalization by the Commission at a roundtable meeting involving the National Intelligence Service, Ministry of State for Provincial Administration and Internal Security, the Attorney General and KLRC.

c) National Police Service

The Ministry of State for Provincial Administration and Internal security, the Administration Police Service and the Kenya Police Service have not submitted reports to the Commission on activities undertaken by the respective organs to implement the Constitution during the second quarter of the year.

The Commission has contacted the Ministry and other relevant organs regarding implementation of the Constitution ahead of the forthcoming elections. The Commission notes that despite the enactment of the National Police Service and National Police Service Commission Act, the two Acts are yet to be operationalised.

The delay in the appointment of the Inspector General of Police and establishment of the National Police Service Commission is a significant setback in the realization of reforms in the police sector as envisioned in the Constitution and the two Acts. The Commission has sought the intervention of the Executive and National Assembly to unlock the stalemate.

► Donor support

The thematic area received support from IDLO.

► Planed activities for the next quarter

1. The Thematic Area shall review administrative measures required to implement the Constitution and operationalise the following legislation—
  - (a) National Police Service Act, 2011
  - (b) National Police Service Commission Act, 2011
  - (c) Kenya Defence Forces Act (upon enactment)
  - (d) National Intelligence Service Act (upon enactment)
  - (e) Independent Policing Oversight Authority Act, 2011
  - (f) Power of Mercy Act, 2011
  - (g) Assumption of Office of the President Act, (upon enactment)
  - (h) National Security Council Act (upon enactment)
2. Review of the National Security Policy formulated by the National Security Council
3. Review of the military and defence policies formulated by the Ministry of State for Defence and the Kenya Defence Forces.
4. Review of the National Intelligence policy formulated by the National Intelligence Service.
5. Review of the National Youth Service Act to align it with the Constitution.
6. Review of the national policing policy developed by the Ministry of State for Provincial Administration and Internal Security and the Inspector-General of the National Police Service.
7. Review of other policies as shall be submitted to the Commission in relation to the implementation of Chapters Nine and Fourteen of the Constitution.
8. Review of the national prosecutions policy formulated by the Office of the Director of Public Prosecutions.
9. Work with Chapters Nine and Fourteen implementing agencies to develop implementation work plans.
10. Participate in implementation activities for purposes of monitoring and evaluating implementation of the Constitution by the relevant Chapters Nine and Fourteen State organs.

3.6 Activities under the Judiciary and Constitutional Commissions Thematic Area

The Judiciary and Constitutional Commissions thematic area is concerned with the constitutional establishment and institutional reform of the judiciary and constitutional commissions as provided in Chapters Ten and Fifteen of the Constitution of Kenya 2010. It addresses such matters as the development, review, enactment and amendment of legislation, policies and administrative procedures required to ensure effective and timely implementation of the Constitution. The various activities undertaken by the team during this quarter are as follows:



► Stakeholder engagements

a) Open Session of the Judges and Magistrates Vetting Board

On 25<sup>th</sup> April 2012, the Judges and Magistrates Vetting Board held an open session at Kenyatta International Conference Centre (KICC) to release a report of its findings on suitability of nine Court of Appeal judges to continue serving in the judiciary. Members of the public and the press were invited to hear the Board's findings. CIC attended the session. The Vetting Board found four of the judges unfit to hold their offices while the other five were cleared to continue in judicial service. It found that the four judges lacked independence, showed bias towards the high and mighty in society, favoured impunity and limited democratic expression.

It is our view that the decision of the Board will help restore public confidence in the Judiciary as well as support the values of accountability and integrity in the Judiciary as required under Articles 10(2)(c), 73(1)(a)(iv), 73(2) and 166(2)(c) of the Constitution of Kenya 2012.

b) Workshop for the Revision of the Supreme Court Rules

The Supreme Court held a three-day workshop to review the Supreme Court Rules at Mombasa Serena Beach Hotel from 14<sup>th</sup> to 16<sup>th</sup> May 2012. CIC was invited and attended the meeting. The workshop brought together all key stakeholders in the justice administration and provided them with an opportunity to review the Rules. The Supreme Court will take the feedback from the public as well as the discussions during the workshop into consideration as it works to finalize the Rules.

c) Stakeholders' Consultative Workshop on the Development of a Framework for Inclusion of National Cohesion and Integration Principles into Laws and Policies

The National Cohesion and Integration Commission (NCIC) held a workshop on 29<sup>th</sup> May 2012 to seek input to develop a framework for incorporating the national cohesion and integration principles into laws and policies of Kenya. The framework aims to provide a tool for inclusion of principles of national cohesion and integration into laws and policies of Kenya, particularly those principles that give effect to non-discrimination and equality requirements of the Constitution and National Cohesion and Integration Act, 2008. It will also help build capacity of NCIC personnel to monitor the development of laws and policies to ensure compliance with national cohesion and integration principles. CIC participated in the workshop.

d) Retreat of Constitutional Commissions and Independent Offices

CIC is committed to working with all constitutional commissions to ensure the letter and spirit of the Constitution is respected. In furtherance of its mandate under section 5(6)(b) of the Sixth Schedule of the Constitution, CIC attended a retreat of Chapter 15 Commissions and Independent Offices in Mombasa from 29<sup>th</sup> to 30<sup>th</sup> May 2012. The Retreat was organized by the Commission on Administrative Justice also known as the Office of the Ombudsman in collaboration with UN Human Rights Office in Nairobi under the theme "*Towards protecting the rights and sovereignty of the people*". The main objective of the retreat was to map out overlaps in the functions of the commissions and identify how best to address them for the benefit of citizens and to optimize the realization of human rights as enshrined in the Constitution.

e) Launch of the Judiciary Transformation Framework

On 31<sup>st</sup> May 2012, CIC attended the launch of the Judiciary Transformation Framework, 2012-2016 at Kenyatta International Conference Centre (KICC). The Judiciary Transformation Framework is the product of a highly consultative process involving all the constituent sections of the Judiciary – judges, magistrates, judicial staff and others affiliated to the justice sector. The Framework aims to provide general principles and goals to be pursued and methods of undertaking the transformation of the Judiciary. The Framework is anchored on four key pillars, which are: (a) People focused delivery of service; (b) Transformative leadership, organization culture and a professional, motivated staff; (c) Adequate financial resources and physical infrastructure; and (d) Harnessing technology as an enabler for justice. These four pillars are intended to be driven and implemented towards the realization of a further ten key result areas.

f) Fourth Meeting of the National Council on the Administration of Justice

The 4<sup>th</sup> meeting of the National Council on the Administration of Justice (NCAJ) was held at Nairobi Serena Hotel on 25<sup>th</sup> June 2012. During its third meeting, NCAJ resolved that nine additional members including CIC would be co-opted into the Council given the relevance of their individual visions, missions and objectives of the Council. The main objectives of the meeting were to receive progress reports from the NCAJ technical committee, to discuss NCAJ agencies' issues and to agree on how to complement each other's respective mandates in a well-coordinated and harmonized approach.

► Challenges

- There is a level of misunderstanding of the mandate of respective constitutional commissions, which tends to inhibit collaboration in the implementation of the Constitution.
- Persistent disregard on the part of the Attorney General's Office of the previously agreed process of legislation and preparation of Bill for tabling before Parliament;
- Continued late submission by the Executive of Bills for preparation before tabling within the prescribed timelines; and
- Continued preparation of Bills in the absence of national policies.

► Activities planned for next quarter

The Judiciary and Constitutional Commissions thematic area has planned the following activities for the next quarter:

1. Review of the Magistrates' Court (Amendment) Bill and the Contempt of Court Bill;
2. Organize a workshop to review the progress in implementing the constitutional right of access to justice in Kenya; and
3. Work with the Judiciary and the JSC to review the rules of the court (the Chief Justice rules, the Court of Appeal rules, the Industrial Court rules, the Environment and Land Court rules and any rules for the subordinate court).

The Executive should make effort to prepare and adopt policies to guide legislation required to implement the Constitution

### 3.7 Activities under Devolved Government Thematic Area

The devolved government thematic area of CIC coordinates all activities relating to the development of legislation, administrative procedures required to implement chapter eleven of the constitution and section 15 to the Fifth schedule of the CoK 2010 which is to effectively monitor the implementation of the system of devolved government. In the period under review the thematic area undertook and accomplished a number of activities relating to devolution. These included a number of structured consultations between the thematic area and various stakeholders including consultation with residents of a number of counties.

► Stakeholder engagements

- a) Meeting with the Association of Local Government Authorities of Kenya (AIGAK)

The thematic area held a consultative meeting with the Association of Local Government Authorities of Kenya (ALGAK) on 21<sup>st</sup> June 2012. The meeting which was held at the request of ALGAK discussed ALGAK's concerns about issues in the Urban Areas and Cities Act 2011 that the Association considered to be contentious. They were concerned about the high population threshold for classifying an urban area as a city b and a municipality. The law requires that for urban area to be classified as a city it must have a minimum of five hundred thousand d resident while a municipality must have a minimum d two hundred and fifty thousand residents. A town on the other hand must have a minimum of ten thousand residents. They were seeking views of CIC on how this requirement could be changed.

b) Workshop with the National Museums of Kenya

The thematic area participated in a workshop organized by the National Museums of Kenya to address issues relating of distribution of functions between the national level government and county level governments. The participants were interested in this issue because their functions are affected by devolution. They were also interested in the legal reforms presented by the distribution of functions between national and county governments. The thematic area presented a paper on distribution of function between national and county government.

c) Workshops with Franciscan Sisters of St. Joseph

In the month of June CIC facilitated a workshop for the congregation of Franciscan Sisters of St. Joseph (FSJ) on the Constitution of Kenya 2010. The workshops that attracted over one hundred sisters was held at St Mary's Nyabururu in Kisii county and was organized in three separate meetings on different days of the month of June 2012. The workshop was used to sensitize the sisters on the entire constitution. The sisters undertook to use the knowledge they gained at the workshop to educate other people they work with.

d) Workshop with the Institute for Social Accountability

The Institute for Social Accountability (TISA) organized a meeting of civil society organizations as a follow up to an earlier meeting organized by them and which was held on 25<sup>th</sup> 2011. The objective of this follow up meeting was to deliberate on the engagement between Non-State Actors and CIC on required reforms in readiness for the coming into being of county governments. The meeting under the theme, *"Deciding on an effective County transition monitoring strategy"*, brought stakeholders together, to develop a county transition monitoring strategy. CIC made a presentation on the status and implementation of devolution legislations that have so far been enacted by parliament.

e) Participation in a Workshop organized by the National Assembly

The Kenya National Assembly organized a two day workshop focusing on county assembly. The workshop brought together selected groups of, researchers and development partners to ponder the implementation of devolved government, with specific focus on preparations for the coming into being of county assemblies. The devolved government thematic area participated on behalf of CIC and presented a paper titled *"Kenya's Experience with Decentralisation Before 2010"*.

Proposed activities for the next quarter of 2012

1. In the next quarter CIC through the devolved government thematic area will audit all legislation passed to implement chapter eleven with a view to establishing any inconsistencies/contradictions within individual bills; across different legislations. The audit will also aim at identifying any additional legislation required to effect devolution. The exercise will also identify any legislation that is inconsistent with the letter and spirit of the constitution.
2. The thematic area will also audit Civic Education Materials developed by civic education providers Including CSOs NGOs etc; hold consultative meetings with ministries on their transition plans; monitor transition activities; work with Transition Authority to ensure timely accomplishment of transition activities required before the general elections; review administrative procedure necessary for effecting transition to devolution. The thematic area will also continue to monitor any violations in implementation of devolution. Finally the thematic area will conduct county visits to sensitize the public, ministries, state agencies, public corporations and local authorities on matters relating to transition activities and generally devolution.

3.8 Activities under Public Finance Thematic Area

The Public Finance thematic area 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 Public Finance thematic area has undertaken numerous steps to facilitate, monitor and coordinate all stakeholders involved in the generation and development of a constitutionally compliant public finance management legal and institutional framework. The thematic area facilitated the process leading to the passage of the Public Financial Management Act on the 27<sup>th</sup> July 2012. The Act is currently awaiting presidential assent. The enacted law established a consolidated framework for governing public finance at national and county level and intergovernmental fiscal relations in the context of Chapters Eleven and Twelve of the Constitution.

In the second quarter, the Public Finance thematic area undertook the following activities:

a) The passage of the Public Financial Management Bill:

Under Schedule 4 of the Constitution, the PFM Bill was required to be enacted by 26<sup>th</sup> of February 2012 since it contained provisions relating to the County Revenue Fund (Article 207) and financial control.

Due to oversight on the part of the legislature, the Bill was not passed on time, hence Parliament extended the date of enactment as authorised under Article 264 of the Constitution. The Bill was to be enacted by Parliament in July 2012.

b) The Budget process 2012

The thematic area reviewed the critical budget documents including the Budget Policy Statement and communicated its concerns both to the Treasury and to Parliament on the content of the Budget Policy Statement.

c) CBK Management and Staff Sensitization:

The Central Bank of Kenya (CBK) sought CIC's assistance to sensitise its 1,380 staff members on the Constitution to enable them to the review the CBK Act to comply with Article 231 of the Constitution. The programme took 4 weeks, beginning 29<sup>th</sup> May 2012.

d) Constitution Implementation among Ministries and State Agencies:

The thematic area initiated discussions with ministries and state agencies clustered under the thematic area in line with its mandate of monitoring the implementation of the Constitution. There have been positive responses so far, and many of these institutions have already started the process of aligning their operations with the new Constitution.

The schedule below summarises the relationships and oversight of the relevant institutions:

► Activities Planned for the 2<sup>nd</sup> Quarter of 2012:

Due to the late enactment of the PFM Act, many of the activities planned by the thematic area especially regarding sensitising members of the public on the content of the law and its implications, had to be postponed. In addition, the planned review of the Kenya Revenue Authority Act and the Public Audit Act has taken longer than anticipated. These will be conducted in the next quarter. This notwithstanding, the following activities have been planned for the third quarter:



1. Development of training and related materials for PFM implementers at Central government and counties level
2. Passage of Controller of Budget Bill – The draft Bill is awaiting an agreement on an appropriate date for the final roundtable after which the Bill will be presented to the Attorney General for publishing
3. Review of the Public Procurement and Disposal Act – The review of this critical legislation is ongoing under the leadership of the Procurement Authority. It is hoped that a draft Bill will be ready for discussion with stakeholders within the next quarter.
4. As documented here above the thematic area shall continue working with the listed ministries and state agencies so as to ably monitor the progress of implementation and compliance with the dictates of the Constitution of Kenya 2010.

#### 4. CHALLENGES AND IMPEDIMENTS IN THE IMPLEMENTATION OF THE CONSTITUTION

The implementation process continues to be hampered by some challenges arising, including:

##### 1. *Delay in operationalising Chapter Fifteen Constitutional Commissions:*

Delay in operationalising constitutional commissions established under Chapter Fifteen has affected implementation of the Constitution. For example, the delay in appointment of members of the Independent Policing Oversight Authority has affected progress in police reforms. The delay in appointment of members of the Ethics and Anti-Corruption Commission has been affecting the Ethics Commission's operations. The challenges in the appointments range from failure to attain the constitutional requirement of gender balance, to lack of consultation between the appointing authorities and stakeholders, to challenging the appointment of some candidates in court.

##### 2. *Continued delay in forwarding Bills:*

There is a critical delay in forwarding key Bills that are due for enactment by 26<sup>th</sup> August. Some of the Bills are crucial for the next general elections, as they will directly impact on processes leading to the elections. These include the Article 119 (Right to Petition Parliament) Bill, the Campaign Financing Bill, Leadership and Integrity Bill, National Government Bill, Parliamentary Service Commission Bill and Public Officers Vetting Bill.

##### 3. *Non-responsiveness:*

Failure by some key government offices responsible for implementation to address issues related to the implementation process is a major challenge. There have been repeated attempts to seek reports and status updates on the specific implementation roles that these offices perform, to no avail. This is particularly problematic when considering particular functions that relate to the next general elections and the resulting devolved government structures.

##### 4. *Lack of National Government framework:*

There are no guidelines on the shape and hence the framework of national government operations in the devolved system. These guidelines are important in guiding the ministries to develop systems for use after the next general elections.

##### 5. *Statute Law (Miscellaneous) Amendment Bill, 2012:*

The use of the Statute Law (Miscellaneous) Amendment Bills by office of the Attorney General and Parliament to introduce sweeping amendments to laws enacted for the implementation of the Constitution without reference to CIC or public participation is a challenge and a breach of the constitutionally sanctioned process for legislation required to implement the Constitution. *See Annex IV for CIC's detailed position on this issue.*

##### 6. *Bills forwarded to CIC too late*

Bills are forwarded to the CIC too late hence the CIC cannot work on them effectively. Shortening of the maturity period deprives stakeholders of opportunity to input into the Bills. A good example is the Right to petition Parliament Act, 2011 and the Leadership and integrity Act, 2012.

##### 7. *Bills are not founded on policies*

Where there are no policy frameworks to guide development of Bills, it leads to the laws being amended soon after they are enacted, as they may not be sufficiently comprehensive to cover the issues they deal with. For example the Elections Act, 2011 which had to be amended to allow the Speaker of the National Assembly to declare Kajiado North and Kangema Parliamentary seats vacant to clear the way for by-elections.

##### 8. *Bills being recalled or held back*

Bills from originating Ministries being recalled or held back from publication after being agreed upon at roundtable meetings with CIC and other stakeholders.

##### 9. *Cabinet amendments clashing with the Constitution*

Some provisions that Cabinet is introducing are proposing substantive changes to the Constitution. For example, the lengthy Miscellaneous Amendment Bill had some proposed amendments to the Constitution even though the Constitution is specific on how key amendments are to be done.

##### 10. *Executive activities on transition to devolved government*

Preparatory activities relating to transition to county governments are not clear nor brought to light to ensure all stakeholders in the implementation process are onboard. Executive should work alongside with other implementers.

#### 5. RECOMMENDATIONS TO ADDRESS THE CHALLENGES IN THE IMPLEMENTATION OF THE CONSTITUTION

As has been the practice in preceding reports, and with a view to ensure implementation remains on track, the CIC recommends the following measures to address the challenges and impediments facing the implementation process.

##### 1. *Fast tracking operationalisation of Chapter Fifteen (15) Commissions:*

The Executive should prioritise operationalization of constitutional commissions to ensure key reforms are on track. Although the Ethics and Anti-Corruption Commission has continued to function, it is imperative that commissioners are successfully appointed and take up offices as soon as possible. The Police Service Commission is a fundamental organ and for the police reforms to be on track there is need to urgently address the issues hampering appointment of the members.

##### 2. *Prioritisation of legislation with Constitutional timelines and those agreed to be enacted by the second year of promulgation of the Constitution (26<sup>th</sup> August 2012):*

There is need to ensure the Bills required for enactment within two years of promulgation of the Constitution and those agreed to be enacted within the same timelines are finalized in good time to avoid violating the timelines and to ensure process of development of Bills is on track.

##### 3. *Need for a national government framework:*

CIC recommends development of a Bill to specifically provide for issues relating to operations of national government and transition activities from the existing structure to the two-tier system of government.

#### 4. *Legislative Process:*

All bills, policies and administrative procedures should be reviewed by CIC to ensure technical soundness and consistency with the Constitution before they are enacted into law.

#### ANNEXES

##### ANNEX I

##### POLITICAL "PARTY-HOPPING" BY SITTING MEMBERS OF PARLIAMENT

###### *The Issue*

In preparation for the forthcoming General Elections, Members of Parliament (MPs) have been realigning their political allegiances. This paper presents an analysis on whether a serving member of Parliament breaches the Constitution of Kenya 2010 when she/he moves to a party other than the one under which she/he was elected to Parliament. In considering this issue, the following questions are pertinent:

- Does the Constitution allow for 'party-hopping'?
- If it does not, are the current MPs exempted from the application of such provisions in the Constitution until after the next general elections (see Section 10 of the Sixth Schedule to the Constitution and transition clauses)?
- If the Constitution exempts MPs due to the suspension of Chapter 7, what are provisions of the previous Constitution, if any, are applicable on party hopping and are they still in force?
- Does the Political Parties Act 2011, prohibit party hopping? If so, does it apply to serving MPs? If yes, what are the sanctions for party hopping?
- Does the Political Parties Act 2011 apply retrospectively (under the previous Constitutional order)?
- In light of the responses to these questions, what is the legality and constitutionality of party hopping by current MPs ahead of the 2013 general elections?

###### *The Constitution and Political Party Membership*

The Constitution prohibits the changing of party membership in the course of the term of an MP. Article 103 requires an MP who leaves the party under which she/he was elected to vacate their elected seat.

The relevant parts of the Article read:

*Article 103 (1), The Office of a member of Parliament becomes vacant ... if, having been elected to Parliament as a member of a political party, the member of Parliament resigns from that party or is deemed to have resigned from that party ... (2) or as an independent candidate joins a political party;*

The Article is clear on the fact that an MP in a political party vacates her/his seat when she/he resigns from that party.

However, the Sixth Schedule, Paragraph 2 suspends the operation of Chapter 8 including Article 103 until the next general elections. In light of this, Paragraph 3(2) of the Schedule of the 2010 Constitution saves the relevant provisions of the previous Constitution until the next general elections, which includes operations of Parliament. Specifically, these are sections 30-40, 43-46 and 48 to 58 of the previous Constitution.

The following is an excerpt of the table of contents of the former Constitution for an overview of the saved provisions-

#### Chapter III – Parliament

##### *Part 1 – Composition of Parliament*

- 30 – Legislative power.
- 31 – Composition of National Assembly.
- 32 – Election of elected members.
- 33 – Nominated members.
- 34 – Qualifications for election.
- 35 – Disqualifications for election.
- 36 – Attorney General to be member of National Assembly.
- 37 – Speaker of National Assembly.
- 38 – Deputy Speaker of National Assembly
- 39 – Vacation of seat in National Assembly.
- 40 – Vacation of seat in National Assembly upon resignation from party.
- 41 – Electoral Commission.
- 42 – Constituencies.
- 42A – Conduct of elections.
- 43 – Qualifications and disqualifications for registration as a voter.
- 44 – Determination of questions as to membership of National Assembly.
- 45 – *(Repealed.)*

##### *Part 1A The Parliamentary Service and the Parliamentary Service Commission.*

- 45A – Parliamentary Service



45B – Parliamentary Service Commission

*Part 2 – Legislation and Procedure in the National Assembly*

46 – Exercise of legislative power of Parliament.

47 – Alteration of Constitution.

48 – Restrictions with regard to certain financial measures.

49 – Oaths to be taken by members of National Assembly.

50 – Presiding in National Assembly.

51 – Quorum in National Assembly.

52 – Powers of President in Parliament.

53 – Official languages.

54 – Voting in National Assembly.

55 – Unqualified persons sitting or voting.

56 – Regulation of procedure in National Assembly.

*Part 3 – Summoning, Prorogation and Dissolution of Parliament*

57 – Powers, privileges and immunities of National Assembly

58 – Summoning of Parliament.

Section 40 of the former Constitution provides that where a member of the National Assembly who, having been elected with the support of or as a supporter of a political party, or having accepted appointment as a nominated member, resigns from that party at a time when that party is a parliamentary party; or after the dissolution of that party, been a member of another parliamentary party resigns from that other party at a time when that other party is a parliamentary party, shall vacate his or her seat forthwith unless in the meantime that party of which he was last a member has ceased to exist as a parliamentary party or he has resigned his seat. However, this section does not apply to the Speaker of Parliament.

As stated above Section 40 of the former Constitution applies with regard to serving members of Parliament and a reading of the provision is clear that an MP vacates office upon resignation from the party, which supported that member to Parliament or nominated that member to Parliament. Section 14(4) of the Constitution of Kenya 2010 also prohibits multiple party memberships.

#### *Political Parties Act*

The Constitutional provision highlighted above is buttressed by Section 14(5) of the Political Parties Act 2011 which provides that a person who, while being a member of a political party; forms another political party; joins in the formation of another political party; joins another political party; in any way or manner, publicly advocates for the formation of another political party; or promotes the ideology, interests or policies of another political party; or campaigns for another political party, or a candidate of another political party commits an offence.

The Political Parties Act 2011 repealed the Political Parties Act No. 10 of 2007. However, the transitional provision [Section 47(1)] obliges political parties existing immediately before the commencement of the 2011 Act to comply with the provisions of the 2011 Act, within one hundred and eighty days from the commencement date. The express provision for parties to transit and the laws of interpretation clearly indicate that the 2007 Act is not in force and cannot therefore be the basis of determining the eligibility of members of parliament to belong to political parties.

In any event to pre-empt any assertion that the 2007 Act permits party defections, Section 17 of the repealed Political Parties Act clearly prohibits express and constructive party abandonment.

#### *Legal Analysis*

In light of the foregoing it is quite clear that the Constitution of Kenya 2010 as read together with the former Constitution and the Political Parties Act 2011 prohibits express and constructive political party resignation by Members of Parliament.

Where a Member of Parliament has given a resignation in writing, that member should vacate office on the day the resignation takes effect. The Speaker of the National Assembly should then move to declare the seat vacant. In the case of constructive resignation then each case will have to be examined in its own merits to determine whether the person can be deemed to have resigned.

On constructive determination, in *Republic V. Speaker of the National Assembly & Another ex parte Aboubakar*,<sup>1</sup> the High Court at Mombasa considered an application seeking an Order of Mandamus against the Speaker of the National Assembly to compel him to declare the Likoni parliamentary seat vacant. In addition, orders were sought prohibiting the then Member of Parliament from continuing to occupy the Likoni parliamentary seat, and prohibiting him from presenting himself as a Member of Parliament under Shirikisho Party. The basis of the argument, which preceded enactment of the anti defection clauses, was that the MP had issued a statement at a public function stating that he had defected from Shirikisho Party which had sponsored him to Parliament. In determining whether the member had defected from Shirikisho party the court noted that in the absence of a written resignation:

*"...one cannot ignore certain conducts that, in general, would be viewed as acts that even though a Member of Parliament was elected with support of a party, he has ceased for all practical purposes to be a member of that party. For example, if after his election to parliament with the support of that party he registers himself as a member of another party, and/or accepts political posts in that other party. ...However, such conduct that would be treated as amounting to resignation must, in our mind, be such that any reasonable person will see it as a conduct that leaves none with any other conclusion but that the member is for all intents and purposes no longer a member of the party that sponsored him."*

Although it has been argued that Paragraph 10 of the Sixth Schedule to the Constitution protects a current MP and allows her/him to continue as the National Assembly for its unexpired term, this provision does not negate the spirit of the Constitution. In the circumstance it will be a legal absurdity to argue that the applicable provisions for removal of an MP from holding office do not apply.

#### ANNEX II

Appointment of the County Commissioners by His Excellency the President

<sup>1</sup> *Civil Misc. App. No. 184. of 2002.* (2008, KLR (Election Petitions at pp, 420)

The current provincial administration lacks legal backing. Although to some extent provided for under the repealed Special Districts (Administration) Act, Cap. 105 and Chiefs Authority Act, Cap. 128. The provincial administration is anchored on presidential decrees authorised under the former Constitution.

Under section 24 of the former Constitution the President has powers to constitute and abolish offices for the Republic of Kenya, make appointments to any such office and terminate any such appointment. Further, section 18 of the former Constitution provides that the responsibility for any of the business of the government of Kenya, including the administration of any of the departments of Government, may be assigned to the Vice-President and the several Ministers as the President may, by directions in writing, determine.

It is on the basis of presidential decrees that the provincial administration has existed. Until the Constitution of Kenya 2010 was promulgated, the President has directly appointed the Provincial Commissioners and Deputy Provincial Commissioners.<sup>2</sup>

This notwithstanding, the restructuring of the provincial administration, recognized under section 17 of the Sixth Schedule to the Constitution must be realized through a clear legal framework, backed by a comprehensive policy to ensure that the restructured provincial administration accords with and respect the devolved government structure established under the Constitution and sets forth the functions and mandate the provincial administration vis-à-vis the dictates of the Fourth Schedule to the Constitution.

As is the case for all policies and legal framework affecting the public, transparency and adequate public participation must be sought. The proposed policies and legislation must be constitutionally sound, coherently fit into the devolved structure, and comply with enacted relevant Acts as well as Bills currently pending scrutiny and debate in Parliament.

Currently neither devolved structures of the national government and the county governments exist. While it is not unconstitutional for the central government to deploy officers, by whatever title, to discharge central government function in the counties pending the establishment of national and county governments, it is unconstitutional to give effect to section 17 of the Sixth Schedule to the Constitution by merely appointing county commissioners with disregard for constitutional dictates.

The Constitution recognizes the need to restructure the existing provincial administration and provides for a timeline (five years) within which the proposed restructuring must be realized. In that case, there is ample time for the national government to evaluate the provincial administration and generate an ideal structure that respects and accords with the devolved structure amongst other Constitution dictates.

#### *Appointment of members of the restructured provincial administration*

Provincial administration forms part of the public service, hence bound by the provisions of Chapter Thirteen and other relevant provisions of the Constitution. The proposed county commissioners are public officers within the meaning of Article 260 of the Constitution.

Article 260 defines a “public officer” as — (a) any State officer; or (b) any person, other than a State Officer, who holds a public office. A “public office” is defined as 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.

According to Article 234 (2) of the Constitution, the Public Service Commission is constitutionally mandated to, subject to the Constitution and legislation, establish and abolish offices in the public service; and appoint persons to hold or act in those offices, and to confirm appointments.

Article 132(4) (a) of the Constitution, although suspended, recognizes the necessity for the President to comply with the recommendations made by the Public Service Commission in the establishment and abolition of public offices.

Article 132(4) (a) states as follows:

“The President may— perform any other executive function provided for in the Constitution or in national legislation and, except as otherwise provided for in the Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission.”

Having said the above, the Public Service Commission has the constitutional mandate to appoint the county commissioners, unless it delegates in writing to any one or more of the Public Service Commission members, or to any officer, body or authority in the public service, as stipulated under Article 234 (5) of the Constitution. In the absence of a delegation, the President acted in violation of the Constitution.

Section 24 of the former Constitution that gives the President powers to appoint persons to hold public offices, are amongst other provisions on the executive that are saved by section 3(2) of the Sixth Schedule to the Constitution. Nonetheless, section 7 of the Sixth Schedule requires that all law in force immediately before the effective date should be construed with the alterations, adaptations, qualifications and exceptions necessary to bring into conformity with the Constitution.

Further, section 7(2) of the Sixth Schedule states:

(2) If, with respect to any particular matter—

(a) A law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) A provision of the Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer; the provisions of the Constitution prevail to the extent of the conflict.

In light of the above, the Constitution, both in letter and spirit, requires that the appointment into any public office shall be by the Public Service Commission, unless delegated in writing. In addition, Chapter Thirteen of the Constitution is not suspended; as such the appointment and recruitment procedure must adhere to Articles 10 and 232 amongst other relevant provisions of the Constitution.

Particularly, Article 232(1)(f)-(i) which states as follows:

232 (1) The values and principles of public service include—

(f) Transparency and provision to the public of timely, accurate information;

(g) Subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) Representation of Kenya’s diverse communities; and

(i) Affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) The members of all ethnic groups; and

(iii) Persons with disabilities.

Additionally the values and principles under the Constitution 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.

#### ANNEX III

#### JUDGMENT ON THE APPOINTMENT OF COUNTY COMMISSIONERS

#### REPUBLIC OF KENYA

#### IN THE HIGH COURT OF KENYA AT NAIROBI

#### MILIMANI LAW COURTS

#### PETITION NUMBER 208 OF 2012

CENTRE FOR RIGHTS EDUCATION & AWARENESS (CREW).....1<sup>ST</sup> PETITIONER  
 CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS) .....2<sup>ND</sup> PETITIONER  
 WOMEN IN LAW AND DEVELOPMENT IN AFRICA (K).....3<sup>RD</sup> PETITIONER  
 DEVELOPMENT THROUGH MEDIA (DTM) .....4<sup>TH</sup> PETITIONER  
 COALITION OF VIOLENCE AGAINST WOMEN (COVAW).....5<sup>TH</sup> PETITIONER  
 YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI).....6<sup>TH</sup> PETITIONER  
 INTERNATIONAL CENTRE FOR POLICY & CONFLICT.....7<sup>TH</sup> PETITIONER

#### VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

#### CONSOLIDATED WITH

#### MISC. APPL. JUDICIAL REVIEW NO 207 OF 2012

PATRICK NJUGUNA .....1<sup>ST</sup> PETITIONER  
 CHARLES OMANGA .....2<sup>ND</sup> PETITIONER

#### VERSUS

ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT  
 MINISTER FOR INTERNAL SECURITY  
 AND PROVINCIAL ADMINISTRATION .....2<sup>ND</sup> RESPONDENT

#### SUMMARY OF THE JUDGEMENT

1. The Petition and Judicial Review Application question the constitutionality of the appointment or deployment by the President of 47 County Commissioners by way of Gazette Notices issued on the 11<sup>th</sup> and the 23<sup>rd</sup> of May 2012.

2. The petitioners seek a declaration that the act of the President in making the appointments is unconstitutional, null and void. The Judicial Review Misc. Application seeks orders of certiorari, mandamus and prohibition in respect of the appointments.

#### FACTS OF THE CASE

3. By Gazette Notice No. 6604 dated 11<sup>th</sup> May 2012, the President appointed 47 persons to be County Commissioners. On the 17<sup>th</sup> of May 2012, the Petitioners filed their petition and application challenging the appointments. On the 23<sup>rd</sup> of May 2012, by Gazette Notice No 6937 of 23<sup>rd</sup> May 2012 titled 'Deployment of County Commissioners', the President revoked Gazette Notice No. 6604. Gazette Notice No. 6937 changed the words used in Gazette Notice No. 6604 from 'Appointment' to 'Deployment' and 'appoint' to 'assign.' It also changed the provisions of the Constitution and the law relied on, and the functions that those 'deployed' would perform. However, the names of those appointed and the counties they were to serve remained the same. Of the 47 persons 'appointed' or 'assigned' as County Commissioners in the two Gazette Notices, 37 were of the male gender while 10 were of the female gender.

4. The petitioners challenge the acts of the President in making the 'appointment' or 'deployment' as being unconstitutional and in violation of Articles 10, 27, and 132 of the Constitution. On their part, the respondents defend the acts of the President and deny any violation of the provisions of the Constitution as alleged by the petitioners.

#### ADVOCATES' SUBMISSIONS

5. The submission by the petitioners was that the appointment of the County Commissioners by the President did not meet five essential principles of the Constitution as follows:

- i) The national values and principles set out in Article 10 of the Constitution, in particular the principles of non-discrimination and protection of the marginalized, democracy and participation of the people had been violated in the non-competitive nature of the appointments. The principle of transparency and accountability had also been violated, as well as the principles of good governance and integrity, which required that those appointed should be appointed in a transparent manner so that their integrity can be put under scrutiny;
- ii) The principles of gender equality set out in Article 27. In Article 27(6) and (7), the Constitution made a promise to the different genders in Kenya. Article 27(8) requires that the state takes legislative and other measures to ensure that it follows the principle that no more than two thirds of any elective and appointive positions are of the same gender. "Other measures" can only mean measures outside legislation such as the current appointments;
- ii) The principle of consultation deriving from the National Accord and Reconciliation Act as enshrined in Section 3(2) of the Sixth Schedule to the Constitution. There was no consultation with the Prime

Minister as required under the National Accord and Reconciliation Act;

- iv) Article 132 on the exercise of Presidential Powers. There were no powers vested in the President to make such appointments. If the President had power, such powers would be found under Article 132 which sets out Presidential Powers and makes the exercise of such powers subject to approval by Parliament; the restructuring of the Provincial Administration contemplated under Section 17 of the Sixth Schedule did not give power to the President to appoint County Commissioners; Such restructuring could only take place so as to accord with the devolved government structure and within an established legal framework. Since the necessary legislation

was not in place, the positions that the President had purported to fill through deployment do not exist, hence the exercise of such powers by the President was in a vacuum and therefore a nullity as being in excess or want of such presidential powers.

6. On the other hand the respondents submitted that they had adhered to the principles in Articles 10, 27 and 132 in making the appointments. They contended that although Gazette Notice No 6604 of 11<sup>th</sup> May 2012 talks of 'appointment of County Commissioners,' the position was clarified as 'Deployment of County Commissioners' and the Gazette Notice of 11<sup>th</sup> May 2012 revoked on 23<sup>rd</sup> May 2012; that the matters before the court have been overtaken by events. A position the court did not agree with.

7. The respondents also argued that the appointments were made 'in the spirit of progressive realization' of the principle contained in Article 27(8). The petitioners referred to the provisions of Article 21 and 54 arguing that had the intention been to subject the principle in Article 27(8) to the progressive realization argument, the Constitution could have provided so expressly.

8. The respondents contend that the deployment was of senior officers within the Provincial Administration in line with the requirements of the Constitution and national values and principles under Article 10; that a criteria was used to identify suitable officers for deployment which included performance, seniority, regional balance and gender; that the officers serving in the administration must undergo training as paramilitary officers and take leadership courses unique to their career, and that in view of this requirement, officers not serving in the scheme of service for administrators are not qualified for appointment as County Commissioners. The state has only 26 women out of 286 District Commissioners, and based on the selection criteria the respondents did not have sufficient numbers of the female gender to meet the constitutional requirement under Article 27(8) because only 10 women were qualified. Therefore there was no violation of the provisions of Article 27(8).

9. On the petitioners' contention that the appointment was subject to Parliamentary approval, the respondents submitted that such approval was not necessary as the County Commissioners are not included in Article 132(f). The act of the 2<sup>nd</sup> respondent was a deployment or assignment of duties, not employment.

10. With regard to Section 17 of the Sixth Schedule, the respondents conceded that the restructuring of Provincial administration is to be done within 5 years and the process was on-going and a draft National Administration Bill was in the process of enactment and would be addressed in a consultative and inclusive exercise; that the deployed officers would operate within the existing legal framework and structure of the Provincial Administration and once a new structure is in place, then new appointments can take place.

#### FINDINGS OF THE COURT

11. The court in its determination considers the following issues:

- Fidelity to national values and principles. Gender equity as provided in Article 10(b) and 27(8). The appointments resulted in 21.3% of the appointees being female and 78.7% of the appointees being male. The appointments do not meet the constitutional requirements at Article 27(8) and on the face of it, violate the non-discrimination provisions of Article 27.
- Public participation and consultation. With regard to public appointments, it is critical that an opportunity is given to all who may be interested in the position to apply, and for anyone who may have a view on the suitability of a proposed appointee, particularly with regard to integrity and competence, to be heard should they wish to be heard;
- Whether the appointment were rightly done under Section 23 and 24 of the old Constitution. These provisions of the former Constitution were not saved by the Transitional Provisions contained in Schedule 6 of the Constitution. Consequently, the President could not make any appointments under the former constitution. The offices and positions did not also exist hence it was not possible to deploy officers without creating the offices and positions first.
- Section 17 of the 6<sup>th</sup> Schedule makes provision for the re-structuring of the Provincial Administration. While it does not spell out exactly how this is to be done, logic dictates that there must be some form of legislative and institutional framework to in consultation with county governments provide for and guide the restructuring process. There is clearly a failure by the Executive and the Legislature in not moving with speed to enact the legislation necessary to begin the process of restructuring the Provincial Administration.
- The President did not have power to appoint or deploy persons as County Commissioners. Even if he had had such powers under the Constitution, then he would have been required by the provisions of Section 29(2) set out above to consult the Prime Minister and to seek the approval of the National Assembly for the appointments.

12. In conclusion the court stated, although, the actions of the respondents were motivated by a desire to start the process of coordinating national government functions at the county level prior to the coming of the county governments following the forthcoming elections, anything that is done in order to implement the new Constitution must faithfully accord with the provisions of the Constitution.

13. In light of the above matters, the court finds as follows:

- The President had no power to appoint or deploy County Commissioners as he purported to do under Gazette Notice No. 6604 of 11<sup>th</sup> May 2012 and Gazette Notice No. 6937 of 23<sup>rd</sup> May 2012.
- Even if the President had had power to make such appointments or deployments, the appointments or deployments violated Article 10 and 27 of the Constitution.
- The purported deployment of County Commissioners by Gazette Notice No. 6937 of 23<sup>rd</sup> May 2012 was therefore unconstitutional, null and void.

#### ANNEX IV

#### CIC's POSITION ON MATTERS RELATING TO THE CURRENT STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL ON THE FLOOR OF THE HOUSE (PARLIAMENT) TO AMEND:

(a) The Elections Act, 2011; and (b) the Political Parties Act, 2011.

##### 1. Mandate of the Commission (CIC):

CIC makes this statement in line with its constitutional mandate as defined in section 5(6) of the sixth schedule to the Constitution of Kenya, 2010. Under this section, CIC's mandate is to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution of Kenya, 2010. The ultimate goal is to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles; and to promote constitutionalism.

##### 2. The Process of Implementation:

In carrying out its mandate CIC seeks to ensure that State Agencies and indeed the people of Kenya adhere to the requirements of the Constitution of Kenya 2010. It is in this context that CIC seeks to address matters relating to the current attempt by Parliament to introduce far-reaching amendments to the Elections Act 2011 and the Political Parties Act 2011, which go to the root of the Constitution and violate various provisions and spirit of the 2010 Constitution.



Of particular concern to CIC is the proposed amendment by Parliament of the two statutes mentioned above in contravention of the established process for the preparation of any legislation intended to implement the Constitution. Article 261(4) requires all legislation intended to implement the Constitution to be prepared by the Attorney General in consultation with CIC before presentation to Parliament for Enactment. Article 10(2) prescribes the national values and principles of democracy and public participation in such a process.

### 3. The Statute Law (Miscellaneous Amendments) Bill 2012:

Statute Law (Miscellaneous Amendments) Bills are essentially intended to consolidate various minor amendments from different Statutes. These relate to the elimination of anomalies, repeal of any obsolete and unnecessary enactments and for general simplification. It is NOT the primary means by which substantive amendments to the law should be effected, particularly amendments that go to the root of the Constitution or otherwise impact on the process of implementation.

The Commission's considered view with regard to substantive amendments to existing statute laws is that proposals for such amendment and resultant amendment Bills should ordinarily result from proposals made by the Executive after following due process as set out in the Constitution.

It is light of this view that CIC expresses concern regarding the legislative process presently applied by the National Assembly to amend various Acts of Parliament that have been enacted since the promulgation of the Constitution of Kenya, 2010 through the Statute Law (Miscellaneous amendments) Bill 2012. The Commission (CIC) has reviewed the Bill and the proposed amendments thereto that have been proposed by Members of Parliament and finds this trend deeply disturbing.

### 4. Substantive Amendments that Impact on the Constitutional Order:

In the case of proposed substantive amendments that impact on the implementation of the Constitution and significantly alter the provisions of any existing Act, such proposals to amend should follow the full mandatory legislative process as outlined in Article 261 of the Constitution. This Article requires the Attorney General to consult with CIC in the preparation of any Bill intended for implementation of the Constitution before its tabling in Parliament. The purpose of CIC's involvement in the preparation of any such Bill is to ensure that its content is in line with the letter and spirit of the Constitution. In addition, the Constitution requires thorough and meaningful consultative process that satisfies the imperatives of public participation required by Article 10 in relation to all legislation and subsequent amendments that impact on the implementation of the Constitution.

The Commission is greatly alarmed by the numerous proposals by the National Assembly to use the Statute Law (Miscellaneous Amendments) Bill to amend crucial provisions of the Elections and Political Parties Acts. Worryingly some of the proposed amendments are clearly not intended for the purpose of reforming the law. Evidently, they are designed to secure the personal interest of currently serving Members of Parliament. This is in direct contravention of Article 116 of the Constitution as a few of the following examples demonstrate.

CIC is particularly concerned by the proposal:

(a) to introduce additional remuneration to Members of Parliament and other Parliamentary officials through the Bill in violation of Article 116(3) (which prohibits legislation designed to confer benefits to sitting members of Parliament) which is an affront to the role of the now operational Salaries and Remuneration Commission and conflicts with Articles 73 and 75 (prohibition of State Officers acting with conflict of interest);

(b) to waive the educational requirements for serving and previous elected officials in contravention of Articles 27 (on non-discrimination), 116(3) and 10 (which prescribes democratic ideals violated in this process);

(c) to allow candidates seeking elective office to stand for one or more elective offices, which conflicts with Article 201 (prudent use of public funds, which multiple candidatures would misuse through consequent wasteful by-elections).

(d) to allow presidential candidates and their running mates to be included in party lists which are intended to give opportunity to apply the principle of affirmative action contemplated by Article 90 of the Constitution in relation to representation of women, the youth, persons with disabilities and marginalized groups and communities. Such an amendment would defeat the intent of Article 90 if such candidates are allowed to take positions reserved for disadvantaged groups and;

(e) other proposed amendments seek to legalize party hopping by current members of Parliament despite clear prohibitions on the same by Article 103 and Section 40 of the previous Constitution under which the MPs were elected.

### 5. The Need for Urgent Intervention:

The process being applied by Parliament to make these substantive amendments violates the constitutional process and the letter and spirit of the Constitution. Accordingly, if Parliament proceeds to pass the amendments as proposed, CIC will be duty bound to seek court intervention on grounds of unconstitutionality, unless His Excellency the President intervenes by declining to assent to such Bills.

In the meantime, CIC has requested the Speaker of the National Assembly to reject any attempt by members to use the Statute Law (Miscellaneous Amendment) Bills to amend the law through an unconstitutional process or to allow the passage of unconstitutional amendments.

We also call on all parliamentarians of good will to exercise their constitutional mandate in such a way as to unreservedly support the established constitutional process and guard against any attempt to water down legislation required to implement the Constitution. More than ever before, we must all remain vigilant and guard against any attempt to subvert the due process and the Constitution.

CHARLES NYACHAE,  
*Chairperson.*

## ANNEX V

### REPORT OF THE COMMITMENTS AT THE PRIME MINISTERS ROUNDTABLE

GOVERNMENT OF KENYA  
OFFICE OF THE PRIME MINISTER  
MATRIX OF COMMITMENTS  
THE SPECIAL PRIME MINISTER'S ROUND TABLE:  
THE STATUS OF IMPLEMENTATION OF THE CONSTITUTION

#### 1. BACKGROUND

The Office of the Prime Minister is charged with the mandate of supervising and coordinating Government. In order to fulfil this mandate and in line with the aspiration of a goal oriented and responsive government trusted by its citizens, the Office has instituted various initiatives to bring the citizen

to the heart of policy making and implementation. A key initiative in this regard is the Prime Minister's Round Table meetings initiative, which was launched on the 5th of August 2008.

These round table meetings were envisioned to be an engagement platform with non-state actors on high level policy reform and implementation issues. The meetings are, therefore, designed to present an opportunity for government to dialogue effectively with representatives of key socio-economic sectors and agree on strategies to facilitate the country's development as well as review government progress on the implementation of key reforms.

Since the initiative was launched, there have been eight round table meetings with the private sector steered by the Rt. Hon. Prime Minister on various thematic areas.

## 2. THE ROUNDTABLE MEEETING

A special roundtable was organised on the status of the implementation of the Constitution by the Office of the Prime Minister with key stakeholders to discuss the status of implementation of the Constitution under the main theme of "Beyond Promulgation – the Road to Full Implementation".

### 2.1 The Objective

The objective of the roundtable meeting was to review the progress made in the Constitution implementation process, lessons learned and to discuss important areas for focus moving forward. The meeting was held on Wednesday, 27th June 2012.

### 2.2 Thematic Areas

The following thematic areas were identified for deliberation during the roundtable meeting:

1. Entrenching Constitutionalism;
2. Elections;
3. Realisation of Socio-Economic Rights;
4. Devolution (Transition from Central Government to National Government); and
5. Devolution (Transition to County Governments).

During the roundtable meeting in-depth discussions were held on each of the above themes. The discussions under each theme sought to address the Achievements made by the key stakeholders since the promulgation of the Constitution; level of Preparedness; Challenges faced in the quest to entrench constitutionalism and the Coordination mechanisms between constitutional implementing partners.

### 2.3 Participants

The roundtable meeting involved a sample of key stakeholders in the implementation of the Constitution i.e. representatives from the following:

1. All Ministries
2. All Independent commissions and constitutional offices
3. Private sector umbrella bodies (including academia and media)
4. The development partner community
5. Civil society organisations

There were more than 40 Public Service institutions and 38 non-state institutions that attended the roundtable meeting.

## 3. COMMITMENTS

The key commitments made on the basis of the roundtable discussions are provided in the matrix below. It was agreed that these commitments would be reported on a quarterly basis and the reports should include initiatives put in place to ensure sustainability of results achieved:

<i>Discussion Table</i>	<i>Issue</i>	<i>Commitment</i>	<i>Actor</i>	<i>Timeline</i>
1) Devolution 1: Transition to County Government	i. Funding of County Governments	• Review CDF Act - to ensure resources go to counties and not to be managed by MPs	Ministry of Planning	December 2012
		• Undertake poverty survey and use findings to inform planning and policy making	Ministry of Planning	July – December 2012
		• Fast track audit of assets and liabilities at the devolved levels	Ministry of Local Government and the Transition Authority	By March 2013
		• Fast track extension of application of IFMIS to the devolved levels	Ministry of Finance	September 2012
	ii. Human resource at the county level	• Develop and begin implementing a comprehensive capacity building programme at the county level	Ministry of State for Public Service; Transition Authority; Kenya School of Government/KIA; and other relevant line ministries	By September 2012
		Staffing • Secondment of staff to the county level • Fast track job evaluation for		On-going

<i>Discussion Table</i>	<i>Issue</i>	<i>Commitment</i>	<i>Actor</i>	<i>Timeline</i>
		county positions	MoSPS Salaries and Remuneration Commission	
		<ul style="list-style-type: none"> <li>Develop and begin implementing a comprehensive programme for mainstreaming national and Public Service values at the devolved levels</li> </ul>	Ministry of Local Government Public Service Commission Ministry of Justice, National Cohesion and Constitutional affairs	March 2013
2) Devolution 2: From Central to National Government	i. Funding Transition Process	<ul style="list-style-type: none"> <li>Allocate funds to the transition process on a reasonable, timely and continuous basis</li> </ul>	Ministry of Finance	Continuous
	ii. Model Legislation	<ul style="list-style-type: none"> <li>To develop ten (10) model laws, covering the functions and competencies assigned to county governments, to act as a framework for consideration by County Assemblies when they come into force.</li> <li>To develop a framework law on Citizen Participation</li> </ul>	Kenya Law Reform Commission Ministry of Local Government Ministry of Justice, National Cohesion and Constitutional affairs	End of March 2013
	iii. Operationalisation of the Transition Authority	<ul style="list-style-type: none"> <li>Swearing in of the Transition Authority</li> <li>The Transition Authority team to meet the Committee of Permanent Secretaries</li> </ul>	Cabinet Office Cabinet Office	4 <sup>th</sup> July 2012 at 9 am By Second Week of July 2012
3) Entrenching Constitutionalism	i. Promoting Constitutional culture	a <ul style="list-style-type: none"> <li>Hold county and national forums on peaceful election by July and August, 2012</li> <li>Facilitation of civic education throughout the country</li> <li>Facilitated the enactment of leadership bill</li> <li>Hold National conference on implementation of constitution in September in liaison with CIC</li> <li>Put in place measures for realizing Policy on National values and principles of governance</li> </ul>	CIC Ministry of Justice, National Cohesion and Constitutional affairs	July 2012 – March 2013
	ii. Anti-corruption and Ethics	Operationalisation of the Anti-corruption & Ethics Commission <ul style="list-style-type: none"> <li>Reconstitution of the commission</li> <li>Vetting protocol within the next 3 months for the Commission</li> <li>Enhance partnership and collaboration with other stakeholders</li> <li>Enhance public education on the role of Ombudsman</li> <li>Establish offices for the commission accessible to the public within and beyond Nairobi in six months</li> <li>Enhance collaboration through annual forums</li> </ul>	Anti-corruption & Ethics Commission  Anti-corruption & Ethics Commission & CoAJ	July 2012 – March 2013
	iii. Participation of non-state actors	<ul style="list-style-type: none"> <li>Input into the vetting tools</li> <li>Promotion of public participation through advocacy</li> <li>Research on devolution</li> <li>Develop public participation policy in liaison with CIC</li> </ul>	The Institute for Social Accountability (TISA)	December 2012
4) Progressive realization of Socio-economic	i. Human Rights Based Approaches	<ul style="list-style-type: none"> <li>To expand human right based approaches</li> </ul>	Commission of Human Rights	On-going

<i>Discussion Table</i>	<i>Issue</i>	<i>Commitment</i>	<i>Actor</i>	<i>Timeline</i>
rights				
ii.	Adopting rights based approach to planning and policy	<ul style="list-style-type: none"> <li>To incorporate Human Resource indicators in the statistical abstract and the Economic Survey</li> <li>To embed HBR into 2<sup>nd</sup> MTP of the Vision 2030 and cascade the same through County plans.</li> </ul>	Ministry Planning Vision Delivery Secretariat Ministry of Justice, National Cohesion and Constitutional affairs	June 2013
iii.	Improved Delivery Service	<ul style="list-style-type: none"> <li>Creation of a One Stop Shop for Housing Services</li> <li>Creation of more housing incentives to attract investment in housing</li> </ul>	Ministry of Housing, Ministry of Planning, Ministry of Finance	?
vi.	Health and sanitation impediments for school girls	<ul style="list-style-type: none"> <li>Commitment to ensuring health issues for girls are addressed e.g. adequate sanitary towels to be provided regularly to girls</li> </ul>	Ministry of Education, Commission on Human Rights  , Ministry of Health	ongoing
5) Elections	i. Preparedness Elections for	<ul style="list-style-type: none"> <li>Enhance police capacity</li> <li>Put in place bio-metric registration of voters, which will eliminate multiple voting</li> <li>Put in place electronic transmission and flow of information from the voting centres to the national level</li> <li>Finalize recruitment and capacity building of investigators</li> <li>Fast track voter education and continue 3 months after the elections</li> </ul> <p>Progress on-going work on:</p> <ul style="list-style-type: none"> <li>Software on party membership in place to detect multiple registration;</li> <li>Regulations on coalitions and mergers;</li> </ul> <p>Progress on-going work on:</p> <ul style="list-style-type: none"> <li>Partnering with Judiciary Training Institute to train staff specifically on election;</li> </ul>	Kenya Police  IEBC  IEBC  IEBC  IEBC & Ministry of Justice, National Cohesion and Constitutional affairs  Registrar of Political Parties  Judiciary & IEBC	February 2013 & ongoing  February 2013      July 2012  August 2012  On-going

## ANNEXI VI

## STATUS OF ENACTMENT OF LEGISLATION DUE FOR ENACTMENT BY AUGUST 2012

## LEGISLATION TO BE ENACTED BY AUGUST 2012 - AS PER THE FIFTH SCHEDULE OF THE CONSTITUTION

BILL	STATUS	X Not Enacted
		Enacted
Legislation on Leadership (Article 80)	Undergoing internal review and Stakeholder consultation	X
Right of Recall (Article 104)	Provided for in the Elections Act, 2012	
Determination of Questions of membership of Parliament (Article 105)	Provided for in the Elections Act, 2012	
Right to Petition Parliament (Article 119) (Proposal for inclusion in the Public Participation Bill)	Bill not yet received at CIC	X
Assumption of Office of the President (Article 141)	Bill submitted to the Attorney General in February but not yet published	X
Judiciary Fund (Article 173)	Provided for in the Judicial Service Act,	



BILL	STATUS	X Not Enacted
		Enacted
	2011	
Financial Control (Article 225)	Legislation included in Public Finance Management Bill, 2012. Awaiting parliamentary debate and approval	X
National Security Organs (Article 239): National Intelligence Service Bill, 2012	Undergoing Internal Review and Stakeholder Consultations	X
National Security Organs (Article 239): National Security Council Bill, 2012	Undergoing Internal Review and Stakeholder Consultations	X
National Security Organs (Article 239): Kenya Defence Forces Bill, 2012	Forwarded to Attorney General for Publication	X
Command of the Police Service (Article 245): National Police Service Act, 2011	Enacted	
Command of the Police Service (Article 245): Independent Police Oversight Authority Act, 2011	Enacted	
Command of the Police Service (Article 245): The National Police Service Commission Act, 2011	Enacted	

Total Number of Bills due by 26<sup>th</sup> August, 2012 Thirteen (13)

Enacted: Six (6)

Pending: Seven (7)

OTHER BILLS NOT IN THE FIFTH SCHEDULE BUT IDENTIFIED FOR ENACTMENT BY 26<sup>TH</sup> AUGUST, 2012

NO.	BILL	STATUS	X Not Enacted
			Enacted
1.	Parliamentary Service Commission	Not yet Received at CIC	X
2.	Public Service Management Bill	Not yet Received at CIC	X
3.	Public Officers Vetting Bill	Not yet Received at CIC	X
4.	The National Government Bill	Not yet Received at CIC	X

OTHER PENDING BILLS

No.	Bill	Status	X Not Enacted
			Enacted
1.	Public Service Commission Bill, 2012	Published. In Parliament	X
2.	Teachers Service Commission Bill, 2012	Published. In Parliament	X
3.	Ratification of Treaties Bill, 2011	Published. In Parliament	X
4.	The County Government Bill	In Parliament	X
5.	The Independent Communications Commission of Kenya Bill	Undergoing Internal Review and Stakeholder Consultations	X
6.	National Coroners Bill	Undergoing Internal Review and Stakeholder Consultations	X
7.	Kenya Law Reform Commission Bill, 2012	Forwarded to Attorney General on 26 <sup>th</sup> March, 2012	X
8.	Controller of Budget Bill, 2012	Undergoing Internal Review and Stakeholder Consultations	X
9.	Public Service Management Bill	Not yet Received at CIC	X
10.	Public Officers Vetting Bill	Not yet Received at CIC	X
11.	The National Government Bill	Not yet Received at CIC	X
12.	Freedom of Information Bill	Undergoing Internal Review and Stakeholder Consultations	X
13.	Data Protection Bill	Undergoing Internal Review and Stakeholder Consultations	X
14.	The Refugee Bill	Undergoing Internal Review and Stakeholder Consultations	X
15.	The Matrimonial Property Bill	Undergoing Internal Review and Stakeholder Consultations	X

No.	Bill	Status	X Not Enacted
			Enacted
16.	Protection Against Domestic Violence Bill	Undergoing Internal Review and Stakeholder Consultations	X
17.	Identification and Registration of Kenya Citizens Bill	Undergoing Internal Review and Stakeholder Consultations	X
18.	The Births and Registration Bill	Undergoing Internal Review and Stakeholder Consultations	X
19.	The Marriage Bill	Undergoing Internal Review and Stakeholder Consultations	X
20.	Health Law	Undergoing Internal Review and Stakeholder Consultations	X
21.	Campaign Financing Bill	Awaiting Bill from the Attorney General	X
22.	Consumer Protection Bill	Undergoing Internal Review and Stakeholder Consultations	X

## ANNEX VII

## LIST OF ALL LEGISLATION ENACTED AFTER THE PROMULGATION OF THE CONSTITUTION

## SCHEDULE OF ALL LEGISLATION ENACTED BY PARLAIMENT

## POST-PROMULGATION OF THE CONSTITUTION OF KENYA 2010

AS AT JUNE 30 2012

NO.	Legislation enacted in 2012	REVIEWED BY THE COMMISSION
1.	Transition to Devolved Government Act, (No 1 of 2012)	YES
2.	Intergovernmental Relations Act, (No 2 of 2012)	YES
3.	Land Registration Act, (No 3 of 2012)	YES
4.	Finance Act, (No 4 of 2012)	NO
5.	National Land Commission Act (No 5 of 2012)	YES
6.	Land Act (No 6 of 2012)	YES
7.	Supplementary Appropriation Act (No 7 of 2012)	NO
8.	Public Service Superannuation Scheme Act (No 8 of 2012)	NO
9.	Kenya School of Government Act (No 9 of 2012)	NO
10.	Kenya Deposit Insurance Act (No 10 of 2012)	NO

	Legislation enacted in 2011	REVIEWED BY THE COMMISSION
1.	Commission on Administrative Justice Act (No 23 of 2011)	YES
2.	Commission on Revenue Allocation Act (No 16 of 2011)	YES
3.	Contingencies Fund and County Emergency Funds Act (No 17 of 2011)	NO
4.	Elections Act (No 24 of 2011)	YES
5.	Engineers Act (No 43 of 2011)	YES
6.	Environment and Land Court Act (No 19 of 2011)	YES
7.	Ethics and Anti-Corruption Commission Act (No 22 of 2011)	YES
8.	Independent Offices Appointment Act (No 8 of 2011)	YES
9.	Independent Electoral and Boundaries Commission Act (No 9 of 2011)	YES
10.	Independent Policing Oversight Authority Act (No 35 of 2011)	YES
11.	Industrial Court Act (No 20 of 2011)	YES
12.	Industrial Training (Amendment) Act, (No 34 of 2011)	NO
13.	Judicial Service Act (No 1 of 2011)	YES
14.	Kenya Citizenship and Immigration Act (No 12 of 2011)	YES
15.	Kenya Citizens and Foreign Nationals Management Service Act (No 31 of 2011)	YES
16.	Kenya National Commission on Human Rights Act (No 14 of 2011)	YES
17.	Limited Liability Partnership Act (No 42 of 2011)	NO
18.	Mutual Legal Assistance Act (No 36 of 2011)	NO
19.	National Construction Authority Act (No 41 of 2011)	NO
20.	National Gender and Equality Commission Act (No 15 of 2011)	YES
21.	National Government Loans Guarantee Act (No 18 of 2011)	NO
22.	National Payment System Act (No 39 of 2011)	NO
23.	National Police Service Commission Act (No 30 of 2011)	YES
24.	Political Parties Act (No 11 of 2011)	YES
25.	Power of Mercy Act (No 21 of 2011)	YES
26.	Price Control (Essential Goods) Act (No 26 of 2011)	NO
27.	Prohibition of Female Genital Mutilation Act, 2011 (No 32 of 2011)	NO
28.	Public Appointments (Parliamentary Approval) Act, 2011 (No 33 of 2011)	NO
29.	Salaries and Remuneration Commission Act (No 10 of 2011)	YES

30.	Supreme Court Act (No 7 of 2011)	YES
31.	Tourism Act (No 28 of 2011)	NO
32.	Unclaimed Financial Assets Act (No 40 of 2011)	YES
33.	Urban Areas and Cities Act (No 13 of 2011)	NO
34.	Vetting of Judges and Magistrates Act (No 2 of 2011)	YES
35.	Veterinary Surgeons and Veterinary Para-Professionals Act (No 29 of 2011)	NO

No.	Legislation enacted in 2010	Reviewed By The Commission
1.	Competition Act (No. 12 of 2010)	NO
2.	Alcoholic Drinks Control Act (No. 4 of 2010)	NO
3.	Animal Technician Act (No. 11 of 2010)	NO
4.	Commission for the Implementation of the Constitution Act (No. 9 of 2010)	NO

## Annex VIII

## 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 the 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

Prof. Peter Wanyande

Prof. Wanyande is the Convener of the Devolved Government Thematic Team.

Dr. Ibrahim M. Ali

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

Dr. Elizabeth Muli

Vice-Chairperson

Dr. Muli is the Convener of the Executive and Security Thematic Team.

Mr. Philemon Mwaisaka, EBS, SS



Mr. Mwaisaka is the Convener of the Public Service and Leadership Thematic Team.  
Imaana Kibaaya Laibuta  
Mr. Laibuta is the Convener of the Judiciary and Constitutional Commissions Thematic Team.  
Ms. Catherine M. Mumma  
Ms. Mumma is the Convener of the Bill of Rights and Citizenship Thematic Team.  
Dr. Florence Omosa  
Dr. Omosa is the Convener of the Representation of the People & the Legislature Team.  
Mr. Kamotho Waiganjo  
Mr. Kamotho Waiganjo is the Convener of the Public Finance Management Thematic Team

MR/2436623