

Commission for the Implementation of the Constitution

Third Quarterly Report July - September 2011

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Foreword

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

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

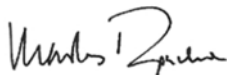
Unfortunately, cases of impunity and misinterpretation of the Constitution reported in the second quarter report have worsened. This quarter witnessed blatant violation of the Constitution through enactment of unconstitutional laws, as well as proposals to change the date of the election through an amendment of the Constitution. CIC notes that it may be necessary to amend the Constitution in some cases, but such amendments need careful consideration and proper justification as well as be based on broad consultations. CIC will however therefore take all necessary measures to ensure that the rights granted to the people of Kenya in the Constitution are not taken away through unjustifiable constitutional amendments that are not made in the interest of the people of Kenya.

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

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

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

I commend the people of Kenya for their continued resolve to uphold, protect and defend the Constitution of Kenya, and I urge them to maintain utmost vigilance regarding the implementation process and to continue to hold accountable, all organs and offices mandated to manage the implementation process.



Charles Nyachae

Chairperson

Executive Summary

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

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

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

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

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

In undertaking its mandate on the legislative agenda, the CIC faced some challenges, which impacted on its effectiveness. The challenges include: late submission of draft bills, and substantive amendment to draft bills after the contents have been mutually agreed upon between the AG, KLRC, and the line Ministries and stakeholders without further reference to the CIC as well as enactment of laws without due regard to the laid down procedures.

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

1 Introduction

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

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

This third quarter report contains six main parts:

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

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

2 About the Commission for the Implementation of the Constitution

The CIC is the focal institution charged with facilitating, monitoring and overseeing the implementation of the new Constitution. Its work is being carried out in the context of a well defined vision, mission and strategic outcome framework and based its mandate as defined in the Constitution of Kenya 2010. This section elaborates on the vision, mission, strategic outcome results and the mandate of the Commission.

2.1 Vision, Mission and Strategic Outcome Results

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

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

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

Strategic Outcome Results:

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

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

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

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

2.2 The Mandate and Role of CIC

The mandate of CIC is to:

- (a) Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution;
- (b) Coordinate with the Attorney-General (AG) and the Kenya Law Reform Commission (KLRC)

in preparing for tabling in Parliament, the legislation required to implement the Constitution;

- (c) Report regularly to the Constitutional Implementation Oversight Committee (CIOC) on:
 - (i) The progress in the implementation of the Constitution; and
 - (ii) Any impediments to the implementation process.
- (d) Work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.
- (e) Monitor the implementation of the system of devolved government effectively.

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

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

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

2.3 Key Processes in Constitutional Implementation

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

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

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

Box 1**Constitutional Values and Principles**

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

3 Key Milestones and Activities Undertaken In Implementation of the Constitution

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

3.1 Key Activities Undertaken in the Third Quarter of 2011

3.1.1 Key meetings with stakeholders and implementing partners

(a) Parliamentary Committees

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

(b) Benchmarking Tour

In July 2011, CIC sent a team comprising of Commissioners and senior technical staff on a benchmarking visit to the Republic of South Africa. The main purpose of the visit was to study the processes and mechanism employed to implement the 1996 Constitution of South Africa. The choice of South Africa as a host nation was informed by the fact that in addition to having a commonwealth background, the Republic of South Africa adopted a new Constitution in 1996 leading to a paradigm shift in governance based on a constitutional democratic governance system. In addition South Africa has successfully implemented a devolved system of government. The delegation, led by Dr. E. Muli, Vice- Chairperson of the Commission held meetings with the following groups and institutions.

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

The first point of contact for the CIC delegation was a meeting with Kenyans leaving in South Africa and Kenya High Commission Staff in South Africa. The meeting, held in Johannesburg on Sunday, 24th July 2011 was highly successful and mutually beneficial to CIC and the Diaspora Kenyans. Firstly, CIC sensitized Diaspora Kenyans on the Constitution, the mandate of



CIC Chairperson and Commissioner Catherine Mumma with Amb. Peter Ogego, Kenya's Ambassador to the US, PS, Ministry of State for National Heritage and Culture, embassy staff and other guests at the residence of Kenya's Ambassador in Washington

the Commission, achievements and milestones in the implementation process and the role of Kenyans at home and abroad. They were advised that they had a unique opportunity to voice their views on the Constitution and the implementation process and, in particular, to express their aspirations and concerns on the Constitution implementation.

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

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

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

(d) Kenya Women Parliamentarians Association

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

(e) Constitutional Commissions

CIC worked with other Constitutional Commissions and bodies charged with appointment of state officers, such as the IEBC Selection Panel, the Judicial Service Commission (JSC), the

Parliamentary Service Commission and the Public Service Commission (PSC) on the need to ensure that all public appointments of public officers comply with Constitutional values and principles including the affirmative action principles. CIC will continue to monitor all public appointments to ensure that these constitutional requirements are implemented.

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

(f) The East African Legislative Assembly (EALA)

Some members of the EALA paid a courtesy call to CIC on the 26th of July 2011. These were: Hon. Gervase Akhaabi, Hon. Catherine Kimura and Hon. Sarah Bonaya. The objective of the meeting was for the EALA representatives to present their recommendations on ways through which the electoral laws of Kenya, particularly those relating to transparency, accountability and offences, could inform the election of members to the EALA. Consequently, the EALA representatives requested for the process of election of Kenyan members to the EALA to be included in the Elections Act, 2011. A resolution was reached that because the Executive arm of the government generates legislation, the matter should be referred to the AG's office and the KLRC to address.

3.1.2 Enactment of legislation

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

Box 2

Procedure for Preparing and Tabling Bills in Parliament

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

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

Stage 1:

A layman's or raw draft Bill emanates from the line Ministry, Government Department or any Institutions mandated with the generation of bills. Under Article 10 of the Constitution, on public participation, the generating institution is required to obtain the views of the public before preparing the policy and Bill. Often, the KLRC and AG work with the line Ministries and State Departments in the generation of these Bills. The drafts are then released to KLRC and

AG's office for technical drafting. The KLRC and the AG's office are the bodies mandated with drafting of Bills. The CIC does not generate Bills. However, in the spirit of the Constitution, CIC may require the Ministry or Department to state the process undertaken in the development of the policy informing the drafting of the Bill.

Stage 2:

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

Stage 3:

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

Stage 4:

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

Stage 5:

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

Stage 6:

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

Stage 7:

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

Stage 8:

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

Stage 9:

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

Based on the above process the third quarter of 2011 witnessed significant legislative work by

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

Table 1

Status on Enactment of Legislation Under the Fifth Schedule to the Constituion and the Agreed Schedule of Bills to Be Enacted By 26th August 2011		
1	The Industrial Court Act, Act 2011	✓
2	The National Police Service Act, 2011	✓
3	The Urban Areas and Cities Act, 2011	✓
4	The Environment and Land Court Act, 2011	✓
5	The National Gender and Equality Commission Act, 2011	✓
6	The Independent Ethics and Anti-Corruption Commission Act, 2011	✓
7	The Elections Act, 2011	✓
8	The Kenya Citizenship and Immigrations Act, 2011	✓
9	The Commission on Revenue Allocation Act, 2011	✓
10	The Power of Mercy Act, 2011	✓
11	The Vetting of Judges and Magistrate Act 2011	✓
12	The Judicial Service Act, 2011	✓
13	The Independent Electoral and Boundaries Commission Act, 2011	✓
14	The Supreme Court Act, 2011	✓
15	The Independent Offices (Appointment) Act 2011	✓
16	The Kenya National Human Rights Commission Act, 2011	✓
17	The Commission on Administrative Justice Act, 2011	✓
18	The Political Parties Act, 2011	✓
19	The Salaries and Remuneration Commission Bill	✓

✓ - Enacted

Laws Enacted Unconstitutionally		
No.		
1	The Contingencies Fund and County Emergency Funds Act, 2011*	X
2	The National Government Loans Guarantee Act, 2011 *	X

X - Unconstitutional provisions

As the table demonstrates there was impressive achievement in this area. Save for Chapter 12 laws which the CIC considers were enacted unconstitutionally as they did not follow the procedure of Article 261(4), all the other priority laws were enacted through the laid down procedures and in time. In this regard, The Commission has prepared an audit report. The audit report highlights the legislative issues of concern in the laws passed and assented to by the President. The report categorizes the issues into those that in CIC's opinion:

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

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

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

Table 2

Bills Before Parliament or Under Review		
Bills		Status of the Bills
1	The Ratification of Treaties Bill, 2011	Before Parliament
2	The National Police Service Commission Bill, 2010	Before Parliament
3	The Independent Policing Oversight Authority Bill, 2010	Before Parliament
4	The Kenya Citizens and Foreign Nationals Management Service Bill, 2010	Before Parliament
5	The National Coroners Service Bill, 2010	Undergoing internal review by CIC
6	The Private Security Industrial Regulation Bill, 2010	Undergoing review internal by CIC
7	Freedom of Information Bill, 2008	Undergoing review internal by CIC
8	Data Protection Bill, 2009	Undergoing review internal by CIC
9	Births and Deaths Registration Bill, 2009	Undergoing review internal by CIC
10	Identification and Registration of Citizens Bill, 2011	Undergoing review internal by CIC
11	Refugee Bill, 2011	Undergoing review internal by CIC
12	Marriage Bill, 2011	Undergoing review internal by CIC
13	Matrimonial Property Bill, 2011	Undergoing review internal by CIC
14	Family Protection Bill, 2011	Undergoing review internal by CIC
15	Public Finance Bill, 2011	Undergoing review internal by CIC
16	Controller of Budget Bill, 2011	Undergoing review internal by CIC
17	National Land Commission Bill, 2011	Undergoing review internal by CIC
18	National Intelligence Service Bill, 2011	Undergoing review internal by CIC

19	National Security Service Bill, 2011	Undergoing review internal by CIC
20	County Government Financial Management Bill, 2011	Undergoing review internal by CIC
21	Transition to Devolved Government Bill, 2011	Undergoing review internal by CIC
22	Intergovernmental Fiscal Relations Bill, 2011	Undergoing review internal by CIC
23	Devolved Government Bill, 2011	Undergoing review internal by CIC

3.2 Institutional Developments at the CIC

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

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

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

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

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



The CIC Chairperson Mr. Charles Nyachae at the National Environment Civil Society Alliance meeting supported by World Wildlife Fund

4 Thematic Area Reports

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

4.1 Public Service and Leadership Thematic Area

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

4.1.1 Achievements

Legislation/policies/administrative procedures

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

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

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

The proposed laws include:

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

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

The Thematic Area made significant effort in ensuring that all the objectives set out for realization in the Third Quarter have been achieved, including finalisation of the laws required Fifth Schedule.

The enactment of the Ethics and Anti-Corruption Commission Act was a major achievement. Another planned activity for the previous quarter was to review the agreed draft of the Public Service Commission bill. An international consultant was hired, with the assistance of GIZ, to review the agreed bill to check on its conformity to Chapter thirteen of the Constitution.

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

4.1.2 Interaction with stakeholders

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

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

4.1.3 Challenges and recommendations on addressing them

In undertaking its activities, the Thematic Area, encountered some challenges. Some of which significantly affected its work on Acts. First, the Thematic Area was caught in a situation where it had to write to the AG to seek confirmation on the veracity of the bills submitted. Second, the slow pace at which the bills were submitted to the Commission significantly hampered the thematic Area's work

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

4.1.4 Activities planned for the next quarter.

(a) Development of Bills/Policies/Administrative procedures

- a) The Thematic Area intends to work closely with the respective line ministries, departments and state organs in the formulation of policies that will inform the development of

the various Bills required to be enacted in accordance with the Fifth Schedule to the Constitution.

- b) The Thematic Area is in the process of engaging at least two consultants to undertake a review of existing administrative measures and procedures to audit their conformity to the letter and spirit of the Constitution. Based on these analyses the Thematic Area will recommend the revision, amendment or even repeal and replacement of obsolete and unconstitutional administrative procedures and laws.
- c) There is likelihood that the development of certain bills will necessitate amendment or repeal of existing laws or formulation of new laws to give full effect to the Constitution.

(b) Interaction with stakeholders

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

4.2 Bill of Rights and Citizenship Thematic Area

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

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

1. Kenya National Commission on Human Rights Bill 2011
2. The Gender and Equality Commission Bill 2011
3. The Commission on Administrative Justice Bill 2011
4. The Citizenship and Immigration Bill 2011
5. The Foreign Nationals Service Management Bill 2011
6. Marriage Bill 2011
7. Matrimonial Property Bill 2011
8. Family Protection Bill 2011
9. Births and Deaths Registration Bill 2011
10. Identification and Registration of Citizens Bill 2011

11. Refugee Bill 2011
12. The Ratification of Treaties Bill 2011
13. Freedom of Information Bill 2008
14. Data Protection Bill 2009

4.2.1 Achievements

Legislation/policies/administrative procedures

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

Kenya National Human Rights and Equality Bills (Article 59)

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

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

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



Commissioner Catherine Mumma with Kenya's Ambassador to the US Amb. Peter Ogego at a CIC Kenya Diaspora event in North Carolina

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

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

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

In the advisory, CIC reiterated its view that:

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

In the advisory, CIC also provided the Parliamentary committees with the different arguments that stakeholders advanced in favour of or against one or more commissions. The advisory also pointed out key issues in some of the Bills, especially in the Kenya National Commission on Human Rights Bill. The issues raised included those that touched on constitutionality and others that were thought to be of value addition. They included the following:

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

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

The Citizenship and Immigration Act 2011 (Article 18)

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

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

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

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

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

Kenya Citizenship and Foreign Nationals Management Service Bill 2011

As highlighted above, CIC reviewed the Kenya Citizenship and Foreign National Management Service Bill 2011 in tandem with the Kenya Citizenship and Immigration Bill 2011. While the Kenya Citizenship and Immigration Bill 2011 was enacted, the Kenya Citizens and Foreign Nationals Management Service Bill 2011 is before the relevant parliamentary committees and is yet to be enacted.

Ratification of Treaties Bill 2011

In the previous quarter, CIC held stakeholder consultations on the Ratification of Treaties Bill. As outlined in the second quarter report, CIC received a copy of the draft Bill on ratification of Treaties from the KLRC and also realized that there was a private members Bill on ratification

of treaties prepared by Hon. Millie Odhiambo. The two versions of bills were consolidated and reviewed at two-stakeholder consultations and a number of technical meetings by committees appointed by stakeholders where the KLRC, AG and CIC participated. The bill was subsequently forwarded to the office of the AG for final technical editing before transmission to the Cabinet for its deliberations.

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

Policy Review

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

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

Administrative Procedures

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

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

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

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

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

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

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

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

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

1. A sector wide approach to planning. Ministries within the sector should work together in the formulation of ministerial policies and plans of action to avoid duplication of efforts, ineffective delivery and utilization of budgetary resources as well as to enhance synergy in the implementation process.
2. Capacity building of the technical personnel on human rights based approach and particularly on socio-economic rights and principle of progressive in the realization.
3. Full appreciation among the Ministries, of their role in the implementation of the provisions in international instruments, which now form part of the laws of Kenya subject to Article 2(6) of the Constitution.
4. Enhanced collaboration between the ministries and the CIC. This it was noted can be achieved through submission by the ministries, of their policies and drafts laws for auditing by CIC.
5. Measures to be put in place that will assist in measuring the progressive realization of the socio-economic rights. This will require each of the sectors to carry out a mapping exercise

to determine the inequalities in the distribution of resources across the country and to effectively and periodically collect and maintain data that will be used to demonstrate the extent to which the rights are being progressively realized.

6. Proper management of resources that can only be guaranteed by proper leadership and effective planning.
7. Ministerial consultants and taskforces to work jointly to ensure that all the issues affecting the sectors are well captured in the policies and laws that emanate from the assignments of the consultant and taskforces.

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

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

Planning

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

CIC, under the thematic area, will also work with stakeholders to develop legislation on equal opportunities that will guide implementers on effective implementation of the principle of affirmative action. This is further to the advisory developed by CIC on the implementing the constitutional principles of affirmative action (**see Summary of Engagement with Stakeholders in Annex VI**).

Donor support/Engagement of consultants

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

4.2.2 Activities planned for the next quarter

The planned activities for the next quarter include:

- i) Finalization of the review of the Freedom of Information Bill 2008 and the Data Protection Bill 2009.
- ii) Finalization of the review of the Births and Deaths Registration 2011; Identification and Registration of Persons 2011; Refugee Bill 2011.
- iii) Finalization of the review of the Marriage Bill 2011; Matrimonial Property Bill 2011; Family Protection Bill 2011.
- iv) Engagement with relevant institutions towards the development of standards on progressive

- realization of socio-economic rights.
- v) High-level stakeholder forum on the human rights-based approach and socio-economic rights.
 - vi) Forums on the development of the Bill on Public Participation and the Bill on Affirmative Action.
 - vii) Audit of the National Policy on Human Rights.
 - viii) Audit of the Kenya Vision 2030.
 - ix) Audit of the National Health Sector Policy and Position Paper.
 - x) Working with two sectors and two marginalized population groups to facilitate their effective application of the affirmative action principle.

4.3 Representation of the People and the Legislature Thematic Area

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

4.3.1 Achievements

Legislation/policies/administrative procedures

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

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

The IEBC Act, 2011 sets out provisions for the appointment and effective operation of the Independent Electoral and Boundaries Commission, which will be responsible for conducting and supervising referenda and elections to any elective body or constitutional office.

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

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

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

The Political Parties Act, 2011

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

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

The Elections Act, 2011

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

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

After Cabinet's approval of the Elections Bill, on 18th August 2011, the AG's office released the Bill to CIC for post-cabinet review. CIC immediately reviewed the Bill and wrote an advisory on the 19th of August 2011 to the AG's office on issues that were unconstitutional. However, it subsequently came to CIC's knowledge that the Bill was published on the 18th of August 2011, i.e. on the same day it was released to CIC for post-cabinet review. The effect of this was that CIC's advisory was not taken into account before the Bill's tabling in Parliament. The Bill was passed by Parliament on 26th August 2011, and subsequently assented to by the President on the 27th of August 2012. CIC has reviewed the Elections Act, 2011 and written an advisory to the AG, through the Audit of Acts Report [**Annex V**], on provisions that are unconstitutional.

4.3.2 Interaction with Stakeholders

(a) Implementing agencies

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

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

(b) Media

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

(c) Parliament

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

4.3.3 Activities for the next quarter

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

1. Development of Bills/Policies/Administrative Procedures.
2. Review legislation pertaining to campaign financing.
3. Working with the implementing agencies, especially the IEBC and the Parliamentary service Commission in the development/review and application of administrative procedures, regulations and other relevant systems for elections.
4. Working with the Devolved Governments Thematic Area in the development/review of administrative procedures and systems required for County Assemblies;
5. Follow-up and audit of policies relating to the laws that were enacted in the last quarter;
6. Application of the Monitoring and Evaluation framework, in which a consultant from GIZ has been contracted.

4.4 Public Finance Thematic Area

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

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



Commissioners Kibaya Laibuta, Kamotho Waiganjo, Philemon Mwaisaka and Prof. Peter Wanyande at a Devolution Workshop in KCB Karen Leadership Centre.

4.4.1 Achievements

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

Legislation/policies/administrative procedures

Public Finance Management Bill 2011

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

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

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

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

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

the Bills were in any event tabled, passed and assented to by the President. The court case is still proceeding.

The Commission on Revenue Allocation Act 2011

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

Controller of Budget Bill 2011

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

4.4.2 Interaction with Stakeholders

(a) Meeting with the Task Force on Devolved Government

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

(b) Engagement of consultants

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

4.4.3 Challenges

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

4.4.4 Activities Projected for the Next Quarter

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

1. Enactment of the PFM Bill. Whilst the Executive has indicated to CIC that it is still seeking

consensus on the draft PFM Bill, CIC shall use the bills received so far from the Executive and any that may be received thereafter as the basis of further review and development of a constitutionally sound legislation. There will be further stakeholder engagement before submission to parliament. It is the Commission's belief that this exercise shall be expedited and concluded within the shortest possible time and at any rate before the end of the 18th month period.

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

4.5 Judiciary and Constitutional Commissions Thematic Area

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

4.5.1 Achievements

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

Legislation /policies/administrative procedures

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

hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

Industrial Court Act, 2011

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

The Thematic Team subsequently organized a stakeholders' consultative forum on 14th July 2011, which was held at CIC offices, Nairobi. The participants included representatives of the office of the AG, KLRC, Ministry of Justice, Ministry of Labour, the Industrial Court of Kenya, Federation of Kenya Employers (FKE), Central Organization of Trade Unions (COTU), the KNCHR, Law Society of Kenya (LSK) and various civil society organizations. The purpose of the forum was to facilitate effective public and stakeholder participation in the development of bills in accordance with Article 10 of the Constitution of Kenya, 2010 and collect views on technical and general issues on the Labour Court of Kenya Bill, 2011.

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

Environment and Land Court Act, 2011

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

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

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

4.5.2 Interaction with stakeholders and Conferences

Commissioner Laibuta was officially invited by the Committee on the UN Convention on the Rights of Persons with Disabilities to participate as a panelist in the discussions and present

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

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

4.5.3 Planned Activities For Next Quarter

The following activities are planned for next quarter:

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

4.6 Land and Environment Thematic Area

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

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



Commissioners Dr. Ibrahim Ali, Dr. Florence Omosa and Catherine Mumma at a Devolution Workshop at KCB Karen Leadership Centre.

4.6.1 Achievements

Legislation/policies/administrative procedures

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

4.6.2 Interaction with stakeholders

(a) Stakeholder forum on the Wildlife Bill

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

(b) Stakeholders Consultation on the National Land Commission Bill

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

from non-state actors that will ensure the objects of the National Land Commission in Article 67 are applied and respected.

(c) Engagement with donors and civil society

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

4.6.3 Planned Activities for the Next Quarter

The following activities are planned for the next quarter.

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

4.7 Executive and Security Thematic Area

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

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

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

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

1. Power of Mercy (Article 132).
2. Legislation on assumption of office of President (Article 141).

3. National security legislation (Article 239).
4. Command of the National Police Service (Article 245).

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

4.7.1 Achievements

Legislation/policies/administrative procedures

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

- i) As indicated in the second quarter report, the planned activities for the third quarter included the review of the Power of Mercy Bill, National Security Council Bill, and National Intelligence Bill. The Thematic Area is pleased to report the successful review of the aforesaid Bills. The Thematic Area further reviewed the Police Reform Implementation Committee programme document to verify its conformity with the letter and spirit of the Constitution. The Power of Mercy Bill was successfully reviewed and submitted to the AG within the stipulated time, despite the delay by the concerned line Ministry in submitting the Bill to the Commission. The Bill was debated and enacted by the National Assembly and subsequently assented to by the President.
- ii) The National Police Service Bill was also finalized in this quarter. Extensive consultations were undertaken to develop a robust law that would ensure reforms in the police service sector. Some of the key aspects of the National Police Service Act are the independence of the Service from the executive, the involvement of the people in policing, devolution of police services, inculcation of human rights, including those of police officers, integration of accountability mechanisms, amongst others.
- iii) The National Police Service Commission Act was also passed by Parliament. The National Police Service Commission Act introduces professionalism and reforms in the National Police Service, including ensuring impartial and independent recruitment, appointments, promotions, and transfers in the police service. The NPSC is also responsible for maintenance of a fair disciplinary system. It will be involved in the recruitment and appointment of the new Inspector-General and Deputy Inspectors-General.
- iv) The Independent Policing Oversight Authority Bill was tabled in Parliament in time and is currently awaiting to be debated when Parliament resumes its sitting.

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

4.7.2 Interaction with stakeholders

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

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

(b) Consultations on power of mercy

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

(c) Donor support/engagement with consultants

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

4.7.3 Challenges and recommendations to address them

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

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

To address these challenges, it is recommended that for the remaining Bills relevant to the Executive and Security sector including the National Intelligence Service Bill, Defence Forces Bill should be availed to CIC by the relevant line ministries in time and as per the agreed timelines. This will give CIC ample time to plan its activities, engage the public and consult with different implementers to avoid a last minute rush when reviewing the Bills. In addition, the Thematic Area also recommends active participation by the different actors by ensuring that the

Bills submitted to the Commission, meet the threshold of consultation under the Constitution. In addition, the constitutional requirement of the involvement of the Commission should be taken on board at the drafting stages and subsequently at other stages of policy making, to avoid unnecessary delays. Finally, efforts should be made to ensure cordial working relations among all the actors in the executive and security sector, to ensure quality and robust bills are drafted, that conform to the letter and spirit of the Constitution.

4.7.4 Activities planned for the next quarter

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

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



CIC Commissioners with Senior Police Officers of the South African Police Service

4.8 Devolved Government Thematic Area

The Thematic Area deals with provisions relating to devolution under Chapter 11 of the Constitution. The Thematic Area is therefore charged with the duty of coordinating and harmonizing constitutional implementation process regarding how the two levels of government will work together for effective implementation of devolution as well as the activities relating to county governments. In light of the implication of resource allocation on the sustenance of devolved governance structure as envisaged in the constitution, legislation on finance and fiscal relation should appropriately cater for the two tiers of government. Given the fact that devolution is new, it is also necessary to ensure that a system of sound foundation even in uncertain and tumultuous time is established and guaranteed. All these must be consistent with the letter and spirit of the Constitution.

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

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

4.8.1 Achievements

Legislation/policies and administrative procedures

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

Devolved Government Bill

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

Inter-governmental Relations Bill

This is a Bill for an Act of Parliament to establish a framework for intergovernmental consultation

and co-operation and to establish mechanisms for dispute resolution and for connected purposes.

Inter-governmental Fiscal Relation Bill

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

County Government Financial Management Bill

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

Transition to Devolved Governments Bills

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

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

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

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

4.8.2 Interaction with stakeholders

CIC held the following consultative meeting with stakeholders:

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

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

(b) Discussion forum with devolution consultant

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

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

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

(c) Consultative meeting with civil society and professional bodies

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

(d) Consultative meeting with implementing agencies

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

4.8.3 Challenges

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

- i) Receipt of different versions of the devolution bills some of which were handed to CIC formally while others were informally sent in.
- ii) Failure by Ministry of Local Government charged with responsibility of generating bills on devolution to work with treasury on the Public Finance Bill, the Fiscal Relation Bill and the County Finance Bill.
- iii) The manner in which the Finance and Fiscal relation Bills that have implication on devolution have been handled by implementing agency, that is, the Cabinet and Parliament, left a lot to be desired. The process followed raised issues of Constitutionality and therefore the quality of the Bills as well.

iv) Passing of the Contingency Fund and County Emergency Fund Bill and the National Government Loan Guarantee Bill was a serious challenge faced by the Thematic Area. The two bills were not been subjected to stakeholder participation and input from Taskforce on Devolved Governance and as a result, the CIC was compelled to commence legal proceedings against the enactment of the bills.

4.8.4 Activities planned for the next quarter

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

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

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

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

5 Engagement With and the Key Activities of Implementing Partners

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

5.1 Parliament

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

5.2 Constitutional Commissions

CIC has established partnerships with Constitutional Commissions and independent offices to ensure that the implementation process is on track and the letter and spirit of the Constitution is respected. In the spirit of transparency and collaboration CIC shares its schedule of meetings with the CRA to ensure synergy in the implementation process. CIC has also continuously worked with other Commissions and independent offices established under Chapter 15 of the Constitution such as the JSC, the Kenya National Commission on Human Rights and Equality Commission and is looking forward to a strong partnership with the new Auditor General and Controller of Budget.

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

5.3 Judiciary

The important role of the Judiciary in upholding constitutionalism and the rule of law cannot be overstated. With this in mind, CIC has played a key role in the re-structuring and re-organisation of the Judiciary. CIC's interventions have ranged from the work related to the enactment of the Judicial Service Act to monitoring the recruitment of the Chief Justice, Deputy Chief Justice and

Supreme Court judges. During the reporting period, CIC Commissioners also paid a courtesy call to the Chief Justice to strengthen working relations between the two institutions and to ensure the implementation process is on track.

In addition, in exercise of its mandate, CIC has on a number of issues relating to interpretation of the Constitution instituted cases and sought the judiciary's guidance. In particular, CIC has instituted court proceedings on two occasions. The Commission is also interested in other cases filed by individuals and institutions. The cases in which CIC is currently an interested party are as follows:

Constitutional Petition No. 65 of 2011

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

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

Constitutional Petition No. 102 of 2011

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

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

In short, at issue is whether the JSC violated the provisions of Article 27 of the Constitution in making recommendation of five judges to the President for appointment as Judges of Supreme court and secondly whether the High Court has jurisdiction to issue orders as sought by the Petitioners without contravening the provisions of Article 168 of the Constitution. It is the contention of the Petitioners that in the process of recommendation for appointment of the five judges, JSC did not meet the mandatory requirement and threshold set by the Constitution. In order to comply with the Constitutional requirements, it is alleged JSC was under a duty to ensure that in the final analysis of its recommendation no gender fell below 33.3% and no gender

exceeded 66.7%. It is contended that in the line of mathematical reality, $1/3$ of 7 is 2.3 and $2/3$ of 7 is 4.7 therefore JSC should have considered that to avoid reducing the numbers below the constitutional minimum and avoid exceeding the constitutional maximum, the 2.3 ought to have been rounded off to 3 and 4.7 ought to have been rounded off to 4 which would have resulted in a Constitutionally compliant ratio. Judgment was issued in the case and although it was not in favour of the Petitioners, FIDA-Kenya filed an appeal contesting the Court decision.

Constitutional Petition No. 145 of 2011

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

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

Constitution Petition No. 137 of 2011

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

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

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

5.4 The Executive

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

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

Accordingly, CIC requested ministries, state agencies and constitutional commission to submit status reports for inclusion in quarterly reports. In the first reporting period of April-June 2011 following the Circular, CIC received reports from more than half the ministries in the executive. Some reports were however received out of time and could not be captured in the Second Quarterly Report. The reports were however analyzed. In this quarter, CIC also requested ministries, state agencies and constitutional commission to submit status of implementation report by 14th September 2011. CIC has only received a total of 23 reports. A list of ministries that did report as at the date of going to press is attached (*see list of ministries that have submitted status of Implementation reports in Annex IV*).

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

Box 3

Section 27 of the CIC Act - Duty to co-operate

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

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

- (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 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.

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

Familiarization with the Constitution

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

Identification and audit of laws, policies and administrative procedures

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

Extent of integration of implementation of the Constitution in performance contracts

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

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

Status of Development of Change Management Strategy

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

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

6 Overview of Key Achievements and Summary of Challenges Encountered in The Constitution Implementation Process

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

6.1 Achievements

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

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

6.2 Challenges

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

- Lack of capacity:** Apparent lack of capacity of originating ministries to prepare draft bills in good time and with soundness of content before submission to CIC.
- Poor drafting of bills:** The growing trend to constitute CIC into a drafting house for a majority number of Bills submitted in raw draft.
- Fatigue:** There seems to be some Constitution fatigue among the public. Their enthusiasm in August 2010 seems to be slowly fading, giving room and space to the cabinet and parliament to start mutilating the Constitution.
- Impunity by the Executive:** The AG forwarded two draft bills to the Cabinet and onward to Parliament for enactment and to the President for Assent without CIC review or input thereby violating the Constitutional process of preparation of Bills.
- Reluctance to implement devolution:** Devolution is emerging as the tool and instrument to tame and slow and, probably, ultimately kill the Constitution. Kenyans now need to seriously monitor devolution if they have to reap the benefits of the Constitution fully.
- Parliament:** Parliament in exercise of their Constitutional mandate introduced amendments, which negated the Constitutionality of bills.

- vii) **Reluctance by some key stakeholders to cooperate with CIC in the development of Bills:** CIC relies heavily on the cooperation implementing partners, state organs, departments and line Ministries to ensure success in the implementation process. Any reluctance on either of the actors, significantly affects the end product. While acknowledging the immense cooperation granted by most of the partners in the process of formulation of the Bills, CIC notes that reluctance to cooperate by some stakeholders, for example, lack of response from various implementing partners to CIC's letters lead to disorganisation of planned timelines and consequently a delay in the finalization of Bills.
- viii) **Late Submission of Bills:** Some draft bills were prepared late in view of the timelines provided in the Fifth Schedule. This compromised CIC's internal arrangement to consult and provide intended in-depth review and consultations with the stakeholders prior to its review.
- ix) **Disagreement among key Stakeholders:** Internal and external differences amongst the key actors in the ministries were a challenge to the process of preparation of bills. The differences between the ministries and departments caused unnecessary delay and consumed the Commission's time in its effort to get the actors agree to a common position, especially where the disagreements were on policy.
- x) **Multiple versions of draft bills:** CIC received more than one version of various bills it reviewed. It was not clear which version of the bills was authentic especially where the versions were coming from the respective departments or Ministries. The lack of a clear mode for submission of the bills caused the CIC to resort to writing to the AG seeking confirmation on the veracity of the bills submitted.
- xi) **Irregular amendment of bills by the executive and ignoring CIOC advisories:** Some Bills, which had been approved by the CIC and the implementing partners (the office of the AG, the KLRC and the line Ministry) at final roundtable meeting and forwarded for publication, were amended without reference to CIC. CIC resorted to issuing Advisories to the AG and National Assembly in a bid to rectify the anomalies created by the amendments. Despite CIC's relentless efforts, some unconstitutional provisions found their way in the enacted laws and some provisions required by the Constitution were omitted from the Acts of Parliament. In cases where CIC has issued advisories these have also been ignored. This trend is disconcerting. Implementing partners, at all levels, need to respect and uphold the letter and spirit of the Constitution, including the process of formulation of Bills in line with Article 249(1) and (4), Article 261(4) and section 5 of the Sixth Schedule to the Constitution.
- xii) **Delay on publication of bills and gazettelement of acts:** Delay in publication of legislations by the Government Printer, in turn caused delays in the implementation process. Delays have also been experienced with respect to publication of acts. For example, despite the IEBC Bill, 2011 being published on the 7th of April 2011, it was only tabled for debate and passed by the National Assembly on the 31st of May 2011. The Bill was assented to by the President over a month later on the 5th of July 2011 and only gazetted almost two weeks later, on the 18th of July 2011. There was further delay in naming the members of the IEBC Selection Panel, who were finally sworn in on the 8th of August 2011. Although the process of appointing the IEBC Commissioners is currently on going, these delays mean that the delimitation of boundaries for the election of members of the national and county assemblies is also delayed.
- xiii) **Staffing levels:** The relevant bodies have not approved CIC's Staff establishment, which is delaying the recruitment process.
- xiv) **Disregard for public participation:** Failure by the Cabinet and the National Assembly to

incorporate into the bills and subsequently the acts, the proposals and recommendations of the CIC to ensure that the legislation is in line with the Constitution resulted in dissatisfaction among the public. Such as in the case of restructuring the KNCHR where after a lot of consultation to bridge divergent view on the number of Commissions it was agreed that Article 59 be restructured into two Commissions.

- xv) **Political interests:** The individual and collective interest of the political class has manifested itself in various ways including the proposed amendment of the election date by the Cabinet for political expediency. Although CIC acknowledges that the Constitution contemplates the possibility of amendment, CIC is also aware that unnecessary amendments made this early would undermine the Constitution. Any amendments to the Constitution must enhance, not claw back on the letter and spirit of the Constitution. CIC is therefore alarmed by the Cabinet decision to propose an amendment to the Constitution to alter the elections date from August to December on the justification to align the Constitution with an administrative process.

7 Recommendations

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

- i) **Observance of Constitutionalism:** Recommendations on legislations from all stakeholders, especially those of a constitutional nature, should be taken on board by the executive and Parliament.
- ii) **Eliminating unnecessary delays:** As far as possible, delays in the implementation process, including formation of various commissions and appointments to various public offices, should be avoided to ensure the implementation process remains on track.
- iii) **Adherence to agreed timelines:** All the implementers should adhere to the agreed upon timelines to ensure that every implementer has an opportunity to give input on various proposed laws. In this regard, CIC recommends that for the remaining police bills, the relevant line ministries should avail to CIC the drafts bills in time and per the agreed timelines, which will give CIC ample time to plan workshops, engage the public, consult with different implementers to avoid last minute rush when preparing bills.
- iv) **Public participation:** It is important that in line with the letter and the spirit of the Constitution the concerned department or ministry undertake sufficient consultation and stakeholder involvement pre, during and post formulation stages of bills. It is critical to facilitate active participation by the different actors to ensure that the bills submitted to CIC meet the threshold of consultation required under the Constitution. In addition, the constitutional and administrative views of the CIC should be taken on board at the drafting stages and subsequently at other stages of policy making, to avoid unnecessary delays.
- v) **Developing policies before legislation:** Line ministries, departments or the state organs concerned, should take the crucial step of developing a policy that would inform the formulation of every bill. This will help the ministry, department or state organ to think through the legal problem, understand the needs analysis and propose the necessary amendment to existing legal and administrative measure
- vi) **Consultation among implementing agencies:** CIC would like to encourage agencies responsible for generation of bills to consult each other during the development of the bills especially where the bills are interrelated.
- vii) **Guarding the sovereign power of the people of Kenya:** All implementing agencies and stakeholders, including members of the National Assembly, should work harmoniously, governed by the principle of guarding the sovereign power of the people of Kenya, which is exercised through the Constitution.
- viii) **Duty to cooperate:** Implementing agencies are advised to take cognizance of the provisions of Section 27 of the CIC Act. They are required at all times co-operate with the CIC in the ensuring the successful implementation of the Constitution. This means that they must respond to any inquiry made by the CIC; furnish CIC with periodic reports as to the status of implementation of the Constitution; and provide any other information that the CIC may require in the performance of its functions.

Annexes

Annex I

The Role of Government Institutions and Commission for the Implementation of the Constitution (CIC) In The Process of Implementing the Constitution of Kenya

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

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

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

The functions of CIC are to: -

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

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

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

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

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

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

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

Process

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

- 1) Each of the Institutions listed above should familiarize itself with the entire Constitution and its implications and ensure that:-
 - a) In the course of performing its duties the constitution is not violated;
 - b) In performing its duties all new and existing policies, laws and administrative procedures that are being applied are consistent with the letter and spirit of the constitution; and
 - c) Implementation of the Constitution is integrated in performance contracts. In this regard, implementing institutions should provide for implementation in its goals, set targets for measuring performance and provide incentives for achieving these targets. The performance contract should incorporate an evaluation model that shall provide feedback on performance and best practice in the implementation process.
- 2) The aforementioned familiarization with the Constitution will enable the institutions to undertake a comprehensive audit of all existing Sessional papers; laws, by-laws and regulations; policies; administrative procedures; government guidelines and circulars relating to its functions and to the sector in which the Institution operates.
- 3) The intention of the audit is to determine the compliance of such sessional papers; laws, by-laws and regulations; policies; government guidelines; circulars and administrative procedures with the letter and spirit of the Constitution.
- 4) Upon audit of all such existing sessional papers; laws, by- laws and regulations; policies; government guidelines; circulars and administrative procedures, any language that is inconsistent with the Constitution be identified and a plan for its review developed and the necessary review subsequently undertaken.
- 5) Each Institution, in consultation with the Attorney General (AG) should also identify any new laws that are required for the implementation of the Constitution. The legislation in question will include but not be limited to those listed in the Fifth Schedule of the constitution. In undertaking this activity the Institutions are also free to consult CIC.
- 6) Each Institution should identify any new administrative procedures that may be required to implement the constitution.
- 7) Each Ministry should, within the shortest time possible after issuance of this circular, submit its comprehensive plan for the development and review of Sessional papers; laws, by-laws

and regulations; policies and administrative procedures required to implement the constitution to the following:

- a) The Commission for the Implementation of the Constitution;
 - b) The Ministry of Justice, Constitutional Affairs and National Cohesion being the Ministry coordinating the implementation of the constitution within Government;
 - c) The Attorney General, and
 - d) The Kenya Law Reform Commission,
 - i) The plans submitted by Ministries should indicate:
 - The sessional papers; laws, by-laws and regulations to be reviewed;
 - The policies and administrative procedures to be developed or reviewed; and
 - Nature of the reviews to be undertaken.
 - ii. The steps in reviewing the by-laws, laws, sessional papers, policies and administrative procedures already taken and the expected timeframes for outstanding activities,
- 8) In reviewing existing policies, administrative procedures and legislation, and determining the necessity of new laws, institutional policies, administrative procedures and legislation, each Ministry or other institutions participating in such processes should in particular take into account the following:-
- a) The existence of any international treaty ratified by Kenya relating to any matter concerning the sector and which has not been domesticated
 - b) The provisions relating to the Bill of Rights in the Constitution and in particular the need to incorporate the requirement for progressive implementation of the socio-economic rights under Article 43 of the Constitution in appropriate legislation
 - c) The values and principles articulated in Article 10, Chapter 6 (Leadership and integrity) and Chapter 13 Part I (values and principles of public service) of the Constitution including:-
 - i. Participation of the people;
 - ii. Equity, inclusiveness, human rights, social justice, equality, non-discrimination and protection of the marginalized;
 - iii. The principle of gender equity and regional balance in the consideration of opportunities;
 - iv. Sharing and devolution of power;
 - v. Good governance, integrity, transparency and accountability
 - vi. Sustainable development;
 - vii. The principles on leadership and integrity in Chapter 6 of the Constitution;
 - viii. The principles of fairness, prudence, clarity and the need for fiscal responsibility in the management of public resources in Chapter 12 of the constitution; and
 - ix. Any other principle within the Constitution.
- 9) In determining new policy and administrative procedures, and generating new legislation, every Ministry and every Institution involved in implementing the Constitution should ensure that the process leading to the determination of policy and generation of legislation and administrative procedures is undertaken in a participatory and transparent manner. In this respect, the public and in particular sectoral stakeholders including members of Civil Society Organisations and Community Based Organisations should be given reasonable opportunity to **effectively** participate in the process taking into account all relevant factors, including the nature of the policy, administrative procedures and legislation, its implications and the applicable time constraints.

Public participation includes any or all of the following:-

- i. Structured process of gathering views of the public during policy formulation or Bill preparation;
 - ii. Stakeholder input via workshops, seminars or other fora;
 - iii. Dissemination of draft Bill to the public for discussion through various media outlets;
 - iv. Focused media debate on policy or draft Bill;
 - v. Credible process of considering public views; and
 - vi. Validation workshops.
- 10) In determining whether any draft legislation forwarded to CIC for review is consistent with the letter and spirit of the constitution, CIC will take the following criteria into account:-
- a) The extent to which the public participated effectively in generating the policy or legislation;
 - b) The consistency of any sessional papers; laws, by-laws and regulations; policies and administrative procedures within the letter and spirit of the constitution;
 - c) The adequacy and sufficiency of the sessional papers; laws, by-laws and regulations; policies and administrative procedures in enabling implementation of the constitution; and
 - d) The impact of the sessional papers; laws, by-laws and regulations; policies and administrative procedures on other laws, institutions and the two levels of government i.e. national and county governments.

Change Management

CIC recommends:-

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

Mode of Collaboration and Working With the CIC

- 15) Each implementing institution should establish an implementation unit that shall oversee the implementation of the work plan and report on the progress and impediments to implementation of the Constitution. The implementation unit shall work with CIC in ensuring that progress is on track.

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

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

Copy to:-

The Rt. Hon. Prime Minister

H.E. the Vice-President and Minister for Home Affairs

The Hon. Deputy Prime Minister and Minister for Finance

The Hon. Deputy Prime Minister and Minister for Local Government

All Hon. Ministers

All Hon. Assistant Ministers

Annex II

Advisory on Implementing the Constitutional Principles on Affirmative Action

Background

The Commission for the Implementation of the Constitution's (CIC) attention has been drawn to the ongoing debate on the principle of affirmative action in respect of gender representation in elective and appointive bodies as prescribed in **Article 81(b)** of the Constitution. The implementation of this principle in respect of the National Assembly, poses a challenge in light of the provisions of Article 97 of the Constitution. **Article 81 (b)** of the Constitution provides that —

“ the electoral system shall comply with the following principles —
(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;”

Article 81 reiterates and reinforces the principle of affirmative action as prescribed in **Article 27(8)** of the Constitution, which provides:

“In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement **the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**”

The two thirds gender ratio is also a requirement at the county level and is adequately provided for in the constitution. **Article 175(c)** states that County governments established under this Constitution shall reflect the principle that **“no more than two-thirds of the members of representative bodies in each county government shall be of the same gender”**. According to **Article 177(1)**, a county assembly consists of, among other members,

- (b) **“the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender**
- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;”

Article 197 (1) also reiterates this principle and states that **“Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender”**.

There are many other provisions in the Constitution that address the principle of affirmative action. Nevertheless, Article 97 of the Constitution does not provide for the methodology to be used to ensure implementation of Article 81 (b) in the event that results of an election for the National Assembly does not achieve the required constitutional gender ratio prescribed by Article 81(b). Unfortunately, none of the State organs charged with the responsibility of implementing the Constitution has a practical solution to this difficulty. Consequently, the Elections Bill cannot

be finalized to give effect to the contingency likely to be faced in light of Article 81(b) of the Constitution.

CIC has considered differing interpretations to the effect that —

- (a) the two-thirds principle expressed in **Article 81(b)** is progressive and does not require immediate realisation;
- (b) the principles of affirmative action and the two-thirds gender ratio demand realisation in the forthcoming elections as well as in all future elections to the National Assembly.

CIC is of the view that —

- (1) The principles of affirmative action and gender ratio prescribed in Articles 27(8) and 81(b) of the Constitution are not progressive. They demand immediate realization if the letter and spirit of the Constitution are to be respected.
- (2) The use of the word “progressive” in the Constitution is specific to those provisions to which the principle of progressive realization applies.
- (3) The Elections Bill cannot be finalized without providing an effective mechanism for the implementation of Article 81(b) of the Constitution, which clearly requires that electoral system provides a mechanism for achieving the two-thirds gender ratio.

CIC and other stakeholders have explored various options, but none would effectively address the requirements of Articles 27(8) and 81(b) of the Constitution. Consequently, CIC is of the opinion that the most prudent option would be to import the provisions of Article 177(1) (b) of the Constitution to the provisions of Article 97 of the Constitution (with necessary modifications). The effect of the proposed amendment would be that, if the required gender ratio is not achieved through the elections, political parties would be required to nominate additional Members of Parliament to meet the gender requirement in the Constitution.

Whereas it is proposed to amend Article 97 of the Constitution, it is imperative that the proposed amendment only serves the purpose of realizing the provisions of Article 81(b) of the Constitution. The proposed amendment would greatly benefit from the constitutional formula provided for the composition of County Assembly in Article 177(1) (b). Importing the provisions of Article 177(1) (b) into Article 97 would also require amendment of Article 90 (1) to include the new provision in Article 97.

If amended, Article 97 would now read as follows:

Membership of the National Assembly

“97(1) The National Assembly consists of—

- (a) two hundred and ninety members elected by the registered voters of single member constituencies;
 - (b) forty-seven women each elected by the registered voters of the counties, each county constituting a single member constituency;
 - (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and
 - (d) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the Assembly are of the same gender;
 - (e) The Speaker, who is an *ex officio* member.
- (2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a)”

In addition to the foregoing, **Article 90(1)** would require amendment to provide that any extra seats arising out of the application of **Article 97(1) (d)** would be on the basis of party lists.

Advantages of the Proposed Amendments

- (i) The proposed amendment does not require a referendum. It can be carried out in Parliament in accordance with Article 256 of the Constitution.
- (ii) The amendment would save the country from repeat election in the event that the gender ratio prescribed in Article 81(b) of the Constitution in relation to the National Assembly is not realised.
- (iii) The amendment will prevent the possibility of a constitutional challenge on the composition of the National Assembly where the mandatory provisions of Article 81(b) of the Constitution are not met.
- (iv) The clause brings uniformity in addressing the gender quotas in the elective offices at National and County Assemblies.

Anticipated Challenges

The proposed amendment only one year after promulgation of the Constitution raises fears that this might open the floodgates of amendment, which would undermine the sanctity of the Constitution. Whereas this fear is legitimate, the proposed amendment, nonetheless, necessary to facilitate the effective realization of the gender ratio stipulated in Article 81(b).

Conclusion

CIC wishes to underscore the following —

- (a) the provision introduced by the amendment will only be invoked if the elections fail to raise the number of men and women to meet the recommended constitutional gender ratio prescribed in Article 81(b) of the Constitution.
- (b) failure to constitute a National Assembly that meets the prescription of Article 81(b) of the Constitution;
- (c) in turn, failure to constitute a legally elected National Assembly means that the Assembly (as elected) would have no power to effect any constitutional amendments (or pass any legislation) to cure the anomaly; and
- (d) consequently, this would present Kenya with a crisis of such magnitude as cannot be wished away.

CIC would like to bring to the attention of Cabinet and Parliament the fact that the full implementation of the Constitution requires the full application of the values and principles of the Constitution, and that this is the only way that we can achieve constitutionalism as envisaged in Article 249 of the Constitution.

At the core of democratic governance, is the principle of equality and inclusion where affirmative action lies. This principle is part of what will ensure social justice. Indeed, the inclusion of the principle of affirmative action in the Constitution takes into account the fact that this country has historically made it difficult for women and other minority groups to be elected.

It's our opinion that any action taken to address the two-thirds principle should be designed to only reinforce implementation. Otherwise, any action purporting to claw back on this principle is outrightly unconstitutional.

Annex III

Press Release: Proposed Amendments On Elections Date

CIC wishes to join other Kenyans in condoling with the families and relatives who lost their loved ones at the Sinai fire tragedy. CIC regrets the unfortunate loss of life and property that has now become a regular part of the Kenyan experience. CIC calls on the Government to fulfill its responsibility of ensuring that the rights of citizens to decent housing and sanitation as provided for in Article 43 of the Constitution is realized.

However, while it is the responsibility of government to ensure that the conditions under which the Sinai disaster occurred are eliminated, CIC calls on Kenyans to also exercise individual and collective responsibility to avoid situations which put their lives at avoidable risk. CIC also appeals to the country's leadership to avoid putting political expediency before the interests and rights of the people of Kenya.

It is such political expediency manifested in the proposed amendment of the election date by the Cabinet which CIC wishes to address. CIC is alarmed by the Cabinet decision to propose an amendment to the Constitution to alter the elections date from August to December.

Although CIC acknowledges that the Constitution contemplates the possibility of amendment, CIC is also aware that unnecessary amendments made this early would undermine the Constitution. Any amendments to the Constitution must enhance, not claw back on the letter and spirit of the Constitution. It is on this basis that CIC would consider supporting an amendment aimed at ensuring the application of the gender equity principle. Even then CIC's desire would be to achieve the gender requirement without a constitutional amendment. Indeed CIC is gratified that the newly appointed Attorney General has publicly expressed his displeasure with piece meal amendments, and looks forward to receiving proposals of other means of achieving gender equity from the Attorney General.

CIC's concern about the proposed amendment of the election date is informed by several facts. First, the issue of an August election date has never been contentious. The date was determined after consideration of the wishes of the people of Kenya which included submissions that a December date interfered with the festive season when Kenyans travel to places where they may not have registered to vote: coincides with religious festivities and the prevailing weather conditions complicate the logistics of ferrying election materials. These reasons remain valid.

Kenyans voted overwhelmingly for an August date while aware of the challenges of preparing for the elections in August 2012. Indeed, it is on this basis that the legislation relating to the IEBC and the elections was scheduled to be completed within the first year to ensure compliance with an August date.

CIC is alarmed by the purported justification to amend the constitution on the basis of the budget cycle. If the budget cycle does not fit into the constitutional framework, what requires alignment

with the constitution is the budget cycle, not the Constitution. The people of Kenya should know that if they accept that the constitution be amended to fit into what are essentially administrative issues, there is likely to be no end to the changes that will need to be made to the constitution to fit into administrative processes.

The contention that the review of boundaries cannot be completed in time for the elections cannot not be a basis for the constitutional amendment. The Cabinet in their capacity as members of Parliament gave IEBC through the IEBC Act, a maximum of four months to delimit boundaries and must be stopped from claiming that the period is inadequate.

The proposed amendments will have implications for the implementation of the Constitution including devolution. The wish of Kenyans to participate in their own governance through the devolved system of government shall, by this proposal, be delayed in violation of the Constitution.

Equally worrying is the fact that the proposed amendment will lead to uncertainty in the electoral process. The Constitution requires a minimum of 90 days before passage of a constitutional amendment Bill by Parliament. Further, since the bill relates to devolution, the constitution requires that the Bill must be with CIC for at least 30 days before tabling in Parliament. Consequently for the next 4 months, the country will remain uncertain as to the election date and all consequential matters. This uncertainty is unacceptable.

CIC wishes to remind Kenyans that what killed reform in this country were “convenience” amendments of the constitution soon after independence. Kenyans must be vigilant to ensure that we do not replay the 1963 scenario again where due to numerous piece meal amendments, the constitution became a pale shadow of its original self. It is such amendments that Kenyans wanted the Constitution to be insulated against.

If Kenyans accept amendments such as the one on the election date proposed by the Cabinet whose effect is clearly to claw back and undermine the constitution, the Nation will have started on a slippery slope which could well sign the death knell of the new Constitutional dispensation. All progressive members of parliament and the people of Kenya must say NO, to the proposed amendment to the election date or forever remain liable to future generations for starting the mutilation of the Constitution-just as was done to the 1963 Constitution, thereby killing the reform dream.

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Annex IV

Report on Audit of Acts

The Commission for the Implementation of the Constitution is mandated to (i) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution and (ii) Co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement this Constitution; and in so doing, follows procedures to ensure that bills that are passed are Constitutional. The audit report contained in this annex highlights the Constitutional issues in the laws passed and assented to by the President during this period. The report highlights the integrity issues, which in CIC's opinion are in conflict with the letter and spirit of the Constitution.

Kenya National Commission On Human Rights Act 2011			
Section	Provision in the Act	CIC Proposal	Justification
8 (c)	The Functions of the Commission shall be to- “(c) monitor, investigate and report on the observance of human rights in all spheres of life in the Republic	Amend by inserting the following words at the end of the sub-section: “including observance by the national security organs”	As currently drafted, the section has limited the Constitutional powers of the Commission as provided by Article 59(2) d of the Constitution and may be seen as limiting the Commission's mandate with respect to security organs
8	The Act as it currently is, has omitted to provide for the responsibility of KNCHR with regards to participation in the development of Standards on progressive realization of socio-economic rights. This mandate is however vested in the National Commission on Gender and Equality.	Amend the section to include clause 8(l) that provides KNCHR with the mandate to: “work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the constitution and other written laws.”	The KNCHR is mandated to monitor implementation of the UN Convention on Economic, Social and Cultural Rights. By including this provision in the National Commission on Gender and Equality and not in the Kenya National Commission on Human Rights, it purports that KNCHR does not have the mandate. In addition, although the mandate of setting standards to achieve progressive realization of Socio-Economic Rights is vested in the Executive, the KNCHR is further mandated to monitor the implementation of socio-economic rights.

30	"The Commission shall not investigate (b) a criminal offence;"	Amend the Act by deleting section 30 (b) which provides that the Commission shall not investigate "(b) a criminal offence"	The mandate of Article 59 commissions includes investigation of human rights violations whether of a criminal or civil nature. For instance the Commission has jurisdiction to monitor implementation of the UN Covenant on Civil and Political Rights (ICCPR) which includes matters of a criminal nature and the UN Convention against Torture and Other Cruel Inhuman Degrading Treatment (CAT), whose entire jurisdiction is about criminal offences. Limitation provided in (b) purports to limit the commission's investigation mandate of such matters which is unconstitutional
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Kenya Citizenship and Immigration Act 2011

Section	Provision in the Act	CIC Proposal	Justification
7	"A person born outside Kenya shall be a citizen by birth if on the date of birth, that person's mother or father was or is a citizen <u>by birth.</u> "	Amend by either deleting the entire Section 7 Or and preferably reverting to the earlier provision as was agreed during the roundtable which was: <i>"A person born outside Kenya shall be a citizenship by birth if on the date of the birth that person's parent, grandparent or great grandparent was or is a citizen."</i>	As it currently reads, section 7 merely reiterates the provision of section 6. In any case, if Section 7 purports to provide for such limitation, it would still be unconstitutional for limiting the rights of persons born out of Kenya as it restricts their parents' status to that of citizens by birth (as italicized and underlined) contrary to the provisions of the constitution. The clause agreed upon during the roundtable was intended to give effect to Article 14(3) of the Constitution on limitation to descent. It provides a reasonable limitation that extends to the great grandparents which is reasonable and comparable to other jurisdictions.

Commission On Revenue Allocation Act 2011

Section	Provision in the Act	CIC Proposal	Justification
2	Definition of revenue: "Revenue" means all taxes imposed by the national government under Article 209 of the Constitution and any other revenue (including investment income) that may be authorized by an Act of Parliament, but excludes revenues referred to under Articles 209(4) and 206(1)(a) (b) of the Constitution	The definition of the phrase "revenue" be amended by deleting the word "means" and substituting there for with the word "include"	The definition of revenue is a fundamental issue and forms the backbone of Chapter 11 and 12 of the Constitution in the Context of Devolution and Revenue sharing. The survival of the county governments shall for the most part be hinged on revenue received from the nationally raised revenue hence the need to apply a liberal meaning to revenue.
5(2)	The chairperson and members of the Commission shall, pursuant to Article 250(5) of the Constitution, serve on a part-time basis.	CIC proposes that the subsection be deleted and substituted for. "Any of the members of the Commission may serve on a part time basis"	To avoid any conflict with Article 250(5) of the Constitution , it is imperative that the Act does not limit the discretion already guaranteed by the Constitution.
5(3)	The chairperson and members of the Commission shall be non-executive and shall perform their functions in accordance with Article 216 of the Constitution	CIC proposes that the subsection be deleted.	The concept of non-executive membership can undermine the spirit of the Constitution as envisaged under Chapter 15 and may incapacitate the Commission's ability to carry out its mandate.
6(1)(3)	(1) A person shall be qualified for appointment as the chairperson or a member if the person— (a) holds a degree from a university or an equivalent professional qualification recognized in Kenya;	The words "an equivalent professional qualification" should be done away with from the statute.	The imprecision in the term equivalent can be abused as it lacks necessary certainty. It is also not consistent with qualifications of members of other commissions
27	For the avoidance of doubt and notwithstanding any other provision of this Act, the provisions of this Act shall apply without prejudice to the appointment and terms and conditions of service of the chairperson and members of the Commission in office at the commencement of this Act.	It is important that this section be recast to read as follows; "For the avoidance of doubt, the appointment and terms and conditions of service of the chairperson and members of the Commission, shall continue to apply without prejudice of this Act."	A plain reading of this section shows ambiguity hence the need to reword the same.

The Independent Offices (Appointment) Act 2011

Section	Provision in the Act	CIC Proposal	Justification
4 (1)(e)	A person shall be qualified for appointment as Auditor General or the Controller of the Budget if such persons (among other things) . . . is a member in good standing of a professional body for accountants recognized by law”	The requirements in Section should be deleted	The Act, through this section, expands the qualification of the Auditor General and the Controller of Budget which have no constitutional backing. The requirement that the nominees be members of good standing of the professional bodies is ambiguous and gives these bodies the discretion of determining the qualification of who would be appointed members to constitutional offices.

The Elections Act, 2011

Section	Provision in the Act	CIC Proposal	Justification
1	This Act may be cited as the Elections Act, 2011 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint	Delete the words “shall come into operation on such date as the Minister may, by notice in the Gazette, appoint” so that it reads: “This Act may be cited as the Elections Act, 2011 and shall come into operation on gazzettment”	Section 9 of the Interpretation and General Provisions Act (Cap 2) provides that an Act shall come into operation either on the day on which it is published in the Gazette or on a day or time specified in the Act. Therefore, the date of enactment of this Act should not be subject to ministerial direction.
2	“nomination” means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act	Amend to read: ““nomination” means the nomination by a political party and the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;”	The word nomination is used in three different ways in the Constitution and in the Act. The definition in the preliminary should not reduce it into only one of the three meanings. As such, the definition should show clarity in three different types of nominations as follows: (a) nomination of a candidate by a political party to vie for elective seats (b) nomination of candidates into a party list as provided for in Article 90 (c) Presentation of papers to the Commission from the nominations under (a) & (b) above.

2	<p>“party list” means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 29, 34, 35, 36 and 37;</p>	<p>Amend to read: “party list” means a party list of candidates nominated by a political party through an election conducted and supervised by the Commission and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 29, 34, 35, 36 and 37</p>	<p>Article 90 does not ask a political party to prepare a party list. They are required to nominate and the nominations shall be conducted and supervised by the Commission</p>
(5) (1) (a)	<p>(5) (1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except— (a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the ninety day period immediately before the election and the date of such election;</p>	<p>Insert the words, ‘thirty day’ in order to capture the election under Article 138 (5), so that it reads: “(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except— (a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the ninety day or thirty day period immediately before the election and the date of such election;”</p>	<p>The provision as it currently stands is not practicable given that the election under article 138 (5) is within 30 days</p>
13(2)	<p>A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission: Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable its candidate before the date of presentation of nomination papers to the Commission.</p>	<p>A) Delete the words “or of the violation of the electoral code of conduct by the nominated candidate” ; B) Also amend to read: “A political party shall not change the candidate nominated: 2) Provided that in the event of the death, resignation or incapacity of the nominated candidate, (a) before the date of presentation of nomination papers to the Commission, the political party may after notifying the candidate that the party seeks to substitute where applicable, nominate an alternative candidate</p>	<p>The provision contradicts and makes some penalties ineffective – specifically, the punishment for violation of elections code of conduct and Articles 81, 84 and 91, 1) The provision contradicts itself in that it gives provisions for both before and after the submission of papers to the Commission. The provision should only allow for substitution of candidates before the submission of papers to the Commission; 2)The provision makes some penalties ineffective, specifically: (i) the punishment for violation of elections code of conduct (see 15, 18, 57, 68, 72 and 110 of this Act) (ii)consequences of deregistration under the Political Parties Act (</p>

		<p>subject to the Constitution, regulations set out by the Commission and the party rules;</p> <p>(b) after the nomination by the political party of the person has been received by the Commission, the political party may after notifying the candidate that the party seeks to substitute where applicable, nominate an alternative candidate, subject to the Constitution, regulations set out by the Commission and the party rules”</p> <p>C) Add a new subsection 3 to read: “Subject to Article 138 (8) of the Constitution, sub-section (2) (b) shall not apply to the nomination of a presidential candidate.”</p>	<p>Sections 8, 21, 30 & 45)</p> <p>(iii) Articles 81, 84, 91 and 138 of the Constitution.</p> <p>(iv) Article 138 (8) (b) specifies that in the event of death of a presidential or deputy presidential candidate, an election shall be cancelled and a new election held.</p>
13 (3)	<p>Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall not be more than twenty-one days after the date of publication of such notice.</p>	<p>1)Substitute ‘county election’ for governor & county assembly elections;</p> <p>2)Redraft to capture the three levels of nomination at the party level, to the commission and for party lists;</p> <p>3)Delete the word ‘or’ between the words ‘constitution’ and ‘rules’ and substitute with the word ‘and’;</p> <p>So that the sub-section should now read: “Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall (a) nominate and submit to the Commission the names of candidates to contest in a presidential, parliamentary or county governor or county assembly election;</p>	<p>1) The constitution does not recognize the term ‘county election’</p> <p>2) The process relating to political parties nomination is not well articulated. The role of the Commission as stipulated in Article 88 (4) of the Constitution is not defined in the Act.</p> <p>3) The provisions of the Constitution are not optional. As it reads, the word ‘or’ may be interpreted to mean either the Constitution or the rules of the political party can be followed, while in fact, the rules of the political party must conform with the Constitution.</p>

		(b) nominate candidates into party lists in accordance with Article 90 of the Constitution and submit to the Commission the names of the nominated candidates; in accordance with its constitution and rules, which shall not be more than twenty-one days after the date of publication of such notice.”	
14 (2) (a)	The notice referred to in subsection (1) shall be in the prescribed form and shall specify— the nomination day for the presidential election;	Capture the two levels of nomination required for a presidential candidate, i.e. nomination through elections at the party level and the submission of papers to the Commission, so that it reads: “The notice referred to in subsection (1) shall be in the prescribed form and shall specify— the days for nomination and submission to the Commission the names of candidates for the presidential election;”	Given that there are two levels of nominations used within Constitution (Articles 82, 88) in reference to a presidential nominee, it is unclear which nomination is being referred to. The proposed change would provide clarity.
15 (1)	Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate, before the date of presentation of nomination papers to the Commission.	1) Delete the words “or of the violation of the electoral code of conduct by the nominated candidate” ; 2) Amend the subsection to capture the events to occur before and after presentation of papers to the commission as follows: “(a) A presidential candidate or a political party shall not at any time change the person nominated as a deputy presidential candidate after the nomination of that person has been received by the Commission. (b) In the event of death, resignation or incapacity of the nominated candidate before the date of presentation of nomination papers to the	The provision contradicts and makes some penalties ineffective – specifically, the punishment for violation of elections code of conduct and Articles 81, 84, 91. Article 138 (8) (b) specifies that in the event of death of a presidential or deputy presidential candidate, an election shall be cancelled and a new election held.

		Commission, the presidential candidate or political party may after notifying the candidate that the party seeks to substitute where applicable, substitute its deputy presidential nominee”	
16 (2)	The notice referred to under subsection (1) shall be in the prescribed form and shall specify— (a) the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution; (b) the day for the nomination of candidates for the parliamentary election;	Capture the three levels of nomination required for a parliamentary election candidate, i.e. nomination through elections at the party level, party list and the submission of papers to the Commission, so that it reads: “The notice referred to under subsection (1) shall be in the prescribed form and shall specify— (a) the days upon which political parties shall nominate candidates and submit a party list in accordance with Article 90 of the Constitution; (b) the days for the nomination and submission of names of candidates for the parliamentary election;	There are three levels of nomination of candidates to vie for seats in a parliamentary election. As such, this should be well captured to be in line with the Constitution.
17 (2)	(2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify— (a) the day for the nomination of candidate for the county governor election;	Capture the two levels of nomination required for a candidate to vie for governorship, i.e. nomination through elections at the party level and the submission of papers to the Commission so that it reads: “The notice referred to in subsection (1) shall be in the prescribed form and shall specify— “the days for the nomination and submission to the commission the name of candidates nominated for the county governor election;”	Given that there are two levels of nominations used within Constitution (Articles 82 and 88) in reference to a county governor nominee, it is unclear which nomination is being referred to. The proposed change would provide clarity.

18	<p>Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate before the date of presentation of nomination papers to the Commission.</p>	<p>Delete the phrase “or of the violation of the electoral code of conduct by the nominated candidate”</p> <p>Amend the to read:</p> <p>(a) before the date of presentation of nomination papers to the Commission, the political party may after notifying the candidate that the party seeks, where applicable, to substitute its candidate subject to the Constitution, regulations set out by the Commission and the party rules</p> <p>(b) after the nomination of the person has been received by the Commission, the political party may after notifying the candidate that the party seeks where applicable, substitute its candidate, subject to the Constitution, regulations set out by the Commission and the party rules.”</p>	<p>The provision contradicts and makes some penalties ineffective – specifically, the punishment for violation of elections code of conduct and Articles 81 and 84 of the constitution</p> <p>While recognizing the provisions of Article 6 of the Constitution, which would require that this provision should be similar to the provisions proposed for amendment to section 15 of this Act, i.e. for the change of a deputy presidential nominee candidate, there may be too many repeat elections in case of multiple deaths, resignations or incapacity after the presentation of papers to the Commission and hence turn out to be costly.</p>
<p><u>New Section</u> Removal of County Governor</p>	<p>The Act does not provide the procedure for removal of a county governor.</p>	<p>Insert the provision for removal of county governor as previously provided for as follows:</p> <p>“(1) A member of a county assembly, supported by at least one third of the members of the Assembly, may move a motion for the removal of the county governor from office on any of the grounds specified in Article 181 of the Constitution.</p> <p>(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly, the speaker of the county assembly shall, within seven days of a resolution by the county assembly, convene a meeting of the county assembly to hear charges against the county governor.</p>	<p>This is a constitutional requirement to give effect to Article 181 (2) of the Constitution. The people of Kenya have a constitutional right to remove their representatives at both levels of government and there should be a similar provision for removal of a county governor as there is for the impeachment of the President.</p>

(3) The county governor shall continue to perform the functions of the office of governor pending the outcome of the proceedings required by this section.

(4) The county assembly may, by resolution, appoint a special committee comprising eleven of its members to investigate the matter.

(5) A special committee appointed under subsection (4) shall-

(a) investigate the matter; and
(b) report to the county assembly within ten days whether it finds the particulars of the allegations against the county governor to have been substantiated.

(6) The county governor shall have the right to appear and be represented before the special committee during its investigations.

(7) If the special committee reports that the particulars of any allegation against the county governor –

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or
(b) have been substantiated, the county assembly shall, after according the county governor an opportunity to be heard, vote on the charges.

(8) If at least two-thirds of the members of the county assembly vote to uphold any charge, the county governor shall cease to hold office.

19 (2)	<p>The notice referred to under subsection (1) shall be in the prescribed form and shall specify—</p> <p>(a) the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution;</p> <p>(b) the day for the nomination of candidates for county elections; and</p>	<p>Capture the three levels of nomination required for county assembly election candidates, i.e. nomination through elections at the party level, party list and the submission of papers to the Commission, so that it reads:</p> <p>“The notice referred to under subsection (1) shall be in the prescribed form and shall specify—</p> <p>(a) the days upon which political parties shall nominate candidates and submit a party list in accordance with Article 90 of the Constitution;</p> <p>(b) the days for the nomination and submission to the Commission the names of candidates for county assembly elections; and</p>	<p>There are three levels of nomination of candidates to vie for seats in county election. As such, this should be well captured to be in line with the Constitution.</p>
22	<p>(1) A person may be nominated as a candidate for an election under this Act only if that person—</p> <p>(a) is qualified to be elected to that office under the Constitution and this Act; and</p> <p>(b) holds a post secondary school qualification recognised in Kenya.</p>	<p>1) Clarify the exact meaning of ‘post-secondary school’ qualification</p> <p>2) Add two subsections to capture the vetting and clearance aspect for candidates as follows:</p> <p>“(c) has been issued with a certificate of clearance by the Ethics and Anti-Corruption Commission;</p> <p>(d) has been vetted by a body authorised to do so.”</p>	<p>(1) A post-secondary school qualification could be a certificate for any training received after secondary school, from as short a duration as a three day training course to a certificate in a professional study, to a diploma or a university degree. Clarity is necessary on the exact level of qualification required here.</p> <p>(2) Given that candidates vying for elective seats in this Act are going to be state officers, compliance with the ethical values and principles articulated in Chapter 6 of the Constitution must be a prerequisite for nomination as a candidate. Vetting should be done by a relevant body and a certificate of clearance issued by the Ethics and Anti-corruption Commission.</p>

24(1) (b)	Unless disqualified under subsection (2), a person qualifies for nomination as a member of Parliament if the person— (b) satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act	Delete the words ‘this Act’ and replace with ‘an Act of Parliament’ so that subsection (b) it reads “satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament”	Other Acts of Parliament may prescribe moral and ethical requirements. As this is a direct copy of Article 99 (b) of the Constitution, there is need to use the exact wording of the Constitution. The use of ‘this Act’ may negate the provisions of other relevant Acts of Parliament in the vetting process for candidates who wish to vie for seats in parliament.
25 (1)(b)	Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person— satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act.	Delete the words ‘this Act’ and replace with ‘an Act of Parliament’ so that subsection (b) it reads “Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person— satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament”	Other Acts of Parliament may prescribe moral and ethical requirements. As this is a direct copy of Article 193 (b) of the Constitution, there is need to use the exact wording of the Constitution. The use of ‘this Act’ may negate the provisions of other relevant Acts of Parliament in the vetting process for candidates who wish to vie for seats in parliament.
32(2)	The Commission shall, upon receipt of the symbol submitted to it under subsection (1) approve or reject the symbol	Clearly define the period of time within which the Commission can approve or reject the symbol for independent candidates This could be captured in regulations.	It is not clear in what timeframe after submission of papers the Commission approves or rejects the symbols. In the interest of fairness so as to protect the rights of independent candidates, and to avoid delays, which may be caused due to re-submissions, the period referred to should be clearly defined.
34	The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.	1) Delete subsections (34) (2), (3) and (4) 2) Add a new provision: “The Commission shall be responsible for the conduct and supervision of elections of candidates for seats specified under subsection (1)” 3) Amend subsection 5 to read: “A political party which nominates a candidate for election for the seats specified	The proposed amendments are to ensure conformity with Article 90 of the Constitution.

		<p>in subsection (1) shall submit to the Commission a party list in order of the priority in which they are listed.”</p> <p>4) Amend subsection (6) to include the provisions of sub-section (2), (3), and (4) as follows: “The party lists submitted to the Commission under this section shall be in accordance with the constitution, the regulations prepared by the Commission in line with section 109 (d) and nomination rules of the political party concerned”</p> <p>5) Add a new subsection: “The Commission and an authorized officer of the political party shall sign off the names listed in the party list”</p>	
34 (6)	The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.	Delete the word ‘or’ and replace with ‘and’, so that it reads: “The party lists submitted to the Commission under this section shall be in accordance with the constitution and nomination rules of the political party concerned.”	The rules of a political party relating to the nomination of candidates must be in line with the Constitution. The “or” suggests that even if the party list violates the Constitution but conforms to the nominations rules it would be acceptable.
34 (9)	The party list may not contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.	Delete the word ‘may’ and substitute with ‘shall’ and amend the provision to read: The party list shall not contain a name of any candidate nominated to vie for a seat under Articles 97 (1)(a) and (b), 98 (1) (a), 137, 177 (1)(a) and 180 (1) of the Constitution	The party list is only for nomination of candidates in line with Article 97 (1) (c), 98 (1) (b), (c), (d) and 177 (1) (b), (c). This is an affirmative action principle to promote the representation in parliament of women, persons with disability, youth, and marginalised communities. As such, persons already nominated to vie for competitive elections cannot also be nominated into the party lists for special seats under Article 90 of the Constitution. Moreover, to provide for only the presidential and the

			deputy presidential candidates not to appear in the party list is discriminatory against candidates and hence violating the values of Articles 10, 91 (1) (d) to (h) and 92 (i). The provision will violate the national values and principles of fairness, equality before the law, democracy and social justice.
39 (2)	Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.	Delete the word 'may' and substitute it with 'shall' so that the provision reads: Before determining and declaring the final results of an election under subsection (1), the Commission shall announce the provisional results of an election.	This violates Article 86 (b) & (c) of the Constitution. At every election, the Independent Electoral and Boundaries Commission shall ensure that— (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; The above two constitutional provisions suggest that the announcement of provisional results by the Commission is not optional.
43 (6)	This section shall not apply to- (a) the President; (b) the Prime Minister; (c) the Deputy President; (d) a member of Parliament; (e) a county governor; (f) a deputy county governor; (g) a member of a county assembly.	1) Amend to read: "Except for sub-section 43 (1) (d), this section shall not apply to- (a) the President; (b) the Prime Minister; (c) the Deputy President; (d) a member of Parliament; (e) a county governor; (f) a deputy county governor; (g) a member of a county assembly.	Only sub-section 43 (1) (d) should not apply to the named persons. State resources should not be used by any person to initiate development projects at least three months before a general election.
45 (3)	A recall of a member of Parliament under subsection (1) shall only be initiated upon a judgment or finding by the High Court confirming the grounds specified in subsection (2).	Delete this provision.	The provision violates the sovereign power of the people as stipulated in Article 1 of the Constitution and limits the constitutional right under Article 104 of the electorate to recall. It is the right of the people to initiate a recall election, and if all requirements are met, a recall election should be held.

45 (4)	A recall under subsection (1) shall only be initiated twenty-four months after the election of the member of Parliament and not later than twelve months immediately preceding the next general election.	<p>i) Delete the phrases: “twenty-four months” and replace with “at any time</p> <p>ii) Delete the phrase: “not later than twelve months immediately preceding the next general election”, so that the sub-section reads: “Subject to Article 104 of the Constitution, a recall under subsection (1) shall be initiated at any time after the election of the member of Parliament”</p>	The provision violates the sovereign power of the people as stipulated in Article 1 of the Constitution and limits the constitutional right under Article 104 of the electorate to recall. The Constitution gives power to the electorate to be able to initiate a recall election any time after the election of a member of parliament. As such, a recall election cannot be limited to only two out of five years of the life of an MP in parliament.
45 (5)	A recall petition shall not be filed against a member of Parliament more than once during the term of that member in Parliament	Delete this provision	The sovereign power of the people as stipulated in Article 1 and of the Constitution and limits the constitutional right under Article 104 of the electorate to recall. If an MP is in breach of sub-section 45 (2) the member should be recalled immediately, notwithstanding any previous petitions of a recall for the MP.
45 (6)	A person who unsuccessfully contested an election under this Act shall not be eligible, directly or indirectly, to initiate a petition under this section	Delete this provision	This limits the constitutional right of a citizen to file for a petition to recall an MP. An unsuccessful contestant of an election will be a member of the electorate like any other citizen, and as such should be able to file a petition.
46 (1) (c)	A recall under section 45 shall be initiated by a petition which shall be filed with the Commission and which shall be— (c) accompanied by an order of the High Court issued in terms of section 45(3).	Delete this provision	As it currently stands, this provision violates the sovereign power of the people as stipulated in Article 1 of the Constitution. It is the right of the people to initiate a recall election, and if all requirements are met, a recall election should be held.
46 (2) (c)	The petition referred to in subsection (1) shall— be accompanied by the fee prescribed for an election petition.	Delete this provision	As the electorate has a constitutional right to initiate a petition for the recall of a member of parliament, this right should not be pegged to a fee

57 (2)	(2) Any person who commits an offence under subsection (1) shall, in addition to the penalty provided in subsection (1), not be eligible to vote in that election or in the next election.	In line with Article 83 (1) (c) of the Constitution, delete the phrase “in that election or in the next election” and insert “in any election in the proceeding five years” so that it reads: “(2) Any person who commits an offence under subsection (1) shall, in addition to the penalty provided in subsection (1), not be eligible to vote in any election in the proceeding five years”	As it stands, the provision could lead to a violation of Article 83 (1) (c) as: (i) if there are no by-elections, a person may be barred from voting for a longer period than five years. (ii) if there are by-elections, a person may be barred from voting for a shorter period of time than five years.
78 (2)	A person who presents a petition to challenge an election shall deposit— (a) one million shillings, in the case of a petition against a presidential candidate; (b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor; or (c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.	Delete the stipulated fees and amend the sub-section to read: “A petitioner who presents a petition to challenge an election shall deposit a fee as may be prescribed by the Court”	If stipulated in law, such fees could be too prohibitive to the ordinary Kenyan citizen and could be a violation of access to Justice under Article 48 of the Constitution,
109 (d)	(d) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation;	Add a new subsection as follows: (i) to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nomination, allocation and re-allocation; (ii) to provide for the manner of nomination for the seats under 82 (1) (d) and the manner of compliance with Articles 84, 88 (4) (d) and (k) and 91 (h) of the Constitution	This is to ensure that the mentioned Articles are captured in legislation as required by the Constitution

The Political Parties Act 2011

Section	Provision in the Act	CIC Proposal	Justification
1	This Act may be cited as the Political Parties Act, 2011 and shall come into operation on such date as the Cabinet Secretary may by notice in the Gazette, appoint.	Delete the phrase “and shall come into operation on such date as the Cabinet Secretary may by notice in the Gazette, appoint.”	Section 9 of the Interpretation and General Provisions Act (Cap 2) provides as follows: An Act shall come into effect either on the day on which it is published in the Gazette or on a day or time specified in the Act. Therefore, the day of commencement of this Act should not be subject to ministerial direction.
11 (7)	Where a political party merges with another political party, a member of the political party that has merged with another political party who is a member of Parliament or of a county assembly, and who does not desire to be a member of the political party formed after the merger shall continue to serve as a member of Parliament or of the county assembly, and may join another political party or choose to be an independent member for the remainder of the term of the member.	Delete the phrase “shall continue to serve as a member of Parliament or of the county assembly, and may join another political party or choose to be an independent member for the remainder of the term of the member,” and amend the provision to read: “Where a political party merges with another political party, a member of the political party that has merged with another political party who is a member of Parliament or of a County Assembly, and who does not desire to be a member of the political party formed after the merger shall be deemed to have resigned from the political party and may seek a fresh mandate from the electorate through a by-election either as an independent candidate or as a member of another political party.”	This provision is unconstitutional in terms of Articles 10, 38, 85, 91, 99, 101, 103, 193, 194 because: <ul style="list-style-type: none"> • A member of parliament or a county assembly who does not desire to be a member of the political party formed after a merger shall be deemed to have resigned from the party within the meaning contemplated under Article 103 (1) (e) and (3) and 194 (1) (e) and the office declared vacant; • Section 14 (5) of the Political Parties Act provides for the circumstances under which a member of a political party shall be deemed to have resigned from the party, specifically paragraph (c), which provides “joins another political party” and paragraph (e) which provides, “promotes the ideology, interests or policies of another political party.” • Section 11 (7) of this Act is inconsistent with Article 101(4) of the Constitution which provides that whenever a vacancy occurs in the office of a member of parliament, a by-election shall within ninety days of the vacancy.

			<ul style="list-style-type: none"> • One of the basic requirements of a political party under Article 91 (1) (e) of the Constitution is that it should abide by democratic principles of good governance; hence political party decisions must be subscribed to fully by all its members; • The spirit of Articles 10 (2) (a) and 38 (2) of the Constitution is that the will expressed by the electorate, by voting for a candidate belonging to a particular party, should be respected. • Articles 99 (1) (c) and 193 (1) (c) provide that a person is elected into parliament or a county assembly either through a political party or as an independent candidate; hence, a sitting member cannot simply join another party or declare oneself an independent member without being subjected to an election. • Articles 85 provides for the grounds under which a person is eligible to be elected into parliament and a County Assembly as an independent candidate.
14 (2)	<p>(1) A member of a political party who intends to resign from the political party shall give a thirty-days written notice prior to his resignation to—</p> <p>(a) the political party;</p> <p>(b) the Clerk of the relevant House of Parliament, if the member is a member of Parliament; or</p> <p>(c) the clerk of a county assembly, if the member is a member of a county assembly.</p> <p>(2) The resignation of the member of the political party</p>	<p>Harmonize sub-section 14 (2) to 14 (1) by deleting the phrase, “receipt of such notice by the political party or clerk of the relevant House or County Assembly” and amend as follows:</p> <p>“The resignation of the member of the political party shall take effect from the date of communication of its acceptance by the Political Party or the Clerk of the relevant House of Parliament or County Assembly or on the expiry of the notice period, whichever is earlier.”</p>	<p>The provision of section 14 (2) contradicts and nullifies the thirty day notice prescribed in section 14 (1).</p> <p>Sub-section (1) is a mandatory requirement that any member of a political party who intends to resign shall give a thirty days’ notice.</p> <p>The thirty day notice is necessary in any setup, for example, for purposes of handing over office.</p>

	shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.		
17 (3)	A member of a political party may, during working hours and on payment of the prescribed fee, inspect and obtain copies of the records of a political party maintained at its head office or county office.	Delete the requirement for members to pay a fee to inspect the party's records, so that the provision reads, "A member of a political party may, during working hours, inspect the records of the political party maintained at its head office or county office and upon payment of a prescribed fee, obtain copies of the records."	This provision violates Article 35 on access to information as relates to achieving the political rights provided in section 38 (1) (b). A fee should only be payable if a member wants to make copies of records.
22 (2)	Where a political party that has been deregistered under section 21 had representatives elected to Parliament, or County Assembly, such representatives shall continue to serve for the remainder of their term as independents or as members of other political parties.	Delete the phrase "such representatives shall continue to serve for the remainder of their term as independents or as members of other political parties," and amend the provision to read: "Where a political party that has been deregistered under section 21 had representatives elected to Parliament, or County Assembly, the office of such representatives shall be deemed to be vacant and the representatives may seek a fresh mandate from the electorate through a by- election either as an independent candidate or as a member of another political party."	This provision is unconstitutional as per Articles 10, 85, 91, 99, 103, 193, 194 <ul style="list-style-type: none"> • Article 91 of the constitution provides that political parties are a platform through which democratic values shall be practiced. Allowing elected members whose party has been deregistered to continue being in office is a violation of this provision and may negate the national values and principles of Article 10 • By virtue of Articles 99 (1) (c) and 193 (1) (c) of the Constitution, a person is disqualified from being a member of parliament or county assembly; • If a political party is deregistered, a member of the political party should seek fresh mandate from the electorate through a by-election either as an independent candidate or as a member of another political party; • In the interest of fairness and democracy, it is important that once a party is deregistered, its members should not be allowed to continue enjoying the benefits of party membership.

24 (1) (a)	<p>The sources of the Fund are—</p> <p>(a) such funds not being less than zero point three per cent of the revenue collected by the national government as may be provided by Parliament</p>	<p>Delete the phrase “not being less than” and in instead insert “not exceeding”:</p> <p>(a) The sources of the Fund are—</p> <p>“such funds not exceeding zero point three per cent of the revenue collected by the national government as may be provided by Parliament”</p>	<p>Articles 217 and 218 provide for how funds should be allocated on a yearly basis. The current provision is unconstitutional to the extent that it allocates specific percentage of national revenue to political parties.</p> <p>The provision of the Act may result in a situation that means that political parties are entitled to a limitless fraction of the national government revenue.</p>
(25) (1)	<p>(1) The Fund shall be distributed as follows-</p> <p>(a) ninety five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election; and</p> <p>(b) five percent for the administration expenses of the Fund.</p>	<p>Insert criteria that provides for the determination of party entitlements to the Political Parties Fund on the basis of affirmative action and the promotion of participation of marginalised groups.</p> <p>For example:</p> <p>(a) twenty percent shall be distributed equally among all political parties;</p> <p>(b) seventy five percent shall be distributed proportionately based on the votes secured in the preceding general election as follows—</p> <p>(i) ten percent to political parties which secured at least one senate, national assembly or governor seat;</p> <p>(ii) ten percent to political parties which secured at least two percent of the total parliamentary votes cast;</p> <p>(iii) ten percent to political parties which secured at least four percent of the total county votes cast; (iv) ten percent to political parties whose women candidates secured at least four seats in the National Assembly, excluding the women nominated under Article 90 and the women elected under Article 97(1) (b) of the Constitution;</p>	<p>The provision lacks any incentive to political parties through funding to uphold the letter and spirit of the Constitution with respect to promoting affirmative action in as far as minorities and marginalized groups are concerned, as required by Articles 27, 54 (2), 55 (b), 56 (a) and 100 which contemplate affirmative action to enable disadvantaged groups take part in national affairs.</p> <p>In the case of women, this will also help to administratively solve part of the challenge of how Article 81 (b) shall be complied with in as far as Article 97) is concerned.</p> <p>Moreover Article 91 (e) and (g) and Article 100 require parliament to enact legislation to promote the representation in parliament of women, persons with disability, youth, ethnic and other minorities and marginalized communities.</p> <p>The Political Parties Act, 2011 is one such legislation and the Political Parties Fund is one way through which parties are obligated to comply with the Constitution. Each and every entity is required to meet the requirements, especially those relating to values and the bill of rights, of the Constitution</p>

		<p>(v) ten percent to political parties whose women candidates secured at least two seats in the Senate, not being the seats referred to under Article 90 and the women elected under Article 98 (1) (b), (c) and (d) of the Constitution;</p> <p>(vi) ten percent to political parties whose women candidates secured at least twelve seats in the county assembly, excluding the women nominated under Article 90 and Article 177 (1) (b) of the Constitution;</p> <p>(vii) ten percent to political parties whose women candidates secured at least twelve seats in the National Assembly, excluding the women nominated under Article 90 and the women elected under Article 97 (1) (b) of the Constitution;</p> <p>(viii) three percent to political parties whose women candidates secured at least six seats in the Senate, excluding the women nominated under Article 90 and the women elected under Article 98(1) (b), (c) and (d) of the Constitution;</p> <p>(ix) two percent to support parties which are provisionally registered;</p> <p>(c) five percent for the administration expenses of the Fund</p>	
<p><u>New subsection</u> 25 (4)</p>	<p>Not provided</p>	<p>Insert a new subsection (4) to read: “The distribution of funds under subsection (1) (b) shall be revised annually”</p>	<p>Each political party's elected members in the elective bodies may change from year to year depending on successful election petitions, recalls, and by-elections. It is therefore important that these changes be reflected in the allocation of funds so as to reflect the constitutional principle of</p>

			of fairness and the right of the people as per Article 104. Moreover, Articles 217 and 218 of the Constitution allocates funds on an annual basis so parties that obtain funds from the consolidated fund should adhere to the same spirit.
26 (1) (c)	(1) Moneys allocated to a registered political party from the Fund shall be used for purposes compatible with democracy including— covering the election expenses of the political party and the broadcasting of the policies of the political party;	Amend this sub-section for clarity by adding a sub-section that states that political party funds shall not be used to directly campaign for a candidate, as follows: “limited to covering the election expenses of the political party and the broadcasting of the policies of the political party, and not for the direct financing of a candidate’s campaign”	This provision does not expressly bar use of the funds to cover campaign expenses; hence, parties may assume that they can use political party funds for directly campaigning for a candidate.
37 (3)	The Public Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under subsection (1), it shall send the petition to the President	Delete the phrase “consider the petition and, if it is satisfied that it discloses the existence of a ground under subsection (1), it shall”, so that it reads: “The Public Service Commission shall send the petition to the President”	The Public Service Commission should not determine whether or not the grounds for removal of the registrar have been satisfied. Instead, the PSC should simply receive the petitions and send them to the president.
44 (2)	The Chairperson and members of the Tribunal shall be paid such allowances and be reimbursed such expenses as shall be determined by the Judicial Service Commission which determine on the recommendation of the Salaries and Remuneration Commission.	Delete the provision that the words “shall be determined by the Judicial Service Commission which determine on”, and amend to read as follows: “The Chairperson and members of the Tribunal shall be paid such allowances and be reimbursed such expenses upon consideration of the recommendation of the Salaries and Remuneration Commission.	Members of the tribunal established under this Act are defined as judicial officers within the meaning of Article 260 of the Constitution. Under Article 172 (1)(b)(i), the JSC cannot determine, review or make recommendations on salaries of judicial officers.

The Independent Electoral and Boundaries Commission Act 2011

Section	Provision in the Act	CIC Proposal	Justification
20 (1)	Members and employees of the Commission shall be paid such remuneration or allowances as the Salaries and Remuneration Commission shall determine	Amend the provision to reflect the fact that the Commission should only make recommendation of salaries, as opposed to determination of salaries of employees of the Commission	The Salaries and Remuneration Commission has (a) The authority to set the salaries and allowances of state officers (Article 230 (4) (a)) (b) The Commission has no authority to set the salaries of public officers. It only has the authority to advise the national and county governments (Article 230 (4) (b)) on such salaries.
Section (2) (1) of the Fifth Schedule	The Commission shall, in addressing the issues arising out of the first review – (a) use as its primary reference material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and (b) use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review.	Add a subparagraph (c) to reflect the fact that the Commission may use, in addition to the mentioned reports, other reports as it may find necessary, as follows, i.e. “The Commission shall, in addressing the issues arising out of the first review – (a) use as its primary reference material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and (b) use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review; and (c) any other relevant material	The provisions of this section are unconstitutional because: (a) It directs the Commission on the manner in which it will carry out its constitutional mandate contrary to Article 249 (2) which grants the Commission independence from any person or authority. The import of Article 249 (2) is that when carrying out its mandate, the Commission is only subject to the constitution. It is admitted that the manner in which the Commission carries out its functions can also be determined by legislation as provided in Article 88 (5) and that such legislation would include the current Act. Such legislation however cannot take away or limit a right given to the Commission by the Constitution. (b) If retained in the current form proposed, the Section would hinder the Commission from curing any defects of a constitutional nature that may be contained in the Boundaries Commission report or the Parliamentary report.

Paragraph (2) (2) (a) of the Fifth Schedule	The issues arising out of the first review are - re-distribution of such wards or administrative units in the affected constituencies as may be appropriate;	Delete the term 'administrative units' so that it reads: "The issues arising out of the first review are - re-distribution of such wards in the affected constituencies as may be appropriate;"	This Section mandates the Commission to review administrative units whereas Article 89, which grants the IEBC the mandate of reviewing boundaries, makes no mention of administrative units, and indeed, the term is not used in the Constitution
Paragraph (2) (2) (b) of the Fifth Schedule	subject to the Constitution, addressing issues of new constituencies falling outside the population quota as provided for by Article 89(6) of the Constitution but at the same time ensuring that such a process shall – (i) take into account the provisions of Article 89(7) (b) of the Constitution that requires progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for the purposes of the first review; (ii) not be subject to new definitions of cities, urban areas and sparsely populated areas or to new population figures (iii) be subject to the use of enumerated national census figures and not projected figures	Delete the specificities of this paragraph, i.e. sub-paragraphs (i) to (iv) so that it reads as in the IEBC Bill, 2011, i.e. "addressing issues of new constituencies falling outside the population quota as provided for in Article 89 (6) in reference to the national census data"	The paragraph directs the Commission on the manner in which it should carry out its constitutional mandate and prescribes limits on how that mandate will be exercised without any constitutional basis, which is a violation of Article 249 (2) on the independence of Commissions
Paragraph (3) (6) of the Fifth Schedule	Within fourteen days of the expiry of the period provided for in sub-paragraph (5), the Commission shall, taking into account the resolutions of the National Assembly under sub-paragraph (5), prepare and submit its final report outlining the matters set out in sub-paragraph (1)(a) for publication in the Gazette.	Amend to be in line with the provisions of the IEBC Bill, 2011, as follows: "Within fourteen days of the expiry of the period provided for in sub-paragraph (5), the Commission shall, after considering the views received under paragraphs (2) and (5), prepare and submit its final report outlining the matters set out in sub-paragraph	This Section purports to direct the Commission on what should be included in the Boundaries report by providing that, in its final report, the Commission will "take into account" the resolutions of the National Assembly before preparing its final report for gazette. This Section is an affront to the Commission's independence that is protected under Article 249(2) b.

		(1)(a) for publication in the Gazette.	<p>Since parliament will have taken a primary role in the setting up of the Commission, and will have expressed its sentiments through the Parliamentary Report, and considering the contentious and personalized nature of the boundaries issue, the constitution anticipates that the Commission shall be guided only by the Constitution in determining boundaries.</p> <p>Where members of Parliament give any recommendations on the Boundaries report, these can only be considered by the Commission but they are not binding on the Commission as the Section suggests. Members of Parliament, like all other people of Kenya shall in any event have an opportunity to challenge the report in a court as provided for in paragraph 4 and 5 of the Fifth schedule.</p>
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National Police Service Act, 2011

Section	Provision in the Act	CIC Proposal	Justification
4	The maximum number of officers shall be determined by the National Security Council in consultation with the National Police Service Commission.	Insert the following new section: The maximum number of officers shall be determined by the National Police Service Commission in consultation with the National Security Council.	Article 246(3) gives the National Police Service Commission the overall control over the recruitment and appointment of members of the Service.
5	The composition of the Service shall, so as far as is reasonably practicable— (a) uphold the principle that not more than two-thirds of the appointments shall be of the same gender; and (b) reflect the regional and ethnic diversity of the people of Kenya.	Delete the words “so as far as is reasonably practicable” Insert a new subsection (2) to read as follows: (2) The service shall take measures including affirmative action programmes and policies to ensure the realization of subsection (1).	The provision violates the gender; ethnic and regional balance principles in Articles 27(8) and 246(4) of the Constitution, which is intended for immediate realization and not progressive realization.

13. (7)	(7) For purposes of appointment of the Deputy Inspector General before the establishment of the Commission, the procedure set out in the Third Schedule shall apply, except that the provisions in the Schedule requiring approval by Parliament shall not apply.	Delete Section 13(7)	The National Police Service Commission shall undertake the recruitment of the DIGs. Delete the section, as it serves no purpose. To comply with Article 245(3) of the Constitution, which states that, the Commission shall recommend DIGs for appointment by the President.
16	Where the Inspector-General is suspended from office under section 15 or incapable of performance of his or her functions, the President may appoint the Cabinet Secretary to act as the Inspector-General, for a period not exceeding three months.	The section has prolonged the replacement, by the Cabinet-Secretary, to three (3) months Delete the words "The Cabinet Secretary" and substitute therefore "The Commission shall appoint one of the Deputy Inspector-Generals"	The section violates 245(2)(b) and (4). The Inspector-General has independent command over the service, to ensure the independence is maintained and noninterference by the executive, the replacement, in the absence of the IG, should be by a DIG, appointed by the Commission.
40. 7	(7) Each station shall have a facility to receive, record and report complaints against police misconduct.	Insert the following: "Each station shall have a facility to receive, record and report complaints against police misconduct and report these to the Independent Policing Oversight Authority. "	It violates Article 244 of the Constitution. To comply with Article 244 of the Constitution and guarantee effective oversight, and to promote transparency and accountability.
108(1)	The President may, on the application of the Government of a reciprocating country, order such number of police officers as the President may think fit to proceed to that country for service therein for the purpose of assisting the police service of that country in a temporary emergency.	Delete the subsection and substitute therefore the following new subsection: The President may, on the application of the Government of a reciprocating country, order such number of police officers as the Inspector General may, in consultation with the Commission, and in accordance with the relevant laws think fit to proceed to that country for service therein for the purpose of assisting the police service of that country in a temporary emergency.	The Inspector-General has the independent command of the Service pursuant to Article 245(2) of the Constitution. It is unconstitutional to take away the powers of the Inspector-General enshrined in the Constitution, through an Act of Parliament.

109(1)	The President may make application to the Government of a reciprocating country for police officers of that country to be sent to Kenya for service therein for the purpose of assisting the Service in a temporary emergency.	Delete the words “the president” and substitute therefore the words “Upon request of the Inspector-General,” immediately before the words “the President may”	The Inspector-General has the independent command of the Service pursuant to Article 245(2) of the Constitution. The proposed change also ensures that the request is need based and the Inspector General is consulted.
Fifth Schedule 9(a)	Arrest and Detention Rules. 9. A detained person shall have the right to— (a) communicate with and receive visits of members of the family subject only to reasonable conditions and restrictions (when exceptional needs of the investigation so require) which shall be spelt out in the Standing Orders subject to the approval from the Ministry;	Delete the words “subject to the approval from the Ministry”	To ensure that the independence of the Service from the executive as envisioned under Article 245 of the Constitution is guaranteed. The Executive, through the Cabinet Secretary should only offer policy directions.

Ethics And Anti Corruption Commission Act, 2011

Section	Provision in the Act	CIC Proposal	Justification
3(3)	There is established an Ethics and Anti-Corruption Commission.	The headquarters of the Commission be provided for: Insert a new subsection (3) to read as follows: (3) The headquarters of the Commission shall be in the Capital City of Kenya, but the Commission shall ensure access to its services in all parts of the Republic in accordance with Article 6(3) of the Constitution.	This is to ensure consistency with other Commission laws as all other Commissions established after promulgation of the Constitution, have a similar provision.
6(2)	The joint forum of religious organizations referred to in subsection (1)(h) shall consist of representatives of – (a) the Supreme Council of Kenya Muslims; (b) the Kenya Episcopal Conference; (c) the National Council of Churches of Kenya;	Provide for the Public Service Commission to facilitate the forum in making the nomination of a representative.	This proposal is intended to ensure that there is no delay in the nomination of a member of the panel, in the event that the forum is unable to meet.

	(d) the Evangelical Fellowship of Kenya; and (e) the Hindu Council of Kenya.		
6(1)		Insert a new subsection 2A to read as follows: (2A) Notwithstanding subsection (1)(d), the representative of the Judicial Service Commission shall not be a judicial officer.	To ensure separation of powers between arms of government.
11 (1) (a) i.e. (iii)- (iv)	11. (1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall— (a) in relation to State officers,— (i) develop and promote standards and best practices in integrity and anti-corruption; (ii) develop a code of ethics;	Insert the following new paragraph: “(iii) develop procedures that give effect to Chapter Six of the Constitution;”	The rationale is that under Article 79, the Commission is mandated to ensure compliance with, and enforcement of the provisions of Chapter six, which includes disciplinary procedures under Article 75 and procedures required under Article 80(a)
11(o)	On the certificate of compliance with Chapter Six.	Insert a new paragraph (o) to read as follows: “upon request, issue a certificate of compliance or any other evidence to show that a person has complied with Chapter Six of the Constitution;”	The rationale is that the Commission is specifically mandated by Article 79 of the Constitution to ensure compliance with Chapter Six of the Constitution.
11(3)	The Commission may cooperate and collaborate with other State organs and agencies in the prevention and investigation for corruption.	Insert the word “prosecution” immediately after the words “agencies in the”	Allows the Commission to cooperate with other Government agencies that have prosecutorial powers.
33(2)(b)	Provides for the regulations that the Commission may make	Insert a new paragraph (b) to read as follows: “disciplinary procedures as provided for under Chapter Six of the Constitution.	To comply with Chapter Six of the Constitution.

<p>Insertion of a new section.</p>		<p>Insert a new section, to establish a duty on public officers to cooperate with the Commission. The section to read as follows: “A public officer, State organ or State office shall at all times cooperate with the Commission in ensuring that the mandates of the Commission as required under Chapter Six of the Constitution, this Act or any other written law are achieved, and in particular—</p> <ul style="list-style-type: none"> (a) respond to any inquiry made by the Commission; (b) furnish the Commission with periodic reports as to the status of compliance and enforcement of Chapter Six of the Constitution; (c) provide any other information that the Commission may require in the performance of its functions under the Constitution and any other written law. <p>(2) An public officer who breaches any of the provisions of this Act shall be deemed to be in contempt of Parliament and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.</p>	<p>The Commission for the implementation of the Constitution Act, 2011 has similar provision, which imposes a duty on public officers, State officers and State organs to cooperate with CIC. With regards to the enforcement of, and compliance with Chapter Six of the Constitution, the Commission will certainly require cooperation with other State organs. CIC considers the clause necessary in a bid to ensuring that the spirit and letter of the Constitution, and in particular Article 79, are achieved.</p>
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Annex V

Ministries and State Organs That Have Submitted Status of Implementation Reports

Reporting for the 3rd Quarter

No	Ministries that submitted status reports	No	Ministries whose status reports are yet to be received
1	Ministry of East African Community	1	Ministry of Energy
2	Ministry of Co-operatives Development	2	Ministry of Fisheries Development
3	Ministry of Environment and Mineral Resources	3	Ministry of States for Immigration and Registrations of Persons
4	Ministry of Gender, Children and Social Development	4	Ministry of State and for Planning, National Development and Vision 2030
5	Ministry of Housing	5	Ministry of Information and Communication
6	Ministry of Public Health and Sanitation	6	Ministry of Forestry and Wildlife
7	Ministry of Labour	7	Ministry of Regional Development Authorities
8	Ministry of Justice, National Cohesion and Constitutional Affairs	8	Ministry of State for National Heritage and Culture
9	Ministry of Finance	9	Ministry for Local Government
10	Ministry of Transport	10	Ministry of Home Affairs
11	Ministry of Special Programmes	11	Ministry of State for Provincial Administration and Internal Security
12	Ministry of Nairobi Metropolitan Development	12	Ministry of State for Defence
13	Ministry of Medical Services and Ministry of Public Health and Sanitation.	13	Ministry of Roads
14	Ministry of Youth and Sports	14	Ministry of Tourism
15	Office of the Prime Minister	15	Ministry of Livestock Development
16	Ministry of Water and Irrigation	16	Ministry of Lands
17	Parliamentary Service Commission of the National Assembly	17	Attorney General
18	Ministry of Higher Education, Science and Technology	18	Registrar- Judiciary
19	Kenya Revenue Authority	19	Ministry of Education
20	Ministry of State for Public Service	20	Ministry of Northern Kenya and other Arid Lands
21	Ministry of Industrialisation		
22	Ministry of Agriculture		
23	Ministry of Trade		

Reporting for the 2nd Quarter

No	Ministries that submitted status reports	No	Ministries whose status reports are yet to be received
1	Ministry of East African Community	1	Ministry of Co-operatives Development
2	Ministry of Energy	2	Ministry of Finance
3	Ministry of Fisheries Development	3	Ministry of Environment and Mineral Resources
4	Ministry of States for Immigration and Registrations of Persons	4	Ministry of Gender, Children and Social Development
5	Ministry of Information and Communication	5	Ministry of State and for Planning, National Development and Vision 2030
6	Ministry of Forestry and Wildlife	6	Ministry of Higher Education, Science and Technology
7	Ministry for Local Government	7	Ministry of Housing
8	Ministry of Justice, National Cohesion and Constitutional Affairs	8	Ministry of Regional Development Authorities
9	Ministry of Lands	9	Ministry of State for National Heritage and Culture
10	Ministry of Livestock Development	10	Ministry of Labour
11	Ministry of Special Programmes	11	Ministry of Home Affairs
12	Ministry of Tourism	12	Ministry of State for Provincial Administration and Internal Security
13	Ministry of Water and Irrigation	13	Ministry of State for Defence
14	Ministry of State and for Public Service	14	Ministry of Roads
15	Ministry of Northern Kenya and other Arid Lands	15	Ministry of Transport
16	Parliamentary Service Commission of the National Assembly	16	Ministry of Youth and Sports
17	Ministry of Education	17	Attorney General
18	Ministry of Trade	18	Registrar- Judiciary
19	Ministry of Public Health and Sanitation		
20	Ministry of Medical Services		
21	Ministry of Agriculture		
22	Ministry of Nairobi Metropolitan Development		
23	Commission on Revenue Allocation		

Annex VI

Summary of Engagements With Stakeholders at Institutional Level and Per Thematic Area

Organisation	Event	Date of Meeting
Institutional level:		
United Nations Development Programme	Breakfast Meeting on funding for CIC work plans	22nd July 2011
East African Legislative Assembly	Courtesy Call	22nd July 2011
Ministry of Foreign Affairs	16th Biennial Ambassadors' Conference	1st August, 2011
Parliament	Meeting with Parliamentary Service Commission	2nd August 2011
ICT Board	Meeting to review practicalities of electronic voting	2nd August 2011
Constitutional Implementation Oversight Committee	Meeting to review progress on implementation of the Constitution and develop modalities for meeting Constitutional deadlines	4th August 2011
Legal Resource Foundation	Annual Stakeholder Round Table	1st September 2011
USAID-PACT Kenya	Workshop	7th September 2011
Media Focus on Africa	Media Roundtable on the Constitution Implementation	27th September 2011
Public Service and Leadership Thematic Area:		
State Corporations Advisory Committee	Discuss taskforce report with a view to reviewing the State Corporations Act-Cap 446 to align management and operations of State Corporations with the Constitution of Kenya 2010 and prepare a draft State Corporations Policy paper	14th and 17th August 2011
State Corporations Advisory Committee Taskforce on the Management of the State Corporations Sector	Preparation of a draft policy paper to inform drafting of a bill for the amendment of the State Corporations Act, Cap 446	27th – 31st August 2011
Bill of Rights and Citizenship:		
Ministry of State for Special Programmes	Meeting on the development of standards for progressive realization of the right to socio-economic rights. The focus was on the ' Right to Food ' as provided for under article 43(1)c of the Constitution.	16th August 2011

Ministry of Public Health and Sanitation	Meeting on the development of standards for progressive realization of the right to socio-economic rights. The focus was on the ' Right to Health ' as provided for under article 43(1)a of the Constitution.	17th August 2011
Ministry of Gender, Children and Social Development	Meeting on the development of standards for progressive realization of the right to socio-economic rights. The focus was on the ' Right to Social Security ' as well as the rights of special groups as provided for under article 43(1)e of the Constitution.	18th August 2011
Ministry of Housing	Meeting on the development of standards for progressive realization of the right to socio-economic rights. The focus was on the ' Right to Housing ' as provided for under article 43(1)b of the Constitution.	22nd August 2011
Ministry of State for Planning, National Development and Vision 2030	Meeting on the development of standards for progressive realization of the right to socio-economic rights. The focus was on effective planning for enhanced realization of the rights.	22nd August 2011
Ministry of Information and Communications	Meeting on the development of standards for progressive realization of the right to socio-economic rights. Focus was on effective ' access to information ' as provided under article 35 of the Constitution.	29th August 2011
Ministry of Agriculture	Meeting on the development of standards for progressive realization of the right to socio-economic rights. The focus was on the ' Right to Food ' as provided for under article 43(1)c of the Constitution.	29th August 2011
Ministry of Water and Irrigation	Meeting on the development of standards for progressive realization of the right to socio-economic rights. The focus was on the ' Right to clean and safe water ' as provided for under article 43(1)d of the Constitution.	19th September 2011

Representation of the People and the Legislature:

Implementing Agencies (KLRC, IIEC, CIC) & stakeholder workshop	Discussions on the Elections Bill, 2011	4th July 2011
The Capital Group Ltd.	CIC courtesy call to media stations	12th July 2011
MediaMax Network Ltd. (K24 TV)	CIC courtesy call to media stations	12th July 2011
The Kenya Broadcasting Corporation	CIC courtesy call to media stations	15th July 2011
The Standard Group	CIC courtesy call to media stations	15th July 2011
The East African Legislative Assembly	Courtesy call by the EALA	26th July 2011
Parliamentary Service Commission (the Task Force on the Implementation of the Constitution)	Introductory meeting to discuss the progress of the two Commissions.	2nd August 2011

Kenya Women Parliamentarians Association	Discussions on how to ensure that the principle that requires that not more than two thirds of members the National Assembly and the Senate shall be of the same gender in the next Parliament	7th September 2011
Judiciary and Constitutional Commissions:		
UN Headquarters, New York - Committee on the UN Convention on the Rights of Persons with Disabilities	-Fourth Session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities -Side meeting of the Kenyan delegation to the Fourth Session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities.	7th-9th September 2011 7th September 2011
Executive and Security:		
Kenyans living in South Africa, Departments of Justice, Public Service and Administration, Rural Development and Law Reform, Constitutional Court, Gauteng Legislature, provincial and local Government, Independent Electoral Commission and National Police Service.	Benchmarking tour to South Africa	24th– 29th July 2011
The meeting were also attended by Conveners for Judiciary and Constitutional Commissions, Devolved Government and Public Finance Thematic Areas		
Devolved Government:		
Taskforce on Devolved Government	Familiarization with the mandate of the Taskforce, discuss the status of development of the devolution bills, facilitate expeditious conclusion of the Taskforce report and preparation of devolution bills within the Constitutional timelines	6th-8th July 2011
AG, KLRC and Taskforce on Devolved Government drafting team	Check the technical soundness of provisions in draft bills on devolved Government	2nd August 2011
Public Finance:		
Task Force on Devolved Government	This meeting undertaken with the aim of familiarizing the CIC with the mandate of the task force whilst also urging the Task Force to expeditiously conclude its work. Subsequent to the meeting, the task force released its interim report.	6th – 8th July, 2011

<p>Kenyans living in South Africa, Department of Public Service and Administration, Rural Development and Law Reform, Constitutional Court, Gauteng Legislature, provincial and local Government.</p> <p>The meeting were also attended by Conveners for Judiciary and Constitutional Commissions, Devolved Government and Public Finance Thematic Areas</p>	<p>Benchmarking tour to South Africa</p>	<p>24th– 29th July 2011</p>
<p>Kenya Law Reform Commission, Attorney General and the Commission on Revenue Allocation</p>	<p>This meeting resulted in the decision to engage the services of a consultant to consolidate the two divergent bills into one Public Finance Management (PFM) bill</p>	<p>5th August 2011</p>
<p>Commission on Revenue Allocation</p>	<p>The meeting was aimed at getting the perspective and views of the CRA with respect to the Public Finance Management Bill and County Government Finance Management Bill as published by the Ministry of Finance and the Task Force on Devolved Government.</p>	<p>11th August 2011</p>

Annex VII

Commissioners of the Commission for the Implementation of the Constitution



Mr. Charles Nyachae
Chairperson



Dr. Elizabeth Muli
Vice-Chairperson
Dr. Muli is the Convener of the Executive and Security Thematic Team.



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



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



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



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



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



Mr. Philemon Mwaisaka, EBS, SS
Mr. Mwaisaka is the Convener of the Public Service and Leadership Thematic Team.



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



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