Commission for the Implementation of the Constitution

Utekelezaji wa katiba, jukumu la wote

END TERM REPORT

December 2015

Paper laid on the Table of The Senate on 11/02/16 by Sen. Mutula Kilonzo Jr.
11/02/16

We, the people of Kenya:

ACKNOWLEDGING the supremacy of the Almighty God of all creation:
HONOURING those who heroically struggled to bring freedom and justice to our land:

PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:

RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:

COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation:

RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:

ADOPT, ENACT and give this Constitution to ourselves and to our future generations.

GOD BLESS KENYA

Preamble – adopted from the Constitution of Kenya, 2010

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ABBREVIATIONS

ADR	Alternative Dispute Resolution
AG	Attorney General
CA	County Assembly
CARPS	Capacity Assessment and Rationalization of the Public Service
CASB	County Assembly Service Board
CC&IOs	Constitutional Commissions and Independent Offices
CDF	Constituency Development Fund
CEC	County Executive Committee
CGA	County Government Act, 2012
CIC	Commission for the Implementation of the Constitution
CIOC	Constitutional Implementation Oversight Committee
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CLMBs	County Land Management Boards
COB	Controller of Budget
COK2010	Constitution of Kenya, 2010
CPSB	County Public Service Board
CRA	Commission on Revenue Allocation
CUC	Court User Committees
DPP	Director of Public Prosecutions
EACC	Ethics and Anti Corruption Commission
FIDA	Federation of Women Lawyers
IEBC	Independent Electoral and Boundaries Commission
IFMIS	Integrated Financial Management Information System
IG	Inspector General
IPPG	Inter-parties Parliamentary Group
KADU	Kenya Africa Democratic Union
KANU	Kenya Africa National Union
KDF	Kenya Defence Force
KNCHR	Kenya National Commission on Human Rights
LSK	Law Society of Kenya
MCA	Member of County Assembly
MDAs	Ministries, Departments and Agencies
NCAJ	National Council for the Administration of Justice
NCBF	National Capacity Building Framework
NGEC	National Gender and Equity Commission
NIS	National Intelligence Service
NLC	National Land Commission
NPS	National Police Service
NPSC	National Police Service Commission
NSC	National Security Council
PFM	Public Finance Management
PSC	Public Service Commission
PWD	Persons with Disabilities
SRC	Salaries and Remuneration Commission
TA	Transition Authority
TSC	Teachers Service Commission
WDF	Ward Development Fund

ACKNOWLEDGEMENT

As the Constitutional Commission charged with the responsibility of monitoring, facilitating and overseeing the implementation of the Constitution, we would like to acknowledge that meaningful discharge of this mandate required support from many other institutions and all the people of Kenya. We therefore express our deepest appreciation to all for your contribution to this worthy course.
The Commission wishes to recognize and appreciate the efforts from all those individuals, institutions and agencies who contributed to the achievements made in the implementation of the Constitution over the five-year period.

First, we salute the people of Kenya for choosing to transform the way Kenya is governed through this constitution. The choice was both courageous and strategic. Secondly, we are deeply indebted to the people for supporting CIC in overseeing the implementation of the Constitution. We encourage you to continue guarding your Constitution and its implementation both in letter and spirit. Your important contribution, through mainstream and social media, and attendance during stakeholder consultations and participation in other public forums have been very helpful to us during the five years of implementation.

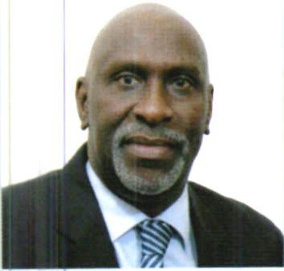
We appreciate the roles of both State and non-state actors including; the executive and the legislature at both the national government and the 47 county governments, who developed legislative proposals, participated in roundtable meetings and provided feedback to various Bills. The Constitutional Commissions and Independent Offices were very instrumental, especially in the implementation of Article 249 in addition to carrying out their own mandates. We urge you to continue with this role to ensure the letter and spirit of the constitution is safeguarded and sustained.

The Constitution of Kenya 2010 gives special recognition to civil society organizations, the media, religious groups, business community and members of various professional bodies. We appreciate the support received from you during the execution of our mandate and we call upon your continued vigilance for the implementation of this Constitution.

The unwavering support from development partners and foreign missions, both technical and financial, made it possible to record these achievements. The support received from the United States Agency for International Development (USAID), The International Development Law Organization (IDLO), the United Nations Development Programme (UNDP), The Government of Japan, The Royal Netherlands Government, Swedish International Development Cooperation Agency (SIDA), Gautsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Danish International Development Agency (DANIDA), United Nations High Commissioner for Refugees (UNHCR), United Nations Office of the High Commissioner for Human Rights (OHCHR), World Wide Fund for Nature (WWF), Open Society Initiative for Eastern Africa (OSIEA) and State University of New York (SUNY-Kenya), cannot be gainsaid.

Finally, we thank the Almighty God for His guidance and blessings over the period.

FOREWORD



To the People of Kenya; in 2010 you gave us the responsibility to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution of Kenya, 2010, the task we have done diligently and reported regularly on the progress, challenges and impediments. We wish, in this End Term Report, to report back to you on progress of the implementation over the last five years.

The Fifth Schedule to the Constitution provides the legislation and their timelines within a five-year period to be enacted by Parliament as provided for under Article 261 of the Constitution. Working with other implementing partners and, in particular the Attorney General, the Kenya Law Reform Commission and various ministries, the enactment of these laws has been on course, except in two occasions when Parliament, using Article 261 extended the implementation period. In August 2014, the national assembly extended six laws for nine months whose timeline was August 27th 2014. Second, in August 2015, the national assembly extended for a period of one year another set of nine laws whose timeline was August 27th, 2015, effectively beyond the five-year period.

Beyond the legislation stipulated in the Fifth Schedule to the Constitution, Government agencies have been reviewing existing legislation and administrative procedures required for the implementation of the Constitution. This process needs to continue to align existing policies, sessional papers, laws and administrative procedures with the Constitution.

During the first five year period after the promulgation of the constitution, the people of Kenya had an opportunity to exercise their democratic right in the election of a President, Governors, Senators, Members of the National Assembly, Women elected to represent Counties in the National Assembly as well as members of County Assemblies. For the first time, the electoral process included the nomination of members of legislative assemblies to represent special interest groups such as the youth, persons with disabilities, as well as marginalised and minority groups. These are some of the promises of the Constitution of Kenya 2010. Notwithstanding the challenges encountered during the elections, as a nation, these were major democratic gains. I call upon the people's representatives to embrace transformative and servant leadership which is enshrined in this Constitution. This approach to governance can only be evident in their service to the people and acknowledging that the power vested on them is the power to serve rather than power to rule. In particular I draw the attention of leaders at both national and county levels to the provisions of Articles 1, 3, 10 and 73 of the Constitution. These articles provide for, among others, recognition of the sovereignty of the people of Kenya, defence of the Constitution, and observance of the national values and principles of governance and the responsibilities of leadership.

This period will go down in our history as the period during which devolved governments came into effect in this country. The elections of 4th March 2013 ushered in the devolved system of government, which has now been implemented for two and half years. The two assessments carried out by CIC (March/April 2014 and June/July 2015), showed commendable progress in the operationalization of the system in all counties. Counties have put in place and are strengthening key institutional structures and systems in both the County Executives and County Assemblies. There has been increased public participation in county planning, and infrastructure has been developed or rehabilitated leading to increased and improved services to the people.

Despite achievements in devolution, there have been substantive challenges, which should be addressed to ensure effective implementation of the system of devolved government, and enhanced services to the people of Kenya. The challenges include the functions that have not been defined as required by the Constitution. Lack of clear definition/and proper unbundling of the functions has lead to some functions meant for County Governments as per the Fourth Schedule being retained at the National Government. The second challenge is resource constraint. This requires more efforts by county governments to raise revenues and the Parliament to allocate more funds to devolved functions.

Thirdly, the Constitution requires decentralization of services to sub-counties, wards, villages, and any other lower levels as practical. The County Governments have been slow in establishing the expected decentralized structures. Fourth, the impeachment of county governors (Embu County and Murang'a county), in brazen, disregard of the rule of law. Article 181 of the Constitution provides for the removal of a county governor and Section 33 of the County Governments Act, 2012 provides the actual process for removal of a governor. While it is within the powers of the county assembly to initiate the impeachment process, and the Senate to make a determination on the same, firstly, the Embu county assembly proceeded to pass a motion for removal of the governor, despite, and in complete defiance of, an order by the High Court, stopping the process, until the determination of the case filed in court by the governor. One cannot implement the law by breaking another law. Worse is when an improper impeachment processes disrupts service delivery to the people.

The full implementation of the devolved system of government promises to, among other things, promote social and economic development and the provision of proximate, easily accessible services throughout Kenya. It is therefore the duty of the people of Kenya, County Governments and the National Executive to play their respective roles diligently in ensuring that the devolved system of government is on track and becomes a benchmark for the region and the world.

As CIC, we have stood for the implementation of the principle of not more than two thirds gender rule in all public appointments and employment. We have supported the proposal to lifting the provisions in Article 177 (1) (b) into Articles 97 and 98 of the Constitution. We have also supported amendments to the Elections Act and the Political Parties Act to entrench provisions which, if passed, would promote the greater participation by women, youth, persons with disabilities, ethnic minorities and other marginalized groups in political party activities and in political elections, in line with Article 100 of the Constitution.

The Constitution being the supreme law of the land calls for its wholesome interpretation so as to promote its purpose, values and principles and to advance the rule of law and fundamental freedoms in the Bill of Rights. At the same time, the Constitution, being a living document, permits for its amendment to suit the needs and demands of a changing society. Indeed, Chapter Sixteen of the Constitution is dedicated to thresholds and avenues through which this constitution can be amended. It includes amendments **through popular initiative supported by at least one million registered voters in the Country (Article 257). This method of amendment requires** a referendum. The constitution can also be amended through Parliamentary initiative

While the Constitution recognises that it can be amended, and gives every person the right to initiate amendments, the right should be exercised with caution, prudence and responsibility. Ideally amendments should be compelling with the main reason of advancing the public good by ensuring legal, political and economic stability. An amendment to the Constitution should meet certain minimum standards, key among them being the protection of the Constitution and the sovereign will of the people of Kenya, as opposed to serving the personal interests of the people to whom the people's power is delegated. Hence, the Commission advises that there is need to reflect on the following while making proposals to amend the Constitution:

a. Who benefits from the proposed amendments?
b. Have the current provisions of the Constitution been given enough time to be tried and tested and consequently established as not working or irresolvable by other means, thereby necessitating amendments to it?

In line with the requirements of Article 3 of the Constitution, in order to reap its benefits, the people of Kenya must remain vigilant to ensure that they protect the Constitution, and that any amendments proposed to it should be for the greater good of this country.

Upon careful analysis, CIC concluded that a number of constitutional amendments proposed by Parliament, thus far, only served to protect Members of Parliament from carrying out their duties within the required constitutional scope or for pecuniary and other parochial interests and benefits. Most of the proposed amendments are those that relate to provisions that were generally not conducive to MPs. These amendments ended up detrimental to service delivery to the people of Kenya.

Under Article 249(1) (a) of the Constitution, Constitutional Commissions and Independent Offices have a collective mandate to protect the sovereignty of the people. This power has been exercised individually or collectively when there is a particular issue that threatens the sovereignty of the people. Indeed, through the Chairperson's Forum of Constitutional Commissions and Independent Offices, these institutions

have held each other accountable and supported each other in facilitating the implementation of the Constitution. As CIC, we have no doubt that through Article 249 of the Constitution, Constitutional Commissions and Independent Offices will carry this mantle after the term of CIC comes to an end.

Despite these achievements, there have been challenges in the implementation of the Constitution. Whereas it is accepted by all implementing partners that policy should precede legislation, in many cases, this has not been the case. The government agencies originating legislation will need to develop/ review the policies for constitutional compliance before developing legislation.

While Article 261 (4) is clear on the legislation process, during this implementation period, some draft laws found their way to Parliament outside the agreed constitutional process, some of them with unconstitutional provisions. In this process, Parliament proved to be the main stumbling block to the smooth implementation of the Constitution. Some laws that were passed failed to keep to the letter and spirit the Constitution. There has also been lack of political will to implement the one-third-gender requirement as ordered by the Court in 2012.

While every Kenyan has a right to propose amendment to the Constitution, the clamor almost in year one of its implementation to amend the Constitution could only be seen as a quick fix to all unfulfilled demands and expectations. By putting in place a five-year mechanism to monitor, facilitate and oversee the implementation of the Constitution, the framers of the Constitution dedicated the first five years of the Constitution to promoting a culture of constitutionalism and rule of law and embedding respect for the letter and spirit of the Constitution in the national psyche. The Commission strongly believed that issues of concern, if any, could be adequately addressed without resorting to amendment of the Constitution. Surgery has never been the first line of treatment for any malady. Good physicians will, as a matter of preference, recommend less invasive methods of intervention.

The socio-economic audit of the Constitution initiated by the National Assembly and the debate on the national wage bill, both, unfortunately, seemed bent on finding fault with offices created under the new Constitution. It was misleading to imply that the system of devolved government was responsible for the increase in the country's wage bill. This is because by the time county governments came into place, the horse had already bolted. Of course, prudent use of national resources is of paramount importance and as a nation, we must, prioritize national programmes.

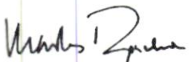
Over the years, the budgetary allocation to CIC from Parliament has, in blatant disregard of Article 249(3) of the Constitution, continued to shrink even as the mandate of the Commission expanded, especially with the establishment of county governments. Notwithstanding this inadequacy, CIC managed to discharge its mandate with support from stakeholders and development partners.

As the Commission completes its term as stipulated in the Constitution, Parliament has a constitutional obligation to explore options for ensuring continued monitoring, facilitation and oversight on the implementation of the Constitution, particularly on matters relating to the implementation of the system of devolved government. This would include exploring existing institutions that could take up CIC's mandate and ensuring the documentation and preservation of records for use as reference materials.

Finally, the activities undertaken by CIC in these five years were realized due to the commitment of CIC commissioners and staff, the participation of stakeholders, technical and financial support received from the government and development partners. Words cannot express the Commissions' gratitude to all these stakeholders. The Commission greatly appreciates support received from the people of Kenya, non-State actors, the national and county governments and chairpersons and members of constitutional commissions and independent offices in the discharge of the Commission's mandate.

We dedicate this report to the People of Kenya. We thank you all for your support and urge you to keep up the constitution implementation momentum and constitutionalism.

THANK YOU.



Charles Nyachae,
CHAIRPERSON

EXECUTIVE SUMMARY

The Commission for the Implementation of the Constitution (CIC), submits to the People of Kenya this End Term Report in line with the statutory requirements and in keeping with best practice of completion of assignments. The report details the experience gained in the implementation f the constitution of Kenya 2010.

Chapter One of the report provides the context, tracing the long journey to the promulgation of the Constitution of Kenya 2010 and highlights the significant changes introduced in Constitution of Kenya 2010. The Constitution of Kenya 2010 differs from the previous constitutions both in content and in the process adopted when developing the document. This constitution is much more reformative and progressive than the previous constitutions. It attempts top address the governance challenges associated under the old dispensation. Further, unlike previous constitution's specific provisions are made to enhance implementation. This incudes the establishment of the Commission for the Implementation of the Constitution (CIC) to monitor, oversee and facilitate the process of implementation. The Commission has discharged its mandate by facilitating development of requisite policy legislation and institutional and administrative frameworks that are compliant with the Constitution.

Chapter Two presents an analysis of the processes relating to the implementation of the Constitution, including development of policies, formulation of legislation and administrative procedures, and the institutional framework required under each chapter of the Constitution. Presented below are some highlights of this chapter of the report:

Sovereignty of the People and Supremacy of the Constitution

The adoption of the Constitution of Kenya 2010 was an expression of the people's popular sovereignty and the People of Kenya's aspiration for a government based on the values of national unity, human rights, equality, freedom, good governance, democracy, social justice and the rule of law. As noted in the report, progress has been realized in ensuring that the just powers of government are founded on the will or consent of the people of Kenya. However, as documented in the challenges and recommendations presented in this report, more needs to be done to ensure that every person is guided by the overriding constitutional obligation prescribed in article 3(1) i.e. to respect, uphold and defend the Constitution

The Republic

Chapter two of the Constitution documents the declaration of Kenya as a sovereign Republic and a multi-party democracy founded on the national values and principles of governance. This chapter of the Constitution provides for devolution and access to services; the national, official and other languages; the relationship between the State and religion; national symbols and national days; national values and principles of governance and culture. To a large extent the policies, legislation, administrative procedures and institutional frameworks required for full implementation of these provisions have been put in place. However, as noted later in the report, this excludes the legislation in respect of culture [Article 11 (3)]. Further, there are enduring implementation challenges, which need to be addressed including the full application of the national values and principles of governance espoused in the Constitution.

Citizenship

Chapter Three of the Constitution on Citizenship sets out the general terms upon which a person may acquire, retain and revoke citizenship. To give effect to these provisions of the Constitution, two laws were enacted. However, the law to implement Article 15(4) is still pending. Parliament is required and is yet to enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries. Additionally, while the legislative reforms on citizenship have been a positive development, experiences on the implementation of the Kenya Citizen and Immigration Act, 2011 reveal that lack of awareness remains a key challenge.

Bill of Rights

The new constitutional dispensation provides that government operations and policies would be based on the values of human rights including equality and non-discrimination, equity, public participation, democratic governance, social justice and the rule of law. Notable progress has been made in the

implementation of the various rights provided in the chapter on Bill of Rights. This includes enactment of legislation explicitly prescribed in the Fifth Schedule to the Constitution as well as establishment of related institutional frameworks such as the relevant Constitutional Commissions. Several of the required policies and regulations have also been put in place. That notwithstanding, implementation of articles 19-23, regarding the rights and fundamental freedoms, application, implementation and enforcement of the Bill of Rights, has been mainly through litigation where State organs and persons have gone to court for redress.

Despite the progress made, a number of laws are yet to be enacted and policies formulated to give full effect to the provisions of the Bill of Rights. The most glaring among them are the laws, policies and standards to guide the progressive implementation of economic and social rights. Legislation limiting the rights and fundamental freedoms also needs to be enacted to ensure that the enjoyment of some rights do not jeopardize the enjoyment of other rights. Further, all existing policy developed prior to the adoption of the Constitution of Kenya 2010, as well as the related laws, requires urgent review to align the with the constitution.

Land and Environment

Chapter Five of the Constitution provides for equitable, efficient, productive and sustainable use and management of land, in accordance with the principles of equitable access, security of land rights, and transparent and cost effective administration among others.

Progress in the implementation of this chapter of the Constitution includes enactment of legislation and the undertaking of key institutional reforms such as the establishment of the National Land Commission and the Ministry of Land, Housing and Urban Development. County Land Management Boards have been established to decentralize the services of the Commission. The implementation of Land reforms has met significant challenges. For example, crucial Bills are yet to be enacted. Further, supremacy battles have been rife in the sector with the national land Commission and the responsible Ministry engaged in turf wars over roles and mandate. This conflict has contributed to the delay in review of a significant number of existing land and environment policies and laws for conformity with the provisions of the Constitution. Review and development of key policies and administrative procedures for the sector is also lagging behind.

Part 2 of chapter five of the Constitution of Kenya obligates the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure equitable sharing of the accruing benefits, protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities, and encourage public participation in the management, protection and conservation of the environment. To realize these objectives two policies (water policy and wildlife conservation policy) and 12 bills have been developed to various stages. Although most of these Bills had 27th August 2015 deadline, parliament extended the constitutional deadlines of these Bills by one year to allow for more consultations on the same.

As detailed in the report, over 65 policies and laws identified in the respective Ministries and the relevant State corporations in the sector are yet to be reviewed to align with the constitution.

Leadership and Integrity

Chapter Six of the Constitution is one of the transformational aspects in the Constitution of Kenya 2010. This provision was informed by the fact that poor leadership was one of the main reasons why Kenyans demanded a new constitution. The two pieces of legislation stipulated in the Sixth schedule to the Constitution were enacted. Further, the required independent Ethics and Anti-Corruption Commission operationalized.

Regrettably, however, the Leadership and Integrity Act, 2012 which is key to giving effect to Chapter Six of the Constitution, was passed with fundamental flaws. The Act as passed by the tenth parliament fails to recognize the Ethics and Anti-Corruption Commission as the primary institution for ensuring compliance with and enforcement of the provisions of Chapter Six. Further whereas EACC was eventually established a myriad of challenges were faced in this endeavor. Key among these was the delay in proper constitution of the Commission as a result of initial failure to meet the two-thirds gender

principle. The appointment of the Chairperson of the Commission was challenged on integrity grounds. This led to a delay in his taking up office. This meant that despite the operationalization of the EACC in 2012, the Commission was only properly constituted during the period July 2013 to April 2015. The departure from office of the chairperson and commissioners in 2015 under unclear circumstances has hampered the work of the Commission.

Representation of the People

Chapter Seven of the Constitution spells out the electoral system, the electoral process to be used, the institutional framework and requirements for political parties. The Constitution also provides a number of principles that should guide the electoral system including the requirement for transparency and inclusivity.

Significant effort has been made to align the electoral processes to the letter and spirit of the constitution. These include the enactment of relevant legislation, the development of administrative procedures for the implementation of these laws and the establishment of the relevant institutions including the IEBC and the Office of the Registrar of Political Parties. Challenges faced include among others lack of guidelines on the funding of political parties, failure to appoint a substantive registrar of political parties, late amendments to electoral legislation and policy There are also legislative gaps for the conduct of a Referendum. These challenges should be addressed prior to the next general election.

The Legislature

Chapter Eight of the Constitution provides for the establishment, roles, composition and membership of Parliament; offices of Parliament; and Procedures for enactment of legislation. Chapter Eleven of the Constitution establishes a county government for each county consisting of a county assembly and a county executive, and goes ahead to provide for how members of a county assembly come into office and the functions and other requirements of each assembly.

The legislative and institutional frameworks for the legislature at national and county level have been developed and implemented as provided in the Constitution. In addition to the fifth schedule legislation, two key laws were enacted to facilitate the conduct of general elections. Some of the challenges observed in the legislative assemblies and which the Commission recommends be addressed include: supremacy battles between the Senate and the National Assembly; duplication in roles of the National Assembly and the Senate committees; implementation of the not more than two-thirds gender principle in parliament; legislative gaps on selection of party leaders in certain situations; quorum in conducting the house business; violation of leadership and integrity requirements.

The Executive

Chapter nine of the Constitution provides for the structure and establishment of the national executive. It has transformed the Executive from a centralized authoritarian and unaccountable form of governance to one which places constitutional constraints on the exercise of governmental authority.

The two pieces of legislation required under chapter nine of the Constitution, and which were crucial in the establishment of the national executive, were enacted within the timeline stipulated in the Fifth schedule to the Constitution. The institutional framework was also reviewed to align it to the Constitution with key offices being operationalized. However, while the requisite laws, systems and institutions are in place and measures have been put in place to implement chapter nine, there are systemic and endemic challenges which if not checked could compromise the gains realized. These include conflict over institutional mandates, inadequate capacity and other resources ands low level of public awareness. Vesting both investigative and prosecution powers in one agency presents serious risks and challenges of abuse of power, conflict of interest and mandate. Another challenge has to do with overlap in the assignment of human resource administrative responsibility.

The Judiciary

Chapter Ten of the Constitution stipulates far-reaching institutional reforms backed by policy and legislation.

Pursuant to this, the required legislative reforms have been undertaken with the timely enactment of laws and operationalization of key implementation structures as well as administrative reforms. For example the Supreme Court, the Employment and Labour Relations Court and of the Land and Environment Court, the Judiciary Ombudsman are significant features of the transformational change attributable to the new constitutional order. The achievements include the engagement with members of the public and Non-State agencies through court user committees and enhancement of the geographical spread of court stations geared towards enhancing access to judicial services. While notable progress has been made, the following challenges have been noted: lack of clarity on issues such as the retirement age for judges and timelines for the appointment of judges, corruption; inadequate financial and human resource capacity, insufficient facilities; complex rules of procedure which render judicial services inaccessible to the majority of court users and limited decentralization of judicial services to the smallest units of service delivery at county level.

Devolved Government

The Constitution of Kenya 2010 introduced a devolved system of government consisting of two levels of government. The decision to adopt a devolved system of government was influenced by Kenya's experience with a centralized system of government, under which decisions including allocation of development resources were made at the capital without the active participation of the people.

There is significant progress in the implementation of the system of devolved government. In addition to the fifth schedule legislation, other laws were enacted to facilitate implementation of the devolved system of government. Further, as envisioned, key institutional structures were established at the national, county and inter-governmental level. Overall, the functions to be discharge by these institutions have, where provided for, been transferred to the appropriate level of government. Significant challenges noted in implementation include the development of law in the absence of a guiding policy framework; some laws, policies and administrative procedures that are inconsistent with the letter and spirit of constitutional provisions on devolution; delays in full implementation of some key provisions such as the requirement for functional analysis, unbundling and costing of functions as well as and glaring capacity constraints.

Public Finance

The Constitution significantly overhauled public financial management in Kenya. Prior to the promulgation of the Constitution of Kenya 2010, public finance management faced challenges and gaps that resulted in misappropriation and misapplication of public funds, inequities in resource redistribution as well as inadequate checks and balances with respect to transparency and accountability. The legislative frameworks posited by the Public Finance framework under the Constitution and undertaken pursuant to the Constitution were put in place to make public financial management more efficient, effective, participatory and transparent resulting in improved accountability and better service delivery. Further the various institutions to oversee the implementation of an efficient financial management system at the national level and county level were established and are operational.

When implementing the required changes, a number of challenges have been faced. These include: ineffective public participation; institutional disputes; inconsistencies in the remittances of fiscal transfers; inadequate funding for devolved functions; capacity gaps and imposition of user fees and charges that are not wholly consistent with the Constitution {Article 209(5)}.

The Public Service

Chapter thirteen of the Constitution provides for values-based transformation at all levels of the public service. The introduction of the values and principles of the public service in article 232 sought to address the issues relating to appointment and promotions within the public service for purposes of enhancing service delivery for the greater benefit of the Kenyan public. Further, the Constitution provides for uniform norms and standards for staffing of county governments, and protection of public officers in the course of the performance of their duties and obligations.

Pursuant to these provisions, key legislation for public service has been put in place. Administrative procedures and policies have also been formulated and are being implemented to realize the required transformation. Also put in place are the required Constitutional Commissions i.e. the Public Service Commission (PSC) and the Teachers Service Commission (TSC). There are considerable efforts being made in the implementation of the values and principles of the public service and the entrenchment of a culture of meritocracy in recruitment and appointments to the public service. However, a number of challenges have been encountered including: Lack of clarity in assignment of roles with respect to the education function in the relevant national policy. This has resulted in conflicts over mandates between the national and county governments. Violation of the leadership and integrity provisions through corruption and unethical conduct amongst public servants has the sum effect of undermining service delivery. Difficulty in meeting the thresholds set in staffing for special group especially PWDs; Limited skills and qualification of staff inherited from the defunct local authorities and the resulting effect on the county governments' wage bill.

National Security

Chapter fourteen of the Constitution provides for the establishment of various State organs and systems designed to guarantee national security. The Constitution prescribes significant changes in the policy, legislation and institutional structures relating to national security. The national government is the primary duty bearer and principal custodian of the right to freedom and security as espoused in the Constitution. The national government has the responsibility to establish the necessary security mechanisms to ensure that this right is protected, promoted and fulfilled for everybody living within her jurisdiction.

Great strides have been made to ensure that national security is aligned to the letter and spirit of the Constitution. Requisite legislation and administrative procedures have been developed, national security organs established to facilitate the effective implementation of national security. Other key achievements in the security sector is the regulation of the use of force and firearms in observance of human rights, enhanced police accountability and the application of the not more than two-thirds of any gender principle in recruitment to the service. Despite the significant progress in implementation of national security, a number of challenges have been observed. They include, among others, the lack of a policy framework to guide national security, lack public participation on issues to do with national securioty, conflict between the line of command of IG and disciplinary control of NPSC; lack of coordination between the KPS and APS; and corruption.

Constitutional Commissions and Independent Offices

Chapter 15 of the Constitution provides for the establishment of Constitutional Commissions and Independent Offices. The establishment of these institutions was in response to the call by Kenyans to have independent public institutions to deal with issues of national interest while being insulated from undue political interference. Coming from a history where similar State agencies could easily be rendered redundant by, among other means, the withholding of funding and arbitrary dissolution of membership, it was imperative that such institutions be independent of political influence and arbitrary exercise of executive power.

Working together, the commissions and independent office have been instrumental in facilitating the nation to record significant progress in the implementation of the Constitution, including policy, legal and regulatory reforms as well as review and development of related institutional frameworks. Key achievements include (a) the successful conduct of the first general elections under the constitution in 2013; (b) facilitating smooth transition to the system of devolved government; and (c) working together with national and county governments to facilitate institutional reforms and the establishment of appropriate systems for effective service delivery in accordance with the principles of devolution specified in article 6 of the Constitution. The commissions and independent offices have also come together on various occasions to seek judicial intervention in matters of national interest and in defense of the constitution.

When carrying out their mandates, Constitutional Commissions and Independent Offices have faced several challenges. These include issues in composition, appointment and terms of office for members, inadequate funding, and conflict on mandates among some of the Commissions and threats and intimidation by other arms of government.

Chapter Three of this report discusses the expectations on entrenchment of Constitutionalism, challenges and recommendations going forward. The Constitution of Kenya 2010 forms the basis for entrenching constitutionalism in Kenya. It has been hailed as one of the most progressive in the world and sought to empower the citizen, guarantee them fundamental rights and freedoms and change the governance structure of the country. It articulates a fundamental shift in the conduct of State affairs, a focus on delivering targeted results for Kenyans while observing the principles of good governance. The transformation envisioned is one where an empowered populace is equitably receiving services that are delivered efficiently, effectively, economically and ethically. This is denoted in the central tenets of the Constitution.

As detailed in the report, during this implementation there have been major challenges to constitutionalism. These include; increasing cases of breach of the Constitution; abuse of constitutionally granted powers and breach of the leadership and integrity requirements by State Officers. As the promotion of constitutionalism is critical to the development of a democratic, peaceful and prosperous nation and must be the primary focus of all citizens and leaders this report contains recommends addressing the challenges noted. These recommendations center on change management to ensure that all actors take up their responsibilities and play their respective roles. The chapter ends by reminding all Kenyans of the need to respect court rulings and respect for the separation of powers.

Chapter Four of the report provides recommendations for amendments, by identifying provisions or articles of the Constitution, which are silent but if included or amended would enhance implementation of the Constitution. These are:

a) Article 97(1) to provide a maximum number of constituencies to 150 that would give to a maximum 225 MPs. Also, amend article 89(8) to provide that the number of Wards shall be 750.
b) Article 113(1) on mediation committee; insert a new provision that involves the appointment of an extra member to the mediation committee from outside either house. We also propose amendment of article 121 that provides the quorum of National Assembly and Senate at fifty and fifteen respectively to a third of the House.
c) Article 127(2) on Parliament Service Commission; remove sitting MPs from being members of the Parliamentary Service Commission, and secondly, the Speaker should not be the chairperson of the committee.
d) Article 221 on Budget Estimates and Annual Appropriation Bill, add a provision to require the National Assembly Committee on Budget to send back their proposed changes on the budget estimates to the Cabinet Secretary responsible for finance for incorporation and rationalization before eventual consideration and passage of the same by the Assembly. Amend this article 26(3) to abolish death sentence.
e) Articles 255, 256, 257 on procedure to amending the Constitution, all referendum questions should be voted on during the general elections. Amend article 67 to ensure the Commission does not exercise executive functions but plays oversight role. Amend articles 245 and 246 to clarify the distinct roles of Inspector General and National Police Service on matters of human resource without interfering with the Command structure of the Service.
f) Finally, articles 161(2)(a), 163(1)(a), 171(2)(a), we propose amendment of respective articles to separate the holders of Chief Justice and Head of the Judiciary, Supreme Court Judge and the President of the Supreme Court and the Chair of the JSC appropriately to remove conflicts of performance.

Chapter Five contains the analysis of challenges and impediments encountered in the processes of implementation and recommendations. These include: Delay in review and development of policies and administrative procedures; Delay in enactment of critical laws such as the land laws; Tabling of bills before parliament without passing the right process; Inadequate public participation; Limited civic education; Delay in disbursement of resources to county governments; Disregard for the rule of law and violation of chapter six of the Constitution by state officers; and Supremacy wars between the National and county governments, Senate and the National Assembly, County Assemblies and executive.

To address these challenges, the Commission recommends for a comprehensive review and development of policies that conform to the Constitution in all sectors to guide service delivery. The Commission

further recommends enactment of relevant legislation. In addition, administrative procedures should be developed where required to implement a law. The executive and parliament need to respect the Constitution and process Bills through laid down process so as to minimize unconstitutional issues in the bills. National and County governments should develop policy and legislative frameworks to facilitate public participation. They should also develop and implement a comprehensive civic education framework and programme. Further, the governments should develop and use inter and intra governmental mechanisms for consultation, co-operation and resolution of disputes.

CHAPTER ONE

1.1. HISTORY OF THE CONSTITUTION OF KENYA, 2010

Kenya's constitution making history is traceable to the colonial period. The colonial government made several attempts to legitimize its rule through legal and constitutional means. The first attempt in this process was made in 1897 with the establishment of the East African Order in Council. This Order established administrative machinery for the East African region of which colonial Kenya was part. The Order created the office of Chief Executive Officer (CEO) of the colony. The CEO was given the title "Commissioner" and had both executive and legislative powers. The 1897 Order in Council was repealed in 1902. The new Order placed more emphasis on administrative powers and less on legislative powers. During this period the colony did not have a legislative assembly. A notable reality was that the people of the colony were not represented in their governance[1].

The next major constitutional step was taken in 1905. In that year, the 1902 Order in Council was repealed and the office of governor created to replace that of Commissioner. Another important result of this development was the creation of two new governance institutions, namely the Legislative Council and the Executive Council. The legislative Council became the law making body while the executive council became the administrative (executive) arm of the colonial government. This was thus the first attempt at separation of governmental powers.

The first real constitution however was not put in place until 1920. It was at this time that the interests of all the racial groups in the colony were first represented in the Legislature. The next step in constitutional development in Kenya took place after the Second World War with the establishment in 1954 of the Lyttelton constitution. Oliver Lyttelton was the then British Secretary for colonies. A significant provision in this constitution was that it recognized the need for all racial groups in the colony to actively participate in their governance. It also established a council of ministers to advise the governor. Four years later in 1958, the 1954 constitution was replaced by the Lennox-Boyd constitution through an Order in Council. A significant development in this regard was the increase in the number of African representatives to the Legislative Council from two to fourteen. They were, however, appointed by the governor and not elected. By this time African representatives in the Legislative Council were making radical demands on the colonial government. They wanted elections and other political rights to be extended to the Africans. Indeed by this time many African countries were demanding political independence. Globally the mood was also supportive of freedom for colonies.

The Political pressure from Africans in Kenya in the context of global support for independence led to the Lancaster House Conference in London in 1960. The conference discussed preparations for Kenya's independence with a focus on a new constitution. Another constitutional conference was held in Lancaster in 1962. Representatives of the major political parties took part in both conferences. The parties were the Kenya African National Union (KANU), the Kenya African Democratic Union (KADU) and the New Kenya Party. The New Kenya Party represented the interests of the European settlers who had concerns about their future in independent Kenya. Following these two conferences, Kenya achieved political independence beginning with internal self rule in June 1963 and full independence on December 12th 1963. The independence constitution that was adopted had many democratic provisions. The most prominent ones included a multiparty system of government with an opposition leader in parliament, two houses of parliament, regional governments each with its executive and legislature, separation of governmental powers, a system of checks and balances, an independent judiciary, right to vote by Africans, and a Bill of Rights, among others.

A number of observations can be made about these constitutions. First is that they were elite driven, i.e., they lacked public participation. The ordinary people did not take part in the making of any of these constitutions. Consequently these constitutions may not have represented the interest

1 See Lumumba PLO & Franceschi (edt). 2014. The Constitution of Kenya, 2010, An Introductory Commentary. Strathmore University Press.

of the ordinary people of Kenya. Secondly the constitution made before the independence constitution were not democratic. Thirdly the independence constitution was arrived at as a result of a political compromise especially between representatives of KANU and their KADU counterparts.

1.1.1. Amendments to the Constitution

A number of amendments were made to the provisions of the independence constitution including the governance structure. Among the first major amendments were the abolition of the bicameral legislature and the introduction of a unicameral parliament. The import of the vast majority of the amendments to the independence constitution was to increase the power of the president and in the process weakening both the judiciary and parliament. Provisions that curtailed or limited the power of the political class were removed. By 1965, barely two years after independence, the decentralized system of government created by the independence constitution had been effectively abolished. In 1982 Kenya became a dejure one party State,with power becoming highly concentrated and centralized.

1.1.2. Quest for a new Constitution

It did not take long before some politicians began to ask for a new constitutional dispensation. Many people blamed the county's political and economic woes of the independence period to the undemocratic nature of the amended constitution. Dissatisfaction with these amendments was first expressed in 1966 with the resignation from government of the First Vive president Jaramogi Oginga Odinga. Odinga subsequently formed an opposition party, The Kenya Peoples Union (KPU) in 1966. Pressure for constitutional review heated up from the 1970s and continued into the 1980s. The people of Kenya made a lot of sacrifices in the quest for a new constitutional dispensation.

The re-introduction of a multi-party system of government in 1991 marked the beginning of heightened pressure for constitutional reforms, characterized by intense advocacy and political activities for a period of another seven years. People claimed more space, Kenya opened up and civil society pushed from the middle for an all-inclusive democratic process to rewrite the Constitution. The media, academia and faith based groups also played a major role in this process. Within this phase, three critical steps were taken. First was to forge a common ground for reforms, under the Ufungamano Initiative. Second was to organize and push for legislative framework to govern the process. And third, was the push for further constitutional amendments under the Inter Parties Parliamentary Group, which somehow stole the chance to rewrite the country's constitution in 1997.

These demands for change culminated in the enactment of the Constitution of Kenya Review Act of 1997. The Act provided the legal framework for a participatory constitution- making process, which resulted in the 2005 Draft Constitution that however was rejected by the popular referendum conducted in November of the same year. The outcome of the 2005 referendum was by no means the end of the collective desire and demand for comprehensive constitutional reforms.

The period 2003-2010 was perhaps the most promising phase in the search of a new constitutional order. In 2002 KANU lost elections to the opposition and subsequently Kenyans were polled as the most optimistic people in the world then. They yearned for and saw change coming. Unfortunately, this opportunity was squandered. Kenya was under a querulous government in 2003, made up of both anti- and pro- reformists. The same period saw the government divided in the referendum of 2005 and the country in a post-election debauchery in 2008 respectively.

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

On 17th December 2008, the National Assembly appointed the Parliamentary Select Committee (PSC) on the Review of the constitution through a resolution of the House. This was one of the organs through which a review of the Constitution would be completed. The other organs were the Committee of Experts, the National Assembly and the Referendum2. The function of the Committee was to facilitate the completion of a comprehensive review of the constitution that stalled following the referendum of 2005.

The 2008 Review Act established the Committee of Experts (CoE), which was mandated to finalize its work on a new, and harmonized draft constitution within twelve months from the date of appointment. On 17 November 2009, the CoE published a Harmonized Draft Constitution, which included the review of;

1) The Draft Constitution compiled in 2002 by CKRC;
2) The National Constitutional Conference of 2004 (Bomas Draft); and
3) The Proposed New Constitution of 2005 (Wako Draft)
4) Reference to the Constitution of Kenya and Constitutions of other countries.

The Draft Constitution was approved by the National Assembly and subjected to a referendum on the 4th of August 2010, conducted by the Interim Independent Electoral Commission (IIEC). The Draft Constitution received 67% support of the electorate in the referendum and, in accordance with the enabling law, was promulgated on 27th August 2010, by the President.

The Constitution of Kenya 2010 differs from the previous constitutions in several ways. First is that it was made in a participatory manner including a referendum. Secondly it is much more reformative and progressive than the previous constitutions. Thirdly the Constitution significantly reflects the will and aspirations of the people of Kenya, and addresses the challenges of governance that the country experienced under the old dispensation. Within this new dispensation are the stated national principles and values, extensive Bill of Rights, desire to reform the land sector, introduction of leadership and integrity not only in the public sector but also in the private sector, adoption of a devolved system of government, with phased transfer of functions, the reformed national security, etc. It is therefore hoped that the full and effective implementation of this constitution will result in improved governance and a culture of constitutionalism. The implementation is also key to ensuring socio-economic and political stability in the country; hence, the Constitution under Article 3 calls for all citizens of the country to respect, uphold and defend it.

Because of this long history in constitution making process in Kenya, the Constitution in the Fourth Schedule prioritized certain laws to be implemented within a period of five years, and in Sixth Schedule, put in place the Commission for the Implementation of the Constitution to monitor, oversee and facilitate the process of implementation.

1.2. THE COMMISSION OF THE IMPLEMENTATION OF THE CONSTITUTION

1.2.1. The Rationale for the Commission

The Constitution created the Commission for the Implementation of the Constitution (CIC) with the main responsibility being monitoring, overseeing and facilitating the implementation of the Constitution of Kenya 2010. CIC was included in all the three earlier draft constitutions; the 2002 Constitution of Kenya Review Commission (CKRC) draft, the 2003 Bomas Draft and the 2005 Wako draft. The rationale for the establishment of CIC was because of history, which is replete with constitutions and legislative documents that suffered incomplete and ineffective implementation. Having gone through more than two decades of constitutional review and reforms, the people of Kenya wanted a mechanism to safeguard and ensure that reforms ushered in by Constitution of Kenya 2010 would be realized.

2 Report of the Parliamentary Select Committee on the Review of the Constitution on the Reviewed Harmonized Draft Constitution, January 2010.

Consequently CIC was established under the Sixth schedule to Constitution as a transitional mechanism to last five years or until full implementation of the Constitution (as determined by Parliament) whichever was earlier. Within these five years, CIC was to ensure that the requisite legislative, institutional and administrative frameworks compliant with the Constitution would be in place; and that the system of devolved government would be implemented.

CIC was required to keep the Parliamentary Constitutional Implementation Oversight Committee (CIOC), and the people of Kenya regularly appraised of progress in the implementation of the Constitution, including any impediments the implementation was experiencing Like any other Commission, CIC was to report to Parliament and the President.

1.2.2. The Commission's Mandate

The mandate of the Commission is spelt out in the Sixth Schedule to the Constitution, and elaborated in the Commission for the Implementation of the Constitution Act, 2010 and the Transition to Devolved Government Act (TDGA), 2011.Section 6 of the Sixth Schedule provides for the functions of the Commission, which are:

a) To monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this constitution;
b) To coordinate with the Attorney General and the Kenya Law Reform Commission in preparing for tabling in parliament, the Legislation required to implement this constitution;
c) Report regularly to the Constitutional Implementation Oversight Committee on –
    i) progress in the implementation of this constitution: and
    ii) any impediments to its implementation; and

d) Work with each constitutional commission to ensure that the letter and spirit of this constitution is respected.

As a Constitutional Commission, CIC, in Article 249(1) is also obligated to;
a) Protect the sovereignty of the people
b) Secure the observance by all state organs of the democratic values and principles; and
c) Promote constitutionalism,

In Section 15(d) of the Sixth Scheduled, CIC is mandated to monitor the implementation of the system of devolved government effectively. This section provides CIC with a mechanism to monitor the implementation of the devolved system of government. Consequently, the Transition to Devolved Government Act, 2011 created the Transition Authority (TA) as one such mechanisms. The Act mandated CIC to receive and review regular reports from TA and Transition Implementation Plans (TIPs) from county governments as well as monitoring their implementation.

In discharging its mandate, the Commission, like all other State organs, was obliged to respect the Constitution of Kenya 2010, including observing, promoting, respecting and protecting national values and principles of governance as stipulated in Article 10 (2) of the Constitution.

1.2.3. Appointment of Members The Commission

Following the enactment of Commission for the Implementation of the Constitution Act, 2010 the chairperson and members of the Commission were appointed through a competitive process and in compliance with the Constitution's, two-third gender rule and gazzeted through Gazzette Notice Number 16952 of 30th December, 2010. The Commissioners took oath of office on 4th January 2011 and started working immediately from Delta House in Westlands, Nairobi. Their first assignment was to review Bills that were already in Parliament.

1.2.4. The Commission's Approach to the Implementation of its Mandate

The Commission is a strategic institution whose contribution to the implementation of the Constitution would set the pace for the constitutional order and system of governance. The Commission adopted the following approach in executing its mandate;

a) Guidelines on its Mandate and working modalities with other Institutions

The Commission issued two circulars, which established the framework used to engage with the executive and the legislature who were primarily responsible for generating policies, legislative proposals and administrative procedures required for the implementation of the Constitution of Kenya 2010. The two circulars were:

i) Circular No. OP.CAB.17/84/1A of 20th April 2011 issued through the Head of Civil Service and Secretary to the Cabinet to the Government Ministries, Parastatals, Regulatory Boards and all Constitutional Commissions and other institutions
ii) CIC Circular No 1 of June 2013 issued to County Governments (Executive and County Assemblies)

b) Review of policies, laws and administrative procedures in line with Article 261(4) and Section 5(6) of the sixth schedule to the Constitution

i) CIC consulted with the Attorney General in preparation of relevant Bills for tabling before Parliament {(Article 261(4)}
ii) CIC coordinated with the AG and KLRC in preparing for tabling in Parliament legislation required to implement the Constitution {(Section 5(6)}.
iii) Priority was given to the Fifth Schedule Legislation. (See also Article 261(1), i.e., "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".

Consequently, the Commission received and reviewed policies, laws and administrative procedures from various government agencies mandated to originate them, and followed each of them through all the stages until it was enacted into law or became policy. For each Bill, CIC checked if it had unconstitutional provisions, was consistent within itself and with other laws and added value to the existing legislation including that when passed, would implement the Constitution.

c) Stakeholder Engagements

i) In addition to consultations ordinarily undertaken in the course of developing and reviewing policies, legislation or regulations, CIC held other stakeholder engagements on various constitutional issues.
ii) The engagements were divided into those organised and facilitated by CIC and those into which CIC was invited and participated.

d) Litigation

The Commission, in exercising its mandate and promotion of constitutionalism, on its interpretation of the law, sought the court's guidance through legal proceedings in cases of real or perceived misinterpretation or misapplication of the Constitution. Annex 3 is a list of court cases instituted by or in which CIC was enjoined.

e) Advisories and Media Statements

The Commission used advisories and media statements as tools to respond to various challenges facing the implementation of the Constitution, to inform and seek views from the public on constitution implementation. In many occasions, the Commission issued advisories to the Cabinet, Ministries and Parliament on Bills and/or issues on constitutionality.

f) Monitoring of the implementation of the Constitution

i) Using tools developed by the Commission, the Commission carried out devolution assessment, county visits and analysed constitutional implementation reports. The Commission also responded to various constitution implantation queries from various stakeholders.

ii) Facilitation of State organs in incorporating of constitutional provisions in their policies, laws and administrative procedures.

1.2.5. The Commission's Organization and Thematic Areas

The Commission established eight Thematic Areas drawn from the subject matter in the different chapters of the Constitution. A member of the Commission convened each Thematic Area.

Thematic Areas	Chapters of the Constitution	Convener
Bill of Rights and Citizenship	Chapters 3 and 4. Ensured that i) Appropriate legislation was enacted to implement the constitution provisions on citizenship. ii) Human rights were integrated into all spheres of government in terms of their legal and policy frameworks. It also	Commissioner Catherine Mumma
Devolved Government	Chapter 11. Dealt with all matters relating to the operationalization of the constitutional provisions on devolved governments; both national and county governments.	Commissioner Professor Peter Wanyande
Executive and Security	Chapter 9 (The Executive) and Chapter 14 (National Security). Monitoring the functions and powers of the offices of the President, the Cabinet, the Attorney general and Director of public prosecutions. Development of instruments and establishment of institutions for the command and operations in the security sector.	Commissioner Dr. Elizabeth Muli, who was also the Vice Chairperson of the Commission
Judiciary and Constitutional Commissions	Chapter 10 (Judiciary) and Chapter 15 (Commissions and Independent Offices). Dealt with i) Judiciary and judiciary reforms ii) Establishment of constitutional commissions and independent offices aimed at implementing specific functions including constitutional implementation or institutional reform.	Commissioner Dr. Imaana Kibaaya Laibuta
Land and Environment	Chapter 5 (Land and Environment). Broadly covered; i) All areas relevant to land and environment management. ii) The functions performed such as land, environment, mineral resources, forestry, wildlife, water, energy and petroleum and Irrigation.	Commissioner Dr. Ibrahim M. Ali
Public Finance	Chapter 12. Coordination and guidance on constitutional implementation relating to matters of Public Finance	Commissioner Mr. Kamotho Waiganjo
Public service and Leadership	Chapter 6 (Leadership and Integrity) and Chapter 13 (Public Service). To ensure operationalisation of leadership and integrity provisions and reforming of the public service in line with the Constitution	Commissioner Mr. Philemon Mwaisaka, EBS, SS
Representation and Legislature	Chapter 7 (Representation of the People) and Chapter 8 (The Legislature). To ensure that; i) Policies, laws, systems, structures and administrative procedures applied at all levels of elections are consistent with the letter and spirit of the constitution ii) Relevant laws were legislated to ensure implementation of the chapters 7 & 8.	Commissioner Dr. Florence Omosa
Chairperson, Mr. Charles Nyachae was a spokesperson of the Commission. The Chair's office was responsible for coordination of activities of the Commission, communications function, monitoring and evaluation and overall leadership of the Commission.		

In addition to convening a Thematic Area, each commissioner held the additional responsibility of being a focal point for assigned national government ministries (and their related State agencies) as well as assigned counties. As focal points, the Commissioners spearheaded the Commission's support to the respective national and county government agencies to ensure policies; laws, administrative procedures and institutional frameworks were compliant with the Constitution. In some instances it required engaging with established inter-governmental structures as well as with sector actors including Non-State Actors in their efforts to implement the Constitution.

The Commission established a secretariat with a Chief Executive Officer and two Directorates; Management and Programmes. The secretariat gave technical and administrative support to the Thematic Areas and the Commission in general.

1.3. SCOPE AND ORGANISATION OF THIS REPORT

Section 29(3) of the CIC Act, 2010 provides that during the dissolution period, the Commission shall ensure that its affairs are wound up in an orderly manner and, in particular shall ensure that those aspects of its work that will be of value to other institutions are preserved, documented and transferred. It is on this basis and in keeping with good practice of completion of assignments that the Commission is submitting to the people of Kenya this End Term Report.

This report analyses the implementation of the Constitution for the five-year period (2011-2015), documenting key deliverables, outcomes, challenges and lessons learnt. This process has provided an opportunity for critical reflection on the constitution implementation, sharing the implementation results and challenges with the people of Kenya, generating a body of knowledge on constitution implementation as reference for institutions and other countries, and identifying what still remains to be done for purposes of full implementation of the Constitution.

Chapter One of the report is a reminder to all of us, the people of Kenya, of the long journey to the Constitution of Kenya 2010. It provides the rationale for the establishment of the Commission for the Implementation of the Constitution; it's mandate and the approach to the implementation of the mandate. Chapter Two presents a narrative assessment of the implementation per chapter of the Constitution, indicating what provisions the chapter makes of (i.e., proposed legislation, policies, administrative procedures, institutions), what the chapter requires for its implementation, and the implementation progress; including what should have been done differently. In each section of this chapter, there are where appropriate short case studies on experiences in the processes of developing laws.

Chapter Three is dedicated to Engendering and Sustaining Constitutionalism; answering the question of what "constitutionalism" means and an analysis of cases demonstrating where constitutionalism has or has not been adhered to, including their effects on constitution implementation and actions taken by CIC in such circumstances. The chapter also looks at the responsibilities of the citizenry in the implementation of and safeguarding the letter and spirit of the constitution. The chapter ends by reminding all Kenyans of the need to respect court rulings and respect for the separation of powers.

This report recognises the Constitution as a living and progressive document. Thus, Chapter Four provides recommendations for judicial interpretation or amendments, by identifying provisions or articles of the Constitution, which are silent but if interpreted or amended would enhance implementation of the Constitution.

Chapter Five contains the analysis of challenges and impediments encountered in the processes of implementation and the recommendations. This is in line with Section 6(c)(ii) of the Sixth Schedule to the Constitution, which required CIC to report regularly to CIOC on progress made and any impediments to the implementation of the Constitution.

Finally, the report includes four annexes. Annex 1 is a summary of the status of enactment of laws in the Fifth Schedule to the Constitution, Annex 2 is a list of Bills with an August 27th 2015 deadline reviewed in CIC and submitted to AG. Annex 3 is a list of litigation CIC instituted or enjoined in during the course of the five year period, Annex 4 is a list of Commissioners and the administrative structure of the Commission.

CHAPTER TWO

2.1 ASSESSMENT OF STATUS OF THE CONSTITUTION IMPLEMENTATION

Article 261 of the Constitution provides for the enactment of legislation required to implement the Constitution. Additionally, the Fifth Schedule to the Constitution prescribes the legislation to be enacted within the five-year period, starting August 27th 2010. This chapter presents an analysis of the processes relating to the implementation of the Constitution, including development of policies, formulation of legislation and administrative procedures, and the institutional framework required under each chapter of the Constitution.

Pursuant to its Constitutional mandate, the Commission for the Implementation of the Constitution received Bills from the Executive through the Attorney General, reviewed them to ensure they were aligned to the letter and spirit of the Constitution. As shown in Annex 1, all the Fifth Schedule Bills were enacted within the timelines, except;

a. The Tenth Parliament invoked its Constitutional Powers under Article 261(3)(b) and extended the timeline for the enactment of the National Land Commission Bill 2011, the Land Bill, 2012 and the Land Registration Bill, 2011 by a period of two months, such that the Bills were assented to on 27th April, 2012 instead of the 18th month constitutional deadline, that expired on the 27th February, 2012.

b. The Eleventh Parliament also extended the timelines for enactment of the following legislation by a period of nine months; The Public Audit Bill, 2014; The Public Procurement and Asset Disposal Bill, 2014; Fair Administrative Action Bill, 2014; The Victims Protection Bill, 2013; The Rights of Persons Deprived of Liberty Bill, 2014; Values and Principles of the Public Service Bill 2014. To date two of these Bills (Audit Bill and Procurement Bill) have not been enacted.

c. On 25th August 2015, the National Assembly extended by one-year timelines for the following laws whose timeline for enactment was August 27th, 2015.

Table 1: Bills whose enactment was extended for one year ending 27th August 2016

Name of Bill and the Constitution Article	Long Title of the Bill	Constitutional deadline
High Court Organization and Administration Bill, 2015 (Article 165)	A bill to give effect to Article 165 (1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.	1 year.
Court of Appeal Organization and Administration, 2015 (Article 164)	Bill not available	1 year.
Contempt of Court Bill, 2013	To define and limit the powers of courts in punishing for contempt of court and for connected purposes	None
Magistrates Court Bill, 2013 (Articles 23 (2) and 169 (1))	To give effect to Articles 23(2) and 169(1) (a) and (2) of the Constitution]; to confer jurisdiction, functions and powers to the magistrate's courts; to provide for the procedure of the magistrates' courts, and for connected purposes	1 year.

Name of Bill and the Constitution Article	Long Title of the Bill	Constitutional deadline
Legal Aid Bill, 2013 (Articles 48 and 50)	To give effect to Articles 19(2 48, 50 (2), (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes	4 years.
Fair Administrative Action Bill, 2014 (Article 47)	To give effect to Article 47 (1) of the Constitution and for connected purposes.	4 years.
Small Claims Court Bill, 2015. (Article 162)	To establish Small Claims Courts and to provide for the jurisdiction and procedure and for connected purposes.	1 year.
Judiciary Fund Bill, 2015 (Article 173)	To provide for the regulation, administration, and utilization of the Judiciary Fund and for connected purposes	2 years.

Annex 2 contains a tabulated list of Bills with an August 27th 2015 deadline, necessary for the implementation of the Constitution, that the Commission, in coordination with the Office of the Attorney General and the Kenya Law Reform Commission, reviewed for tabling before Parliament within the August 27th 2015 deadline. It shows the date Bills were received in CIC, processed and submitted to the Attorney General for further submission to Parliament.

2.2 SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION

In exercise of their sovereign and inalienable right to determine the form of governance for their country, and having participated fully in the making of the Constitution, the people of Kenya adopted, enacted and gave the Constitution of Kenya, 2010 to themselves and to the future generation. Democracy embodies the idea that "the people are the ultimate authority and the source of the authority of government"[3].

The adoption of the Constitution of Kenya 2010 five years ago was an expression of the people's popular sovereignty and recognition of their aspiration for a government based on the values of human rights, equality, freedom, democracy, social justice and the rule of law. The reform process is guided by the founding pillars of the Constitution, namely, (a) the sovereignty of the people; and (b) the supremacy of the Constitution.

In principle, the just powers of government (including the executive, the legislative and judicial authority) are founded on the will or consent of the people of Kenya. This means that the people have the sovereign power to determine the persons and institutions through whom executive, legislative and judicial power shall be exercised on their behalf and for their well-being This is what is referred to as popular sovereignty.

The principle of popular sovereignty in Kenya is expressed in Article 1(1) of the Constitution, which provides that "[a] All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution". Clause (2) states that "[t]he people may exercise their sovereign power either directly or through their democratically elected representatives". According to clause (3), the people's sovereign power is delegated to three main State organs, namely, (a) Parliament and the legislative assemblies of the county governments; (b) the national executive and the executive structures in the county governments; and (c) the judiciary and independent tribunals. For this reason, the three State organs exercise their constitutional functions and powers at the national and county levels (i) in accordance with the Constitution, (ii) on behalf of the people; and (iii) for the benefit of the people of Kenya.

3 Bahmueller CF "The Concept and Fundamental Principles of Democracy" in Hargrov DW (ed) Elements of Democracy: The Fundamental Principles, Concepts, Social Foundations, and Processes of Democracy (Centre for Civic Education Calabasas California USA 2007) p.12.

The Commission's report is premised on the immutable principle that "[t]he Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government4". Accordingly, no person may claim or exercise State authority except as authorized under the Constitution. Likewise, (a) any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency; and (b) any act or omission in contravention of the Constitution is invalid. With these principles in mind, the Commission effectively exercised its constitutional statutory mandate and persistently sought to impress on every person the overriding constitutional obligation prescribed in Article 3(1) to respect, uphold and defend the Constitution. Only then could the Constitution be successfully implemented.

In addition to the foregoing, the successful implementation of the Constitution depends on; (a) the effective discharge by every national State organ of its constitutional mandate to ensure reasonable access to its services in all parts of the country, (i) so far as it is appropriate to do so; and (ii) having regard to the nature of the service; and (b) fidelity on the part of all persons to observe the national values and principles of governance specified in Article 10(2) of the Constitution.

The national values and principles specified in Article 10(2) include (a) national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and (c) good governance, integrity, transparency and accountability, all of which provide valuable indicators as to the efficacy of implementation of the Constitution.

Special emphasis is placed on the national values and principles of governance, which bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. It is on the basis of these values and principles, among other founding pillars and principles specified in the Constitution, that the Commission embarked on its mandate to monitor, facilitate and oversee the implementation of the Constitution for the five-year term ending 29th December 2015 to which this report relates.

2.3 THE REPUBLIC

With respect to Chapter Two of the Constitution, Kenya is a sovereign republic and a multi-party democracy. This reinforces the right to belong to a political party and take part in political activities (Article 38). The chapter also defines the territory of Kenya, provides for devolution and access to services, the national, official and other languages, and states the relationship between the State and religion. The national symbols and national days are provided for in Article 9 and the national values and principles of governance (Article 10) are applicable across the entire Constitution. Culture as a foundation of the nation should be recognized, promoted and protected through the law, (Article 11).

The implementation of this chapter is spread across a number of chapters, as discussed below.

2.3.1 Declaration of the Republic

The Multi-Party Democracy

The Political Parties Act, 2011 which provide for the registration, regulation and funding of political parties, also promotes political democracy in the country, and therefore reinforcing Article 4(2) of the Constitution. Political parties are funded through the Political Parties Fund (Section 23) for purposes that are compatible with democracy, and should not be for any other purpose incompatible with the promotion of a multiparty democracy and the electoral processes, or with the Constitution, {(Section 26(3)(d)}.

4 The Constitution of Kenya, 2010, Article 2(1).

2.3.2 Devolution and Access to Services

Article 6(1) of the Constitution is self-enforcing. The 47 counties are specified in the First Schedule. However, CIC is of the view that the District and Provinces Act (Cap 105A) of 1992, which defined the then 47 districts upon which the counties were based, should be repealed to provide for Counties, Sub-Counties and Ward boundaries. This would address boundary conflicts experienced between counties, such as Machakos versus Makueni over Konza Technopolis, Kisumu versus Vihiga over whether Maseno University falls within Vihiga County or Kisumu County, Narok versus Kajiado, Taita-Taveta versus Kwale, etc.

The operationalisation of county governments following the March 4th 2013 General Elections established the structures (executive and county assemblies) to facilitate service delivery at the county level. The County Governments Act, 2012 that gives effect to Chapter Eleven of the Constitution; has elaborate mechanisms for county governments to plan for and deliver services to county residents. On the other hand, the national government, through the National Government Coordination Act 2013 establishes administrative structures at the national, county and decentralised units to ensure access to national government services in all parts of the Republic.

2.3.3 National, Official and Other Languages

The national language of Kenya is Kiswahili with English and Swahili being the official languages. Article 7(3)(b) of the Constitution obligates the State to promote the development and use of indigenous languages, Kenyan sign language, braille and other communication formats and technologies accessible to persons with disability. This is because equality of opportunity to access information is critical to inclusive development.

Legislative framework in languages

A draft Languages of Kenya Policy and Languages of Kenya Bill, 2014 were finalized. Though the policy is yet to be approved and the Bill enacted into law, they obligate public and private institutions to access and facilitate the use of Kenyan sign language, braille, augmentative and alternative communications and all other accessible means in suitable format of communication to accommodate the needs of persons with disability. There is need for a legal framework that facilitates the adoption and use of national languages as catalysts for the promotion, development and protection of African Languages and the use of these languages as medium of instruction in schools in Kenya.

2.3.4 State and Religion

The provision of the Constitution (Article 8) that there will be no State religion, has encouraged a good relationship between the State and religion. While the constitution recognizes the right to worship, it makes all religions equal, hence eliminating potential conflict between various religious groups.

2.3.5 National Symbols and National Days

The national symbols set out in the Second Schedule to the constitution are the (a) national flag, (b) national anthem, (c) coat of arms, and (d) public seal.

Legislative framework on national symbols and national days

The National Emblems and Symbols Act 2014 and the Order of Precedence Act 2014 have been enacted at the national level to implement Article 91(a)-(d). The Act allows county governments to fly county flags within their jurisdictions. As a result, some county governments have enacted symbols and emblems legislation under various names, defining the order of precedence in public functions and what symbols may be carried by various officers. For example, Turkana County Assembly passed a law that allowed the governor, deputy governor, the speaker of the county assembly, the county attorney and the county executive committee members to use flags and sirens on their motorcades and processions. Mandera County has also passed a similar law (The Mandera County Flag, Emblems and Names Act, 2014).

The Constitutional in Article 9 (1)(a-b) lists three National Days, namely Madaraka Day, Mashujaa Day and Jamuhuri Day. This in effect removes arbitrariness in declaring national holidays.

2.3.6 National Values and Principles of Governance

The express enunciation of national values and principles in the Constitution is a key milestone in the journey to establishing a constitutional democracy in Kenya. Enshrined in both the preamble and in Article 10 of the constitution, these values and principles embody the aspirations for a "government based on values of human rights, equality, freedom, democracy, social justice and the rule of law." The national values and principles provided for in Article 10, bind all State organs, State officers, public officers and all persons whenever any of them;

a) applies or interprets this Constitution;
b) enacts, applies or interprets any law; or
c) makes or implements public policy decisions.

The national values and principles of governance include;

a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
c) good governance, integrity, transparency and accountability; and
d) sustainable development.

Article 10 expounds on two fundamental issues that guide its implementation. First, it provides for the binding nature of the principles on all State organs, State officers, public officers and all persons. The application of article 10 therefore is not confined just to the public sector but applies also to the private sector and individuals. The application of the values and principles is not discretionary but mandatory. Second, it sets out how it is to be applied in the interpretation of the Constitution, application and interpretation of any law and the implementation of public policy or decisions. Consequently, implementation of article 10 occurs concurrently with the implementation of all chapters of the constitution and the relevant law giving effect to the constitution and policies.

a) Legislative Framework

The Commission took particular care to ensure that the national values and principles under Article 10 were incorporated in all the legislation developed under the Fifth Schedule. Regrettably, some legislation did not follow the constitutional process Nonetheless, Article 10 is self-enforcing and all actors both state and non-state remain bound.

b) Administrative Procedures

Article 132(1)(i) prescribes that the President shall once every year report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in Article 10. The President is further required to publish in the Kenya Gazette the details of the report. The President has made some strides in promoting national values and principles. They include requiring all Ministries, Departments and Agencies (MDAs) to incorporate national principles and values in their work and to report on the progress made in implementing the same in each individual MDA. These initiatives have bolstered initiatives of the national and county governments in addressing social and economic inequalities, management of ethnic and other social-cultural diversities and prevention, management and reconciliation of conflicting situations. Through Executive Order No. 6 of March 2015, The President directed MDAs to prioritize programmes and projects that have direct impact on citizens' welfare. In addition, MDAs are required to base implementation of their programmes and operations on the provisions and tenets of Article 10 of the Constitution.

The Ministry of Interior and Coordination of National Government published and forwarded to the National Assembly Sessional Paper No. 8 of 2013 on National Values and Principles of Governance and Sessional Paper No. 9 of 2013 on National Cohesion and Integration. The two documents await

deliberation by the National Assembly. Further, the Ministry through the Directorate of National Cohesion and National Values trained Focal Point Persons from MDAs who would be responsible for overseeing the mainstreaming of national values and principles of governance in their respective MDAs and the performance contracting processes. The Ministry also conducted training for 32 County Public Service Boards (CPSBs) and held stakeholder sensitisation forums in 32 counties on their role in the promotion of national values and principles of governance.

In promoting good governance, integrity, accountability and transparency, the President issued Executive Order No. 6 of 6th March 2015 on Ethics and Integrity in the Public Service cautioning MDAs on breaches of ethical standards, instances of pilferage and outright thefts involving civil servants, State and public officers. This Order requires all relevant institutions in the ethics and anti graft war to act swiftly, without fear or favour to detect, investigate and prosecute all perpetrators of economic crimes irrespective of social status.

Challenges

a) Lack of coordination between various State organs and institutions.

Public institutions have applied a varying understanding of their Constitutional and legal mandates on promotion of national unity and exercise of sovereign power. For instance, the incessant conflicts between the Ministry of Lands, Housing and Urban Development and the National Land Commission over management of land have negatively impacted on national unity.

b) Inadequate Capacity and Budgetary allocation

Public institutions have inadequate physical and human resource capacities necessary for the promotion of national identity, a key pillar of patriotism.

c) Low levels of Public Awareness

Considerable progress has been achieved in creating public awareness on the national values and principles. However, the lack of sustained and coordinated civic education on these constitutional principles has led to low levels of awareness among the general public.

Recommendations

1) The National Government and County Governments should enhance capacities at both levels of government to ensure that their officers are equipped to effectively implement programmes, projects and activities for the promotion of national values and principles.
2) Further, the National Government should partner with County Governments and other stakeholders to enhance a coordinated and sustained national civic education programme to sensitize the public on national values and principles.
3) Existing laws and policies should be reviewed and audited to facilitate the application of the national values and principles.

2.3.7 Culture

In Article 11(1), the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Article 11(2) requires the State to promote (i) all forms of national and cultural expression and the intellectual property rights of the people of Kenya, plus (ii) to recognise the role of science and indigenous technologies in the development of the nation. Article 11 (3) obligates Parliament to enact legislation to; (a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and (b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

The Commission's understanding of these provisions is that the Constitution identifies the importance of culture and calls for the same to underpin what we do as a people. However, in accordance with article 159, the constitution provides a caveat that only cultural practice that is not repugnant to justice and morality, or results in outcomes that are repugnant to justice or morality and/or is not inconsistent with

the Constitution should be upheld. This means that all offices, entities and organs should recognize and promote cultures that do not fall under those cultural practices limited by article 159 of the constitution.

a) Legislative Framework

The laws required by Article 11(3) were developed through the process agreed on and reviewed by CIC. However, they are part of the laws whose period of enactment was extended by the National Assembly for one year. The laws are listed in table 1 above.

b) Challenges

Two challenges have been experienced in the implementation of the Article. One is how to ensure that each level of government align its activities with the functions set out in the Fourth Schedule. This is largely because of reluctance to change and challenges that stem from failure by the Transition Authority to clearly unbundle and assign and a number of functions as required. With these experiences in implementing the Article, the governments are struggling to learn to perform what is allocated to them. The Commission believes that the challenge will be overcome, with time. The second challenge is lack of incorporation of culture into programs of State organs due to the absence of a clear policy or legislative guideline on the same.

We recommend that a policy is developed to guide State organs and other entities on how they make culture the foundation of their programs.

2.4 CITIZENSHIP

Chapter Three of the Constitution on Citizenship sets out the general terms upon which a person may acquire, retain and revoke citizenship. Compared to the repealed constitution, the Constitution of Kenya 2010 has significant new provisions in Articles 14(5), 15(4) and 16 that allow for dual citizenship. This means that a Kenyan citizen can acquire citizenship of another country without relinquishing his or her Kenyan citizenship, and any other person can acquire Kenyan citizenship if that person meets the requirements of the chapter. Further, the constitution allows for restoration of citizenship of those who were citizens by birth, but lost citizenship by virtue of the provisions of the repealed constitution.

In seeking to ensure gender equality, the Constitution of Kenya 2010 allows a foreign husband of a Kenyan woman and their children to acquire Kenyan citizenship, and can no longer lose their citizenship through marriage or upon dissolution of marriage.

This section presents the status of implementation of chapter three for the period 2010-2015. It highlights the provisions of the chapter, laws, policies, institutions and other measures that have been put in place to give effect to the chapter. It also highlights what remains to be done and the challenges faced in the course of implementation.

Legislative Framework

Article 18 requires Parliament to enact legislation on various aspects of citizenship and in particular make provisions for giving effect to the provisions of the Chapter. The Fifth Schedule to the Constitution requires that this legislation be enacted within year one. Following this, the following two laws were enacted:

1) The Kenya Citizenship and Immigration Act, No. 12 of 2011, which provides for matters relating to Citizenship, duties and rights of citizens, issuance of travel documents and immigration as required under Articles 12(2), 14(3) and 18 of the Constitution. The Act repealed the Kenya Citizenship Act Cap 170, The Immigration Act Cap. 172 and the Aliens Restriction Act Cap 173, of Laws of Kenya. Pursuant to the Act, the Kenya Citizenship and Immigration Regulations 2012 ("Regulations") were developed and came into force in June 2012.
2) The Kenya Citizens and Foreign Nationals Management Service Act, No. 31 of 2011, which provides for the creation and maintenance of a national population register and the administration of laws relating to births and deaths, identification and registration of citizens, and immigration and refugees.

Article 15(4) requires Parliament to enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries. This provision recognizes circumstances that may force citizens from other countries to seek citizenship in Kenya, and hence the need to define acceptable conditions for consideration. This law has not been developed. This means that though the Constitution allows non-Kenyans to acquire Kenyan citizens, this cannot be implemented, as the requirements are yet to be defined.

Challenges

While the legislative reforms on citizenship have been a positive development, experiences on the implementation of the Kenya Citizen and Immigration Act, 2011 reveal challenges that affect its implementation5. Most prevalent are:

a) The public, especially the women are generally not aware of their rights granted through the various provisions.
b) Most officials in the implementing agencies are on the whole, unaware of the legislative reforms and hence not facilitating their implementation.
c) Delay in the enactment of the National Registration and Identification Bill 2012. The bill seeks to provide for the notification and registration of births and deaths, for the identification of Kenya citizens, the issuance of documents of registration and identification, and for connected purposes. The Bill is expected to repeal the Births and Deaths Registration Act and the Registration of Persons Act in order to provide a legal framework to guide digital biometric registration of persons.

Recommendations

To address the above challenges, the Commission recommends the following:

a) The public should be sensitized on the provisions of the legislation on citizenship including their rights and the concept of dual citizenship among others.
b) Implementing agencies should undertake to sensitize their staff on the reforms in law.
c) The enactment of the Registration and Identification Bill 2012 should be fast tracked to provide a legal framework to guide digital biometric registration of persons and hence ease issuance of Identification documents.
d) Parliament should fast-track the development and enactment of the law to give effect to Article 15(4) f the Constitution

2.5 BILL OF RIGHTS

The promulgation of the Constitution on 27th August, 2010, ushered in a new constitutional dispensation in which government operations and policies would be based on the values of human rights including equality and non-discrimination, equity, public participation, democratic governance, social justice and the rule of law.

The realization of rights and fundamental freedoms in the Bill of rights requires significant political goodwill from all State actors. Implementation of the Bill of rights requires that the rights in the national and county laws, and operational and institutional policies, frameworks be respected. The Constitution requires State organs, State officers and public officers to espouse a work culture centred on human rights approaches to service delivery.

This chapter provides the status of implementation of chapter four of the Constitution. It highlights the provisions of the chapter, the laws, policies and other measures including the setting up of institutions that facilitate the implementation of the Bill of rights. It also highlights what remains to be done and the challenges faced in the implementation of the chapter.

2.5.1 General Provisions Relating to the Bill of Rights

Article 19 of the Constitution provides for the Bill of Rights as an integral part of Kenya's democratic State, it being the framework for social, economic and cultural policies. It provides for the purpose of

5 UNHCR and the Kenya Human Rights Commission Kenya Dialogue on Gender Equality, Nationality and Statelessness report (http://www.refworld.org/pdfid/54f838564.pdf)

recognizing and protecting human rights and fundamental freedoms and provides for the universality and inalienability of human rights and fundamental freedoms.

Article 20 provides for the application of the Bill of Rights to all law and binds all State organs and all persons. It further provides a threshold for how the courts ought to apply a provision in the Bill of Rights and what to promote in interpreting it. It also provides for the principles to be considered by the courts, tribunals or other authority in applying any right under article 43, if the State claims not to have resources to implement the right.

Article 21 makes it a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. It further obligates the State to take legislative, policy and other measures, including the setting of standards to achieve the progressive realization of the rights guaranteed under article 43. It also mandates the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.

Article 22 provides for the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened in his or her behalf on or behalf of another person. It mandates the Chief Justice to make rules providing for- (a) right of standing; (b) minimal formalities and if necessary entertain proceedings on the basis of informal documentation; (c) scrap filing fees; (d) preventing unreasonable procedural technicality; and (e) provide for a person to appear as a friend of the court.

Article 23 vests the High Court Jurisdiction in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right and or fundamental freedom in the Bill of Rights with the courts granting appropriate relief including-(a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and not justified under article 24; (e) an order of compensation; and (f) and order of judicial review. Parliament is mandated to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right and or fundamental freedom in the Bill of Rights.

The implementation of articles 19-23 has mainly been through litigation where State organs and persons have been taken to court for redress of a denial, violation or infringement of, or threat to, a right and or fundamental freedom in the Bill of Rights. The courts have been laudedfor developing positive jurisprudence in relation to the Bill of Rights and Fundamental Freedoms as depicted in, among others, the case of Patricia Asero Ochieng & 2 others v. The Attorney General[6]. The Chief Justice in implementing Article 22 prepared the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 whose objective is to give effect to the provisions of article 22 and to facilitate access to justice as required under article 48. The rules are operational and guide all Constitutional Petitions.

The implementation of the Bill of Rights has not been without challenges, among them lack of policy framework, programmes and legislative provisions on how such rights are to be implemented. A case in point is the implementation of economic and social rights where the Court in the case of Satrose Ayuma & 11 others v. The Registered Trustee of the Kenya Railways Benefit Scheme and 3 others[7] directed the State to formulate policies and guidelines to ensure the progressive realisation of the right to accessible and adequate housing and to reasonable standards of sanitation. Regrettably even with the Court directions, little has been done to implement the right to accessible and adequate housing, and to reasonable standards of sanitation.

The Commission recommends that the State formulate a policy, programmes, and legislative provisions to implement the rights and fundamental freedoms in the Bill of Rights. This is because the State has an obligation to implement the Bill of Rights (article 21).

6 Nairobi High Court Constitution Petition No. 409 of 2009
7 Nairobi Constitutional Petition number 65 of 2010

Article 24 provides that a right or fundamental freedom can only be limited by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account relevant factors, including-(a) the nature of the right and fundamental freedom; (b) importance of the purpose of limitation; (c) the nature and extent of limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve it. It further provides for the limitation by legislation of the right to privacy; freedom of association; assembly, demonstration, picketing and petition; labour relations, economic and social rights; and rights of an arrested person; of persons serving in the Kenya Defence Forces and the National Police Service.

The Constitution of Kenya 2010 makes violation of a right difficult, as any limitation upon a constitutionally protected right must be based on law. The constitution further provides for avenues to challenge the unconstitutionality of a limitation of a right. In implementing this article, a number of legislation has been enacted among them the Penal Code. As for the persons serving in the Kenya Defence Force, the Kenya Defence Force Act in sections 42 to 54 has provisions limiting the rights and fundamental freedoms listed in article 24(5).

The implementation of article 24 has not been without challenges as can be deduced from among others, the case of CORD & 2 Others v. The Attorney General & Another[8] where sections 12, 16, 20, 26, 34, 48 and 64 of the Security Law amendment Act were found to be unconstitutional for violating the freedom of expression, freedom of the media, the right of an arrested person to be released on bond or bail, the right of accused person to remain silent, and not testify during proceedings and to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

The Commission recommends that parliament in passing legislations ensure statutes do not have unconstitutional provisions limiting rights and fundamental freedoms.

Article 25 provides for the rights and fundamental freedoms that may not be limited including- freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to fair trial; and the right to an order of habeas corpus.

The rights listed in article 25 are so important that they are considered as being fundamental to the maintenance of an international order to the extent that they are peremptory norms of international law from which no derogation is allowed even in a state of emergency. This is one of the self-enforcing articles.

2.5.2 Rights and Fundamental Freedoms

a) Right to Life

Article 26(1) guarantees the right to life, which begins at conception. Article 26(3) guards against depriving of life intentionally save as authorized by the Constitution or other written law with abortion being prohibited unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

As it stands, there is no law providing for abortion as provided for in Article 26(4) although the Health Bill, 2015 has a provision in clause 6(1) (c) providing for abortion and enumerates conditions within which abortion is allowed.

The Right to Life has been limited by sections 40 (3), 204, 296(2) and 297(2) of the Penal Code providing for death sentence. The Commission has engaged with the Power of Mercy Committee, which has observed that since the promulgation of the Constitution, death row convicts are left in abeyance without clear position on their sentences. There have been debates as to whether death sentence should be abolished with international best practices favoring abolition. Further, mandatory death sentence as

8 Nairobi High Court Petition No. 628 of 2014 consolidated with petition number 630 of 2014 and Petition No. 12 of 2015

provided for in the Penal Code was rendered unconstitutional in the case of Godfrey Ngotho Mutiso v. Republic (2010) e KLR.

The Commission recommends the review of the Penal Code in so far as it provides for mandatory death sentence. The commission further recommends the enactment of the Health Bill, 2015 providing for conditions within which abortion is permitted.

b) Equality and Freedom from discrimination

Article 27 provides for equality before the law and the right to equal protection and equal benefit of the law including the full and equal enjoyment of all rights and fundamental freedoms. It provides for equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres between women and men. The State and all persons are obligated not to discriminate directly and indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The State in implementing this article is mandated to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination with such measures required to adequately provide for any benefits to be on the basis of genuine needs.

The State is further mandated to 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 State has apportioned a 1/3 of the tender award to women, youth and persons with disabilities. The state has further created the Uwezo Fund and Women's Enterprise Fund.

The Constitution provides for 2/3-gender representation in elective and appointive bodies to ensure that people of either gender are represented and have equal benefit of the law. The State has made efforts to ensure that no more than 2/3 of the members of appointive bodies are of the same gender and further that the appointments in most cases reflect the national diversity of the country including the youth, women, persons with disability, marginalised and minority groups. This is a positive move towards equality of both genders in both elective and appointive bodies. This provision has resulted in the increased representation by women in the political sector at both the national and county level.

In implementing this article, the following Acts of parliament and policies have been formulated and passed-

1) National Gender and Equality Commission Act, 2011. This is the framework law creating a Commission with objective of promoting gender equality and freedom from discrimination.
2) The Persons with disability Bill, 2015 a framework law abolishing discrimination against persons with disability on all grounds.
3) The Kenya Health Gender and Equality Policy seeking to ensure that all categories of persons access the highest attainable standard of health care services without discrimination.

There is a however a misconception on what this article entails as evidenced by the tendency to presume that the third slot for members of elective and appointive bodies is for a women. Further, the private sector is yet to embrace the provision of this article as most boards of private entities consist of one gender with discrimination against women, persons with disability among other persons in some quotas.

Since August 2010, some State organs have fully catered for article 27 (8) but others are struggling to implement the affirmative measures. This is partly because of resistance to change.
The other challenges that the implementation of article 27 (6)-(8) has faced are:

1) The Policies, programs, standards, laws and other measures are not yet in place. This is especially so with respect to the need for an overarching policy and law to guide people and State organs as they deliver services to the people
2) Continued violations of the explicit provisions of article 28 (7)

The Commission recommends the integration of the provisions of this article in both public and private sectors to ensure that there is equality of all persons. The Commission further recommends the formulation of an overarching national policy and law to implement this article.

c) Human Dignity

Article 28 provides for inherent dignity and the right to have that dignity respected and protected.

Although the Constitution provides for limitation of the Right to Life in article 26(3) and the Penal Code providing for death sentence, there has been debate as to whether death sentence should continue to exist.

Corporal punishment has also been outlawed as a form of punishment in schools. This form of punishment is not only a cruel, inhuman or degrading treatment or punishment but also impairs the child's right to education.

d) Freedom and Security of the Person

Article 29 provides for the right to freedom and security of the person, including the right not to be- (a) deprived of freedom arbitrarily or without just cause; (b) detained without trial except during a state of emergency; (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman or degrading manner.

Although this is one of the self-implementing Articles, its implementation has been through strengthening the institutions in Chapter 14 of the Constitution. The information on strengthening security institutions can be found in Section 2.15 of this report on Security.

e) Slavery, Servitude and Forced Labour

Article 30 provides that a person has a right not to be held in slavery or servitude and the right not to perform forced labor. This is a self-enforcing article.

f) Privacy

The Constitution in article 31 provides for the right to privacy. It includes the right not to have one's person or property searched, their possessions seized or information relating to them and their family unnecessarily required or released. Parliament has not passed an overarching law on the right to privacy but provisions in different statutes protect certain aspects of the said right. These include the right to privacy on health status in the HIV and AIDS Prevention and Control Act and the requirement for warrants before searches on ones' property in prescribed circumstances in the Criminal Procedure Code.

The Ministry of Information Communications and Technology formulated the Data Protection Bill giving effect to the provisions of article 31(c) and (d). It sought to regulate the collection, retrieval, processing, storing, use and disclosure of personal data and set down the objects and principles of personal information protection.

The Bill has not yet been enacted. The Commission recommends the urgent enactment of the said Bill.

g) Freedom of Conscience, Religion, Belief and Opinion

Article 32 provides for the right to freedom of conscience, religion, thought, belief and opinion to each person either individually or in community with others, in public or private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship. It further provides for the right to access any institution, employment or facility and the enjoyment of any right. This is a self-enforcing article.

h) Freedom of Expression and Media

Article 33 guarantees the freedom of expression, which includes the freedom to receive and impart ideas and the right to academic freedom. Importantly article 33(2) limits the freedom of expression in cases of propaganda for war, incitement to violence; hate speech and advocacy of hatred, particularly

relating to ethnic incitement. The article also requires all persons to respect the rights and reputation of others whilst exercising the said freedom.

The National Cohesion and Integration Act, which sets up the National Integration and Cohesion Commission, establishes the principal legislative and institutional frameworks for monitoring and enforcing the limitation in article 33(2).

article 34(3) guarantees the right of establishment for broadcasting and other media. The Article provides that any licensing procedures for such media must be independent of control by government, political and commercial interests.

To implement this article, parliament passed the Kenya Information Communications (amendment) Act, which sets up the independent Kenya Information Communication Authority. The Authority is a multi-sectoral body comprising of representatives from government and other members appointed through a competitive process undertaken by an independent panel.

Article 34(5) on the other hand obligates parliament to enact legislation establishing a body independent of control of the government, political interests or commercial interests; reflect the interest of all sections of the society; and set media standards and regulate and monitor compliance with those standards.

To implement this provision Parliament passed the Media Council of Kenya Act as the framework law giving effect to article 34(5) of the Constitution by establishing the Media Council of Kenya and the Complaints Commission.

The Constitutionality of the Kenya Information Communications (amendment) Act has been challenged through Nairobi High Court Judicial Review Application Number 30 of 2014 as consolidated with 31 of 2014 between Nation Media Group & 2 others v. Attorney General & 5 others.

i) Access to Information

Article 35(1) guarantees the right of access to (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom guaranteed under the Constitution. Accordingly, the right of access to information is enforceable against any person, State or Non-State agencies subject, however, to the relevant law relating to data protection in accordance with article 31(c) and (d), and to any limitations imposed in accordance with article 24 of the Constitution.

In addition to the general right of access to information, clause (2) confers on every person the right to the correction or deletion of untrue and misleading information that affects the person while clause (3) mandates the State to publish and publicise any important information affecting the nation.

In view of the fact that the provisions of article 35 are not self-enforcing, it became necessary to formulate legislation to give effect to this right. To this end, the Commission reviewed and submitted the draft Access to Information Bill, 2013 to the Attorney General for publication and tabling in Parliament as far back as 2013. To this day, the Bill (which was finally published and tabled in Parliament in August 2015) is still pending enactment.

The proposed Access to Information Bill, 2013 seeks, among other things, to make provision for (a) classification of information in relation to which the constitutional right of access to information may be exercised; (b) the classes of information in relation to which this right may be limited in accordance with article 24; (c) the terms and conditions under which this right may be exercised; (d) the administrative procedures required to regulate the manner in which this right may be exercised; and (e) the mechanisms for redress in cases of unlawful denial of this right.

The inordinate delay in the enactment of the 2013 Access to Information Bill has the adverse effect of, among other things, (a) perpetuating the application of the Official Secrets Act Revised 2012 (1970), which does not give effect to article 35 of the Constitution; (b) continued denial of access to information by State and Non-state agencies on the basis of "official secrecy", "national security" or "data protection"; (c) lack of a legal framework for the classification of information to which article

35 applies; and (d) inability of aggrieved persons to effectively exercise or enforce their basic rights as contemplated by article 35(1)(b) of the Constitution.

The Commission recommends (a) the immediate formulation of policy guidelines on access to information; (b) the enactment of the Access to Information Bill, 2015 and the related Data Protection Bill; (b) the formulation of administrative procedures to guide formal application for information and the terms and conditions on which such information may be accessed pursuant to article 35 of the Constitution; and (c) continuous public education programmes to create awareness on the nature and scope of this constitutional right

j) Freedom of Association and Right to Assembly, Demonstration, Picketing and Petition

The right to freedom of association as provided in article 36 complements the right to freedom of assembly, demonstration, picketing and petition provided in article 37. The Constitution allows individuals to engage in legal meetings, protests marches, demonstration, picketing and petition as long as they are peaceful and does not violate other people's right.

With the recent strikes experienced in the health and education sectors that hindered the enjoyment of the right to health and education among Kenyans, it begs the question as to whether these rights are absolute for essential service workers such as doctors and teachers.

The Commission recommends the formulation of legislation addressing the freedom of association and the right to assembly, demonstration, picketing and petition of essential service workers to avoid the enjoyment of certain rights and fundamental freedoms by the people.

k) Political Rights

Article 38 provides for the right to make political choices, which includes the right to- (a) form, or participate in forming, a political party; (b) to participate in the activities of, or recruit members for, a political party; or (c) campaign for a political party or cause. It provides for the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-(a) any elective public body or office established under the Constitution; or (b) any office of any political party of which the citizen is a member. It further provides for the right, without unreasonable restrictions to- (a) be registered as a voter; (b) vote by secret ballot in any election or referendum; and (c) be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. For the implementation of this article, challenges and recommendations see discussions on section 2.8 of the report on Representation of the People, Section.

l) Freedom of Movement and Residence

Article 39 provides for the right to freedom of movement and the right to leave Kenya. It further provides for the right of citizens to enter, remain in and reside anywhere in Kenya. This article is one of the self-enforcing articles that need no legislation to give effect to its provisions.

m) Right to Property

Article 40 provides for the right to own property both movable and immovable, either individually or in association with others, and to acquire and own property of any description in any part of the country. Arbitrary deprivation of one's property is prohibited. However the State can deprive a person's property under certain exceptional circumstances only if the acquisition is for a public purpose or interest. Such acquisition must be accompanied by prompt compensation to the affected person. The right to property stipulated by the constitution is not limited to the protection of land rights but applies also to movable property and intellectual property.

In implementing this right, A number of laws guiding the implementation of this right are in place. They include the land Acts, Intellectual property right and other statutes on movable property rights. The implementation of this right has however been faced with some challenges. There have been instances where private property has been acquired by the government without compensation and where there is compensation, those to be compensated have not been compensated promptly.

To address some of these challenges the Commission recommends the formulation of a statute detailing how the compensation ought to be done in line with principles of international law regarding payment and just compensation.

n) Labor Relations

Article 41 addresses matters relating to labour relations including fair remuneration, reasonable working conditions, and formation of trade unions. The implementation of this article requires the review of existing legislation, policies and administrative procedures that were in place before the promulgation of the Constitution in order to align then with the COK, 2010. The Ministry of Labour, Social Security and Services prepared amendment bills to review the various laws as follows;

i) The Labour Relations (Amendment) Bill, 2015 seeks to provide for the registration, regulation and management of trade unions and employers' organisations or federations, and for expeditious settlement of disputes and for connected purposes. The Amendment Bill introduces aspects of conciliation under dispute resolution and provides for how conciliation should be carried out between disputing parties and how to handle unresolved disputes after conciliation. It also provides for how arbitration will be conducted, a process that was not provided for in the Labour Relations Act, 2007.

ii) The Occupational Safety and Health (Amendment) Bill, 2015 (OSHA) seeks to amend OSHA and provide for the establishment of Occupational Safety, Health and Injury Compensation Authority to, among other things, co-ordinate the various occupational safety and health management activities and promote the integration of occupational safety and health considerations into development policies, plans, programmes and projects with a view to ensuring the worker's safety and health.

iii) The Work Injury Compensation (Amendment) Bill, 2015, introduces a Work Injury Compensation Fund to allow for adequate compensation to employees or their dependents for any death, injury, disability, or disease arising out of and in the course of employment. The Bill provides for the appointment of a Director-General to administer the Act and Work Injury Compensation Fund and a Director of Work Injury Compensation to administer the Act.

iv) The Labour Institutions (Amendment) Bill, 2015, seeks to establish labour institutions, to provide for their functions, powers and duties and to provide for other connected matters. The amendment proposes the establishment of a Mediation, Conciliation and Arbitration Commission to among other functions, facilitate the settlement of trade disputes through arbitration and investigate labour related complaints.

v) The Employment (Amendment) Bill, 2015 seeks to amend the Employment Act 2007 by providing for the grounds of non-discrimination, inclusion of paternity, entitlement to sick leave, service pay, notification by employee to employer on retirement, safeguarding retirement benefits, protection of employees terminal dues during insolvency, prohibition of child labour and requirement of record keeping by the employer without withholding original documents of an employee.

vi) While progress has been made in trying to align labour related laws to the constitution, there is need to fast track the process to enable the full realization of labour relations rights. It should also be noted that the pending legislation applies to the national and county governments. The amendment bills propose to establish many institutions with considerable economic implications. There is need to critically analyse the financial implications of the proposed institutions and to avoid possible duplication of roles.

o) Environment

Article 42 provides for the right to clean and healthy environment including the right- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69; and (b) to have obligations relating to environment under article 70.

In implementing this article, the Environmental Management Coordination Act has been passed recognizing the right to clean and healthy environment.

p) Right to Health

Article 43(1) (a) guarantees the right to the highest attainable standard of health. This includes the right to health care services and reproductive health care. In addition, clause (2) prohibits denial to any person of emergency medical treatment at any medical facility, whether public or private. Notably, article 43 cannot be applied in isolation and neither is it self-enforcing. Appropriate legislation is required to give it effect.

The basic right to health guaranteed under article 43 is more effectively realized when interpreted in the context of other constitutional guarantees on matters relating to health. These include;

i) article 42, which guarantees the right to a clean and healthy environment;
ii) article 53(1)(c), which guarantees every child the right to basic nutrition, shelter and health care;
iii) article 46(1)(c), which guarantees consumers the right to protection of their health, safety and economic interests; and
iv) article 56(e), which mandates the State to put in place affirmative action programmes designed to ensure that minorities and marginalized groups have reasonable access to water, health services and infrastructure.

Even though section 2 of Part 2 of the Fourth Schedule to the Constitution assigns the responsibility for the provision of primary health services to county governments, the realisation of the rights guaranteed under articles 43(1) and (2), 42, 53(1)(c), and 56(e) requires national policy, legislation and administrative procedures to give effect to article 43 of the Constitution. Moreover, section 28 of Part 1 of the Fourth Schedule to the Constitution mandates the national government to formulate policy guidelines for the provision by all State and Non-State agencies of health care services. In addition, section 23 assigns national referral health facilities to the national government.

The Kenya Health Policy (2012-2030) was adopted and published in 2015. Notably, the following legislative proposals or Bills on matters relating to health care preceded the health policy, an anomaly that has gradually defined the character of Kenya's policy and legislative framework:

a) the Health Bill, 2015-designed to provide the legal framework for the implementation of the right to health by county governments as a devolved function;
b) the Reproductive Health Care Bill, 2014 which recognises reproductive health as a right and sets standards for service delivery to facilitate access to this right; and
c) the Mental Health Bill, 2014-which addresses the prevention of mental illness and the provision of care, treatment and rehabilitation of persons with mental illness.

In addition to policy and legislation, judicial intervention has played a critical role in the protection of the right to the highest attainable standard of health, which is closely linked to the right to life and human dignity. The scope and fundamental nature of the right to life was the subject of the Court's decision in Patricia Asero Ochieng and Two Others v the Attorney-General Nairobi HC Constitutional Petition No. 409 of 2009 (unreported) where the Court held that the right to life, human dignity and health encompasses access to affordable and essential drugs and medicines, including generic drugs and medicines.

Despite the ambitious constitutional guarantees and the ongoing reform process to redefine the legal framework for the delivery of health care services, the health sector faces serious challenges, which include:

a) lack of policy on the provision of emergency health medical treatment at public and private health facilities;
b) Inadequate legislation on the domestication and implementation of various international human rights treaties on matters relating to health;

c) lack of national standards, policy and legal framework to guide State and Non-State agencies in the health sector on the progressive realisation of the right to health;
d) failure on the part of parliament to undertake reforms in legislation to align public entities in the health sector with the devolved functions;
e) lack of county policies and legislation in the majority of counties to guide and facilitate effective service delivery and discharge of their devolved functions; and
f) persistent industrial action by health personnel attributable to poor planning and dysfunctional human resource management.

Recommendation

In order to effectively deal with these challenges, the Commission recommends the following, among other reform measures (a) formulation of relevant national and county government policies to facilitate effective health service delivery; (b) immediate restructuring of all public corporations in the health sector in harmony with the system of devolved government; (c) that the national government facilitates capacity building to enable county governments to establish effective human resource management systems and address the recurrent industrial actions that invariably disrupt health service delivery; (d) the Transition Authority be prevailed upon to forthwith complete in the unbundling and costing of health functions so as to define the respective roles of both levels of government in the sector; and (e) mechanisms be established to facilitate effective consultation and cooperation among State and Non-State agencies at the national and county levels to ensure unity of purpose and collaboration in health service delivery.

Case Study: Access to Emergency medical treatment;

1) The case of Alex Madaga

The right to emergency medical treatment is recognized by the Constitution, a positive provision that was lacking in the repealed constitution. Despite this, the right to emergency medical treatment to poor patients remains an illusion. A case in point is that of Alex Madaga (now deceased), a road accident victim, who waited for eighteen hours in an ambulance to receive emergency treatment. Mr. Madaga could not get admission to any public or private medical facility within Nairobi for emergency treatment for reasons that there was unavailability of space in the Intensive Care Unit (ICU) at KNH and Nairobi Women's Hospital and where there was space like in Coptic Hospital and Ladnan Hospital, failure to make a deposit for emergency treatment.

2) The case of Elizabeth Akala

According to media reports, on 27th October 2015, a pregnant lady sought urgent medical attention due to pregnancy complications. On arrival at the Kakamega Level 5 hospital, an ultrasound examination revealed that the 34-week fetus was dead in the womb. Notwithstanding the need for urgent medical attention, it is reported that, since it was 5pm, the gynecologist on duty at the hospital admitted the patient and left the hospital because 'she had completed her shift'. The patient died the next morning before receiving any medical attention.

q) Right to Housing and Sanitation

Article 43 (1) (b) states that every person has the right to accessible and adequate housing, and to reasonable standards of sanitation. This is in line with article 11 (1) of the International Covenant on Economic, Social and Cultural Rights. This means that- (a) every person is entitled to the right without discrimination, (b) every person is entitled to live anywhere in security, peace and dignity as the right to housing is integrally linked to other human rights, (c) the housing must be adequate in terms of privacy, space, lighting, ventilation, basic infrastructure and location with regard to work and at reasonable cost.

The Commission recommends that a housing policy, law and administrative procedures be developed and at a minimum cater for all to enjoy the right.

r) Right to Adequate Food

Article 43(1) (c) provides for the right to be free from hunger, and to adequate food of acceptable quality with the State obligated to take legislative, policy and other measures, including setting of standards to

achieve progressive realization of this right. This is a positive provision, as the repealed constitution did not have such a provision.
To operationalize this article, Food Security Bill, 2014 has been formulated to eliminate hunger in the counties and to give effect to article 43(1)(c). Further, there exists the National Food and Nutrition Security Policy, 2011 a policy framework to ensure Kenya has safe food in sufficient quantity and quality to satisfy nutritional needs for optimal health.

Despite the positive provision on the right to food, there is no law to guide the implementation of the provision of article 43(1)(c) that recognizes the right to food. The Commission recommends that the government should come up with measures to ensure food security in the country. It is further recommended that measures to give effect to the right to be free from hunger and to have adequate food of acceptable quality be put in place. Further, the Commission recommends the fast tracking of the enactment of the Food Security Bill, 2014.

s) Right to Clean and Safe Water in Adequate Quantities

Article 43(1) (d) of the constitution provides for the right to clean and safe water in adequate quantities. In implementing this article, the Water Bill, 2014 was formulated as, a framework for the regulation, management and development of water resources and water and sewerage services. It further recognizes the right to clean and safe water in adequate quantities and to reasonable standards of sanitation.

Despite the positive provision on the right to clean and safe water some parts of the country still lack water. The Commission recommends the passing of the Water Bill. The Commission further recommends that the government introduce programmes, policy and legislation to implement this right.

t) Right to Social Security

Article 43(1) (e) provides for the right to social security. The repealed Constitution did not recognize social security as a right. In implementing this right, the State is obligated to take legislative, policy and other measures, including setting of standards to achieve progressive realization of this right.

In implementing this right, the following pieces of legislation and policy are in place -

i) National Social Security Fund, 2013, a law establishing a National Social Security fund providing for contributions to and the payment out of the Fund.
ii) National Hospital Insurance Fund. This is law establishing a National Hospital Insurance Fund/ provides for contributions to and the payment of benefits out of the Fund.
iii) Kenya National Social Protection Policy, 2011. This is a policy developed to reduce poverty and the vulnerability of the population to economic, social, and natural shocks and stresses by providing retirement pensions, sickness benefits, maternity protection, employment injury and disease protection (workers' compensation), survivors' benefits, disability coverage, family benefits, and unemployment protection.

In addition to the above legislation and policy, the Directorate of Gender and Social Services gives the vulnerable and the elderly people who cannot support themselves a monthly stipend of KShs. 2,000 through the M-Pesa platform.

The Ministry of Labour, Social Security and Services has also established a Consolidated Social Protection Fund through which cash transfer for orphans and vulnerable children, older persons and persons with severe disabilities is facilitated.

As it stands, there are more than 15 Social Security Funds established by the government most of which do not operate under clear policy frameworks.

The Commission recommends a review and auditing of legislation that existed on Social Security prior to the promulgation of the Constitution. It is further recommended that a clear policy framework be developed to guide the operations of the established Social Security Funds

u) Right to Education

The Constitution recognizes education as a right in article 43(1)(f) and obliges the State to ensure that the right is realized (Article 21).[9] In part 1 of the Fourth schedule to the constitution, the national government is charged with the following functions in the education sector: Education policy, standards, curricula, examinations and the granting of university charter, universities, tertiary educational institutions and other institutions of research and higher learning, primary schools, special education, secondary schools and special education institutions. County governments on the other hand are charged with pre-primary education, village polytechnics, home craft centres and childcare facilities.

In an attempt to achieve the constitutional imperatives within the education sector, the national government launched a number of reforms, which include: an increase in resources available for the provision of free primary and free secondary day education; review and development of a sessional paper on reforming the education and training sectors and review or development of various Acts of Parliament relating to the education sector. The relevant Acts enacted include: the Basic Education Act, 2013; the Technical and Vocational Education and Training Act, 2013; the Science, Technology and Innovation Act, 2013; the Kenya Institute of Curriculum Development Act, 2013; the Universities Act, 2013; and The Kenya National Examination Council (Amendment) Act, 2013.

While the county governments took up management of pre-primary education,, homecraft centres and childcare facilities soon after the first general election in March 2013, the management of village polytechnics was transferred upon application by the counties vide Gazette Notice No. 116 of 2013. As presented in the CIC Second Devolution Assessment Report, several county governments have developed various policies and laws to facilitate the discharge of this function. The following policies have been developed: Early Childhood Education Policies, Youth and Women Empowerment Policies, Vocational Training Policies, Education and Bursaries Acts, Vocational Training laws, among others. Several counties have also recruited childhood development teachers (caregivers) and polytechnic instructors. County governments have also provided equipment to the relevant education facilities.

Notably, there is lack of a comprehensive framework to guide the progressive realisation of the right to education. Further, as observed in the Commission's advisories to the Ministry of Education, Science and Technology existing policy and legislation require review to align them with the Constitution. In the context of implementation, lack of appreciation of constitutional mandates of the respective education sector players has led to turf wars between the ministry and the counties as well as between the Teachers sService Commission and the two levels of government. Additionally, the sector is plagued by inadequate number of teachers, facilities and equipment. Another factor that compromises the realisation of the right are the perennial teachers' strikes.

The Commission recommends the development and implementation of a comprehensive programme for the progressive realisation of every person's right to education. There is also need for sector players to engage each other in order to ensure a common understanding of the roles and responsibilities of the different actors and to build synergy to facilitate realisation of the right. The Commission further recommends negotiations between the State and various teachers' organizations to come up with a solution to the causes of perennial teachers' strikes.

v) Right to Family

Article 45 (1) states that the family is the natural and fundamental unit of society and the necessary basis of social order, and enjoying recognition and protection of the State. It further provides that every adult having a right to marry a person of the opposite sex, based on the free consent of the parties. The parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at dissolution of marriage.

Under Article 45(4), parliament is obligated to enact legislation recognising marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that they are consistent with the Constitution.

9 Every child in Kenya has a right to free and compulsory basic education (Article 53 (1)(b)).

The following Acts dealing with the right relating to family have been passed by parliament:

i) The Marriage Act, 2014 which is a legal framework amending and consolidating various laws relating to marriage and divorce under one statute;
ii) The Matrimonial Property Act, 2013 which provides for the rights and responsibilities of spouses in matrimonial property; and
iii) The Protection against Domestic Violence Act, 2015 which provides protection and relief to victims of domestic violence, protection of spouse and children or other dependent persons.

Although there exists new laws enacted under the Constitution of Kenya 2010, consolidating different regimes of marriages and providing for responsibilities of spouses, there is need to align these pieces of legislation with the Children's Act. This would help put in place a comprehensive mechanism for custody and child maintenance during divorce.

In view of the above, the Commission recommends the review of the Children's Act (Amendment Bill) to align the existing children laws to the Constitution.

w) Consumer Rights

Article 46 provides for Consumer rights to- (a) goods and services of reasonable quality; (b) the information necessary for them to gain full benefit from goods and services; (c) the protection of their health, safety, and economic interests; and (d) compensation for loss or injury arising from defects in goods or services.
Under Article 46(2), parliament is obligated to enact legislation providing for consumer protection and for fair, honest and decent advertising.

Parliament enacted the Consumer protection Act, 2012 law protecting the Consumers and preventing unfair trade practices in consumer transactions. The Act is however not comprehensive enough as envisaged in article 46 as it lacks provisions for fair, honest and decent advertising. The Commission recommends the integration of the rights enunciated in article 46 in all sectors. The Commission further recommends the amendment of the Consumer Protection Act to provide for fair, honest and decent advertisement.

x) Fair Administrative Action

Article 47(1) of the Constitution guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Clause (2) requires that a person whose right or fundamental freedom has been or is likely to be adversely affected by administrative action be given written reasons for such action. Clause (3) mandates parliament to enact legislation to give effect to clause (1). This legislation is required to, among other things, (a) provide for the review of administrative action by a court or an independent and impartial tribunal; and (b) promote efficient administration.

In order to give effect to article 47, parliament enacted the Fair Administrative Action Act, 2015. According to section 3, the Act applies to all State and Non-State agencies, including any person (a) exercising administrative authority (to discharge this function); (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates. In effect, the 2015 Act codifies the general principles of common law relating to fair administrative action and gives practical basis for the exercise by the High Court of its supervisory jurisdiction conferred under article 165(6).

Despite the existence of a legal framework for the protection of the constitutional right to fair administrative action, the relevant Cabinet Secretary is yet to make the regulations required under section 13(1) for the better carrying out of the provisions of the 2015 Act on fair administrative action. This leaves the application of the Act entirely to the substance of common law and procedure relating to judicial review of administrative action. In addition, no programme has been designed to create public awareness of the nature and scope of the right guaranteed by article 47 and the administrative law remedies available for breach of this right. Consequently, the majority of the people are ignorant of these rights and of the possible avenues for redress.

The Commission recommends (a) the formulation of regulations to operationalise the Act and give full effect to article 47 of the Constitution; (b) that appropriate programmes and plans and actions be undertaken to create awareness on (i) the nature and scope of the rights guaranteed by articled 47 of the Constitution; (ii) the remedies available under the Act; and (iii) the avenues for administrative and judicial intervention in the enforcement of one's right to fair administrative action.

y) Access to Justice

Article 48 of the Constitution mandates the State to "... ensure access to justice for all persons..." and provides that "... if any fee is required, it shall be reasonable and shall not impede access to justice". The notion of "access" encompasses not only the equality of opportunity and reasonableness of the cost of accessing judicial services, i.e., the proportionality of costs, but also the principles of fairness of process and the quality of outcomes. Access to justice also requires that justice be expedited. These key indicators are dependent on the extent to which the on-going judicial reforms and administrative procedures have facilitated the realization of the constitutional standards of access to justice prescribed in article 48. The phrase "all persons" should be construed in the context of article 27, which prohibits discrimination or differential treatment on any basis. Accordingly, justice should be accessible by all without distinction on any of the basis specified in article 27 of the Constitution.

The constitutional right of access to justice guaranteed under article 48 is premised on the principle of equality of opportunity to access judicial services and other mechanisms for the management of conflicts and resolution of disputes. Various studies and reports of taskforces previously commissioned by the Judiciary cite high costs of litigation as the foremost impediment to the right of access to justice. Accordingly, access to judicial services at proportionate costs has been elusive to many court users, who include indigent persons, women, children and persons with disabilities. This has, over the years, prompted the establishment by various civil society and faith-based organizations of legal aid programmes to support those economically disadvantaged, vulnerable and marginalized groups in the promotion and protection of their basic rights and freedoms.

The pressing need for a State funded legal aid and awareness scheme led to the establishment of a pilot legal aid and awareness scheme steered by the National Legal Aid and Awareness Programme (NALEAP). It is administered by the Department of Justice in collaboration with civil society organizations and development partners. The programme steered the formulation of the National Legal Aid Policy and the proposed Legal Aid Bill, 2014, which is still pending enactment despite timely technical review in 2014 by CIC and its subsequent submission to the Attorney General for Cabinet approval, publication and tabling in Parliament.

For more details on this matter, see the Section (2.11) on the Judiciary.

z) Rights of Arrested Person

Article 49 provides for the right of arrested person- (a) to be informed promptly, in a language that the person understands,– (i) of the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent; (b) to remain silent; (c) to communicate with an advocate, and other persons whose assistance is necessary; (d) not to be compelled to make any confession or admission that could be used in evidence against the person; (e) to be held separately from persons who are serving a sentence; (f) to be brought before a court as soon as reasonably possible, but not later than- (i) twenty-four hours after being arrested; or (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day; (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. Article 49 (2) provides for a person not to be remanded in custody for an offence that is punishable by a fine only or by imprisonment for not more than six months.

The rights of arrested persons guaranteed under article 49 are given effect by, among other instruments: (a) the recently published Bail and Bond Policy; (b) the Sentencing Guidelines and Policy; and (c) the Persons Deprived of Liberty Act, 2014. Both policy documents and legislation are designed to supplement the provisions of the Criminal Procedure Code Revised 2010 (1930) and give effect to the constitutional

guarantees for the promotion and protection of the rights of persons held in detention or other lawful custody. The 2014 Act is designed to provide the legal framework for the realization of International Standards and treaty obligations, which form part of the law of Kenya by virtue of article 2(5) and (6) of the Constitution. For more information on this article, see also section 2.11 on the Judiciary.

aa) Right to Fair Hearing

Article 50(1) provides for the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. It further provides for the right to fair trial as- (a) to be presumed innocent until the contrary is proved; (b) to be informed of the charge, with sufficient detail to answer it; (c) to have adequate time and facilities to prepare a defence; (d) to a public trial before a court established under this constitution; (e) to have the trial begin and conclude without unreasonable delay; (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed; (g) to choose, and be represented by an advocate, and to be informed of his or her right promptly; (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result; (i) to remain silent, and not to testify during the proceedings; (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence; (k) to adduce and challenge evidence; (l) to refuse to give self-incriminating evidence; (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial; (n) not to be convicted for an act or omission that at the time it was committed or omitted was not- (i) an offence in Kenya; or (ii) a crime under international law; (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted; (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

Article 50(4) provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

An accused person- (a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and (b) has the right to a copy of the record of the proceedings within reasonable period after they are concluded, in return for a reasonable fee as prescribed by law. It further provides that in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
In implementing this article, the Victims Protection Act, 2014, giving effect to article 50(9) of the Constitution by providing protection of victims of crime and abuse of power and to provide them with better information and support services and to provide for special protection for vulnerable victims was enacted.

Despite the provisions of the Victims Protection Act, 2014, there are still instances where witnesses have been threatened not to testify or lodge complaints.

bb) Right of Persons Detained, Held in Custody or Imprisoned

Article 51(1) provides that a person detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned with such person entitled to petition for an order of habeas corpus.

Article 51(3) mandates parliament to enact legislation that- (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and (b) takes into account the relevant international human rights instruments. The provision in this article has been lauded and viewed by many as moving away from the days when persons detained, held in custody or imprisoned were tortured and treated in a manner that did not consider their rights and fundamental freedoms.

=In implementing this article, the Persons Deprived of Liberty Act, 2014 has been enacted. It sets out the rights of persons deprived of liberty and duties of persons in charge by providing complaint mechanisms and disciplinary procedures for a person deprived of liberty and where the person can lodge a complaint. The Act also establishes a consultative committee to deliberate on and resolve matters relating to persons deprived of liberty.

There have been reports, in the media, of prisoners being beaten by prison Warders to the extent that they succumb to death. A case in point is that of Kevin Otieno (deceased), who was convicted of robbery with violence and sentenced to death in 2012. Regrettably he was beaten to death by prison Warders for having two mobile phones[10].

2.5.3 Specific Application of the Bill of Rights

a) Interpretation of this part

Article 52 provides for the elaboration of certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to children, persons with disability, youth, minorities and marginalized groups and older members of society by providing that part 3 shall not be construed as limiting or qualifying any right.

b) Children

Article 53 provides for the right of every child – (a) to a name and nationality from birth; (b) to free and compulsory basic education; (c) to basic nutrition, shelter and healthcare; (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor; (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and (f) not to be detained, except as a measure of last resort, and when detained, to be held- (i) for the shortest appropriate period of time; and (ii) separate from adults and in conditions that take into account the Child's sex and age.

In implementing this Article, a number of legislation having provisions on Children have been enacted. They include-

i) Kenya Citizenship and Immigration Act, 2012 providing for citizenship by presumption of children foundlings and how children acquire citizenship.
ii) Basic Education Act, 2013 recognising the right to free and compulsory basic education and prohibits discrimination, physical punishment and mental harassment.
iii) Protection against Domestic Violence Act, 2015 offering protection and relief to victims of domestic violence including children by criminalizing physical, sexual or psychological abuse of the child by any person. This includes the risk of seeing or hearing domestic squabbles. The law makes child marriage violence against the child.
iv) Marriage Act, 2013 prohibiting child marriage and makes provision for the Children's Act to be followed on custody and maintenance of a child during divorce.

The following Bills have yet to be enacted into law –

i) Child Justice Bill, 2015. This Bill seeks to establish a criminal justice system for children suspected or accused of committing offences.
ii) Children Act (amendment) Bill, 2014 seeking to amend various laws relating to children in line with the constitution.

The Commission recommends the review and audit of existing laws touching on children to align them with the Constitution we further recommend the enactment of Child Justice Bill, 2015 and Children Act (Amendment) Bill, 2014. The Commission also recommends the formulation of policies and programmes to facilitate the implementation of Article 53.

10 http://tuko.co.ke/57789-family-in-agony-as-kisii-prison-warders-allegedly-beat-inmate-to-death.html accessed on 20/11/2015 at 1205hrs

c) Persons with Disability

Under Article 54(1), a person with any disability is entitled to be (i) treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; (ii) access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; (iii) to reasonable access to all places, public transport and information; use Sign language, Braille or other appropriate means of communication; and access materials and devices to overcome constraints arising from the person's disability.

To realize these rights, the following measures have been put in place: The Persons with Disability Bill, 2015 has been developed; Guidelines on inclusion of persons with Disability (2014) developed; Sensitization of national and county governments on disability rights undertaken; there is a proposal to amend the Basic Education Act, 2012, to include the rights of learners with disability.

In addition to the above, there are other rights for PWDs provided by the Constitution. Article 54(2) mandates the State to ensure the progressive implementation of the principle that at least five percent of the members of elective and appointive bodies are persons with disability. This has generally been realized. Article 56 empowers the State to put in place affirmative action programmes designed to ensure that minorities and marginalized groups (including PWDs) participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; are accorded special opportunities for access to employment; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure. In addition to domesticating the Convention of the Rights of Persons with Disability as provided in article 2 (6), the express constitutional provisions on the rights of persons with disability have given renewed impetus to the disability movement by providing an array of constitutional guarantees for the promotion and protection of disability rights in the context of a progressive and ambitious Bill of Rights.

Article 22(1) guarantees everyone "... the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." According to clause (2), proceedings to enforce the Bill of Rights may be instituted (a) in person; (b) by a representative of a person who is unable to bring an action in his/her own name; (c) by a person acting in the public interest; or (d) an association acting in the interest of one or more of its members. In addition to the right to seek enforcement in judicial proceedings, the constitution imposes a duty on all public officers to implement the rights and fundamental freedoms of all persons, including PWDs. Article 21(3) provides that "All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disability, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities." To this end, article 21(4) mandates the State to "... enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms".

Article 7(3)(b) obligates the State to promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disability. Equality of opportunity to access information is critical to inclusive development. Article 27(1) guarantees the right to equality before the law and freedom from discrimination while sub-article (4) prohibits discrimination on the basis of disability. To give full effect to the realisation of the rights guaranteed under this Article, sub-article (6) obligates the State to "... take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination".

Other rights provided by the Constitution that affect persons with disability are those on the electoral system and fair representation, representation in political parties and parliament and county assemblies. In this regard, electoral legislation were enacted to give effect to articles 97, 98, 100 and 177 of the constitution. Other relevant articles are 232(1), which prescribes the values and principles of public service, and article 258(1), which guarantees the right to institute court proceedings whether in person or by a representative to enforce the rights protected by the constitution.

The above constitutional provisions have led to an increase in opportunities for persons with disability. There are increased opportunities in representation at the National Assembly and also at the Senate.

The requirement that 30% of all procurement work be reserved for PWD, women and youth has enhanced access of PWD to government tenders. The national and county governments are also presently in the process of formulating appropriate policy and legislation to guide suitable programmes and actions to facilitate the realisation of the constitutional rights of PWDs. In addition, civil society continues to advocate for the promotion and protection of disability rights. Indeed, a substantial number of programmes, including enterprise development Fund are spearheaded by civil society and Disabled Peoples Organisations with the support of, among others, the National Development Fund for Persons with Disabilities.

In order to enhance the implementation of the constitutional provisions on the rights of PWDs, the Commission developed guidelines for their inclusion in mainstream society. The guidelines have been instrumental in providing broad guidance to policy makers and implementation on how to observe the principles of inclusion and disability mainstreaming as they generate policy, legislation and administrative procedures.

The new constitutional order and the appurtenant policy, law and institutional reforms give renewed impetus to the efforts of State and Non-State agencies to promote and protect the rights of PWDs. The restructured service delivery model dictates that national and county governments reposition themselves in an effort to deliver on the constitutional guarantees, which they are obligated to uphold. While these guarantees are the subject of progressive realisation, there are areas in which quick wins can be achieved. The following are some of the areas recommended for immediate attention towards short-term gains:

i) the national disability policy framework (including the special education policy) should be reviewed to guide the formulation and implementation of suitable programmes, plans and actions designed to ensure the effective realisation by PWDs of all constitutional guarantees towards full implementation of the UN CRPD;
ii) Amendment of (i) the Persons with Disabilities Act, 2003; (ii) the Basic Education Act, 2012*; (iii) labour laws relating to employment and labour relations; (iv) health related legislation; (v) electoral laws; (vi) legislation on physical planning and the built environment; (vii) legislation on public transport; and (viii) legislation on access to information and information technology, only to mention a few;
iii) County governments to formulate function-specific policy and legislation to guide the promotion and protection of disability rights and to guide effective service delivery to PWDs on an equal basis;
iv) Effective mechanisms be established to facilitate consultation and collaboration among (i) national and county governments; (ii) civil society organizations; (iii) disabled persons organizations; and (iv) the private sector, in the promotion and protection of the rights and freedoms of PWDs;
v) County governments to establish technical forums comprising of representatives of (i) the national and county governments; (ii) civil society; (iii) disabled persons organisations; and (iv) local administration, to guide policy and programmes for effective service delivery and the realisation of the rights of PWDs at the devolved units of service delivery;
vi) The establishment of a mechanism for monitoring and evaluating the status of (i) service delivery by State organs of basic education and health; (ii) levels of employment of PWDs in both public and private sectors; (iii) the extent to which PWDs are engaged in decision-making on matters that affect their social, economic and political life; and (iv) the level of representation by PWDs in elective and other national bodies;
vii) The formulation of a national master plan for the promotion of disability rights at national and county levels; and to aid in planning, a national census be undertaken to ascertain with a reasonable degree of accuracy the population of PWDs disaggregated on the basis of gender, age, disability type, degree of disability, occupation and location;
viii) A national registration campaign be undertaken to create an accurate data base on persons with disability and their special needs to facilitate appropriate intervention and effective service provision; and
ix) Budgetary allocation be enhanced to support (i) education and training of PWDs; (ii) enterprise development; and (iii) social support of indigent and severely incapacitated PWDs.

d) Youth

Article 55 of the Constitution compels the State to take measures, including affirmative action programmes to ensure that the youth (a) access relevant education and training; (b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; (c) access employment; and (d) are protected from harmful cultural practices and exploitation.

Election laws have provided for the representation of the youth in the Senate, National Assembly and the County Assembly. The procurement laws provide for 30% of all government tenders to go to the special groups including the youth. Further, some funds for the youth have been created as special avenues for the youth to be involved and to access opportunities. Between 2012 and 2014, CIC facilitated some activities aimed at educating the youth on opportunities and responsibilities the constitution avails and places on the youth. However, the State has not come up with a comprehensive policy to guide the realization of article 55, including the youth who are marginalized and in need. The Commission for the Implementation of the Constitution proposes that such a policy be fast tracked so that the implementation of Article 55 is not intermittent.

e) Minorities and Marginalised groups

Article 56 mandates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups- (a) participate and are represented in governance and other spheres of life; (b) are given special opportunities in education and in the economy; (c) are provided special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure.

The Constitution defines marginalised groups as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more grounds in article 27(4). The Constitution has not defined minorities thus resulting in a practice in which minorities and marginalized are used interchangeably by several actors.

Article 56 of the Constitution obligates the State to ensure adequate representation of "marginalized groups" in all levels of government, execute affirmative action on behalf of these groups, and promote the use of indigenous languages and the free expression of traditional cultures. There are statutes criminalizing discrimination of the marginalized and minorities. Notably, with devolution and the requirements of representation of Kenya's diverse communities in public service and parliament, marginalised and minorities are now represented in both elective and appointive bodies. The National Gender and Equality Commission established by the constitution is also promoting equality and fighting non-discrimination of hitherto marginalized groups.

This is a positive development. The challenge however is the lack of clarity on the meaning of minorities. The definition is relative depending on the context since a minority in one place might not be a minority in another place. The Commission recommends the formulation of Equality policy, action plans and programmes to facilitate the implementation of the provisions of article 56(a)(b)(c)(d)& (e).

f) Older Member of Society

For the first time in the history of Kenya the rights of the aged have been recognized under article 57 of the Constitution. The article reflects the principles of the International Plan of Action on Ageing (IPAA) and the 1991 United Nations Principles for Older Persons. Kenya is a signatory to the International Plan of Action on Ageing (IPAA) adopted in 1982 in Vienna, Austria during the first World Assembly on Ageing.

Article 57 stipulates that the State shall take measures to ensure the rights of older persons to fully participate in the affairs of society, to pursue their welfare, to live in dignity and respect and be free from abuse, to receive reasonable care and assistance from their family and the State. There is currently no legislation giving effect to article 57 of the constitution. Older member of society are treated like other members of society without any special status in the various legislation that relate to human rights.

Some efforts that have been made towards the implementation of Article 57 include the formulation of a draft national policy on older persons and the aged by the Ministry of Labour, Social Security

and Services. In addition, to promote social justice and inclusivity, the national government through the Ministry of Labour, Social Security and Services started the Older Persons Cash Transfer (OPCT) programme covering 164,000 households to cushion them against life threatening risks such as sickness and injuries. This programme is managed by Constituency Social Assistance Committees. Furthermore, the national government through the Ministry of Health has implemented provision of health insurance to elderly people of 65+ years.

While national government has indeed taken steps to implement Article 57, a lot still remains to be done. The national government is yet to develop administrative procedures that ensure that older persons participate in the affairs of society, and are free from abuse. Other areas that need to addressed include:

i) The draft national policy for older persons is yet to be adopted by cabinet and as such it cannot be operationalized. Some of the programmes that the policy proposes include the provision of adult education to provide older persons with functional literacy and measures to safeguard the property of older persons and women. If adopted, this policy would greatly improve the lives of older persons.
ii) There is a lack of coordination between the national government and county governments regarding programmes for older persons.

There is need for immediate adoption and operationalization of the national policy for older persons. This should include the development of mechanisms that ensure coordination between the national and county governments over the programmes for the older persons. It is further recommended that effective public participation with regard to the programmes for the older persons be encouraged.

2.5.4 State of Emergency

Article 58 provides that a state of emergency may be declared only under article 132(4)(d) and only when- (a) the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to meet the circumstances for which the emergency is declared. It envisages the formulation and enactment of legislation by the National Assembly- (a) limiting a right or fundamental freedom in the Bill of Rights only to the extent that- (i) the limitation is strictly required by the emergency; (ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency; and (b) shall not take effect until published in the gazette.

The effect of the declaration of a state of emergency is that it allows for the possibility of derogation or suspension of the full enjoyment of human rights and fundamental freedoms. Article 58(6)(a) provides that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the limitation is strictly required by the emergency and the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency.

Article 58(6) (a) presumes that legislation may be developed after the declaration of the state of emergency. This presents a challenge because the limitation of rights and fundamental freedoms occurs after the state of emergency is declared. It is important that the public is aware prior to the declaration of the state of emergency of the rights that can be limited and the exact nature of powers to be exercised by State organs in that period and to allow for public participation in the formulation of the said legislation in view of the weighty and critical limitations it may address. To leave the enactment of such legislation to a period of crisis and national disaster, risks the possibility of enacting a law that may provide for excessive exercise of powers and unjustifiable limitation of rights.

The Commission recommends the formulation and enactment of a legislation defining what a state of emergency entails and the powers of the State during such period pending the enactment of the legislation contemplated in article 59(6).

2.5.5 Kenya National Human Rights and Equality Commission

Article 59(1) establishes the Kenya National Human Rights and Equality Commission with its function as- (a) promote respect for human rights and develop a culture of human rights in the Republic; (b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development; (c) to promote the protection, and observance of human rights in public and private institutions; (d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs; (e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated; (f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs; (g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and convections relating to human rights; (h) to investigate any conduct in State affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety of prejudice; (i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct; (j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and (k) to perform any other functions prescribed by legislation.

Article 59(4) mandates parliament to enact legislation to give full effect to this part and come up with a legislation to restructure the Commission into two or more separate Commissions and if parliament chooses to come up with such legislation- (a) that legislation shall assign each function of the Commission mentioned in article 59 to one or the other of the successor Commissions; (b) each of the successor Commissions shall have powers equivalent to the powers of the Commission under article 59; and (c) each successor Commission shall be a Commission within the meaning of chapter 15, and shall have the status and powers of a Commission.

In implementing this article, the Kenya National Human Rights and Equality Commission was restructured resulting into the establishment of three Commissions through the enactment of-

i) Kenya National Commission on Human Rights Act, 2011. This is a law restructuring the Kenya National Human Rights and Equality Commission and establishing the Kenya National Commission on Human Rights listing its functions including the investigative function and how it ought to be done;
ii) The National Gender and Equality Commission Act, 2011.This is a law restructuring the Kenya National Human Rights and Equality Commission by establishing the National Gender and Equality Commission pursuant to article 59(4) and listing its mandate including the investigative function and how it ought to be done; and
iii) The Commission on Administrative Justice Act, 2011, that restructured the Kenya National Human Rights and Equality Commission and establishing the Commission on Administrative Justice pursuant to article 59(4) listing its mandate including the investigative function and how it ought to be done.

The Kenya National Human Rights Commission has been lauded for its approach of educating both the State and Non-State actors on human rights. Further, out of the 1,797 complaints received by the Commission in the 2013-2014, 221 complaints were processed and various redress actions taken, 1308 complaints were assisted through provision of legal advice and referral partners while 228 complaints were pending due to want of provision of supporting information.
The Commission on Administrative Justice has been lauded for its approach of handling complaints. In the year 2014, 86,905 complaints were received out of which 70,806 were resolved. Further, its efforts on awareness creation, building complaints handling capacity in the public sector, promotion of constitutionalism and partnerships and institutional development have also been hailed.

The National Gender and Equality Commission has been hailed for its efforts to ensure inclusivity and non-discrimination through public interest litigation ensuring that jurisprudence touching on special interest groups is developed and that justice is sought for the most vulnerable in society.

Although the law establishing the three Commissions is different with each having its own mandate, there has been a general lack of clarity on the span of each Commission's mandate. In particular there is

lack of clarity regarding the extent to which KNCHR and NGEC deal with rights specific to one gender. The Commission recommends a clear delineation, streamlining of the mandates of each of the three Commissions to avoid overlap in mandates that end up causing confusion. Further, CIC recommends the formulation and enactment of policies, legislative provisions and other measures to ensure monitoring and the enforcement of the Bill of Rights.

Conclusion

From the above analysis, it is clear that the Bill of Rights has moved Kenya to a better place where various rights are being enjoyed. There are a number of laws that have been enacted especially those provided in the Fifth schedule to the constitution. There are also some policies and regulations that have been adopted to operationalise the implementation of this chapter. Further, a number of institutions such as NGEC, KNHCR, CAJ have been created to monitor, investigate and report on human rights violations.

However, a number of laws are yet to be enacted and policies formulated to give effect to the provisions of the Bill of Rights. The most glaring among them are the laws, policies and standards to guide the progressive implementation of economic and social rights. Legislation limiting the rights and fundamental freedoms also need to be enacted to ensure that the enjoyment of some rights do not jeopardize the enjoyment of other rights. A case that comes to mind is the possibility of limiting the right to demonstrate and the right to industrial action for those in professions that provide essential services to ensure that the right to life is not violated

2.6 LAND AND ENVIRONMENT

2.6.1 Introduction

Chapter Five of the Constitution provides for equitable, efficient, productive and sustainable use and management of land, in accordance with the principles of equitable access, security of land rights, and transparent and cost effective administration among others. It provides that; all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals; and that land in Kenya is classified as public, community or private land. The Chapter also obligates the State, among others to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. Similarly, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

Land ownership, use and management have been a highly emotive issue in Kenya and a cause of conflict among communities. The Ndungu Commission Report11 of 2004 noted that throughout the 1980s and 1990s public land was illegally and irregularly allocated "in total disregard of the public interest and in circumstances that fly in the face of the law". The Agenda Number 4 of Kenya's National Dialogue and Reconciliation articulated the need for comprehensive land reforms on three fronts: (1) anchoring the Land Principles in the Constitutional process, (2) finalization, adoption and implementation of the National Land Policy, (3) redressing historical injustices that continue to aggrieve communities in order to foster national harmony.

Chapter Five seeks to address most of the problems associated with land in Kenya. It provides a way forward in addressing the key land issues, including historical land injustices, unequal access to and unfair distribution of land, elimination of gender discrimination in law, customs, and the right of communities and minority groups. Land is recognized not just as a commodity of trade but also as a principal source of livelihood.

The framework for implementation of Chapter Five includes

1) Legislation on land
    a) Revision, consolidation and rationalization of existing land laws;
    b) Revision of sectoral land use laws in accordance with the principles set out in article 60 (1) of the Constitution, and

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11 Government of Kenya (2004). "Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land" (referred to as the "Ndung'u Commission Report")

c) Enactment of legislation to regulate and protect ownership of land (article 68 (c) (i) – (vii) of the Constitution.
d) Enactment of legislation to:
   i) give effect to article 63 on community land;
   ii) provide for the operation of article 64 on private land;
e) Enactment of legislation to ensure that investment in property benefited local communities and their economies.

2) National Land Policy, which was to be developed and reviewed regularly by the national government through legislation.
3) The National Land Commission (NLC) whose functions among others was to manage public land on behalf of the national and county governments.
4) Legislation on environment and natural resources.

This section of the report therefore summarizes the status of the implementation of the Chapter in terms of the policies, legislation and administrative procedure developed, the challenges, and recommendations under land, environment and natural resources.

2.6.2 Legislative Framework Under Land

Land ownership in Kenya has been the source of controversy resulting in a need for specific legislation. Articles 63 and 64 require parliament to enact laws to provide for community land and land-holding by non-citizens respectively. Further, the constitution provides for regulation of land use and planning in article 66 and obligates the State to regulate the use of land or any interest in or right over any land. It also requires parliament to enact a legislation ensuring that investments in property benefits local communities and their economy. Article 68 requires parliament to revise, consolidate and rationalize existing land laws, revise sectoral land use laws in accordance with the constitutions and prescribe minimum and maximum land holding acreage in respect of private land.

Most of the legislation under Chapter Five identified in the Fifth Schedule to the Constitution were to be enacted within a timeframe of 18 months and five years of constitution implementation. This was because of the central role of land and environment in development. The Status of Implementation of the Legislation is discussed below.

1) The Land Registration Act, 2012

The Act revises, consolidates and rationalizes the registration of titles to land, and gives effect to the principles and objects of devolved government in land registration. The law was passed by parliament in April 2012 and became effective on 2nd May 2012. The legislation had a constitutional timeline of 27th February 2012 but which was extended by parliament by a further 60 days to allow parliament adequate time to consult over the bill.

2) The Land Act, 2012

The Act gives effect to article 68 of the Constitution, and seeks to revise, consolidate and rationalize land laws. It also provides for the sustainable administration and management of land and land based resources. The law was passed by parliament on 25th and 26th of April 2012 and became effective on 2nd May 2012. The legislation had a constitutional timeline of 27th February 2012 but which was extended by parliament by a further 60 days to allow parliament adequate time to consult over the bill. There have been limited effects since its enactment. For example it is not clear if there exists a database of all public land, which is geo-referenced and authenticated by a statutory body responsible for survey.

3) The Matrimonial Property Act, 2013

This Act provides for the rights and responsibilities of spouses in relation to matrimonial property and for connected purpose. In addition to the three Acts above, the following Bills on land have been prepared over the five year period.

4) The Physical Planning Bill, 2013

The Bill gives effect to article 66(1) and provides for the planning, use, regulation and development of land. It provides for the preparation and implementation of physical development plans. This Bill has a five year deadline, but which was extended by one year by Parliament to allow sufficient time for deliberations. The enactment has been delayed and this has led to limited coordination in the preparation and implementation of physical development plans. Since the functions of the CLMB is subject to the physical planning and survey requirements, the continued absence of a law on physical planning may lead to lack of clarity in the functions of the boards and significantly affect their service delivery.

5) Community Land Bill, 2013

The land laws require that all land in Kenya, whether private, public or community land are to be registered. The land laws therefore make provision for the registration of community land. Community land Bill 2013 was developed to give effect to article 63 (5) of the Constitution; providing for the recognition, protection and registration of community land rights; management and administration of community land; and the role of county governments in relation to unregistered community land. The deadline for this law was 27th August 2015 but has since been extended by parliament for one year to allow for more consultations.

The enactment of this law was delayed mainly by supremacy battles between the County and National Government on control of community land and lack of agreements on the role of the county government and the national government in relation to the community land. There was also conflict between the national assembly and the senate, the Ministry of Lands Housing and Urban Development and NLC on who was to deal with community land. Further, there was perception of limited involvement of key stakeholders leading to delay in its completion. This Bill is important as it seeks to address critical and important issues relating to land and is expected to benefit the communities once enacted.

Community land Bill should be fast-tracked to facilitate streamlining of community land ownership. The continued delay not only leads to delay in land reforms but also complicates the full implementation of related laws such as the Wildlife Management Act 2013 and other natural resources Acts, which has provisions on community land. There is need for more consultations and public participation on contentious issues regarding conversion of land from one category to another.

6) Land Laws Amendment Bill

This Bill seeks to amend the laws relating to land in order to align them with the Constitution, to give effect to articles 68(c)(i) and 67(2)(e) of the Constitution, to provide for procedure on evictions from land; and for connected purposes. There are proposed amendments to the NLC Act to address conflicts in mandate and challenges that have arisen from implementation of the principle act.

7) Minimum and Maximum Land Holding Acreages Bill 2015

This Bill gives effect to article 68c, (i) of the constitution and provides for the establishment of a legal framework and procedure for determining minimum and maximum land holding acreages in respect of private land. The Bill was amalgamated into the land laws amendment Bill but key components was not incorporated

8) The Investigations and Adjudication of Historical Land Injustices Bill, 2015

The Bill provides for the investigation, adjudication and redress of claims arising from historical land injustices. The Bill was reviewed by the Commission and forwarded to the AG. This Bill was also incorporated into the land laws amendment bill under article 67(e). The function of NLC is to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress

2.6.3 Legislative under Environment and Natural Resources

Part 2 of chapter five of the Constitution of Kenya obligates the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure equitable sharing of the accruing benefits, protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities, and encourage public participation in the management, protection and conservation of the environment. To realize this objective a number of policies and legislation have been developed and are at various stages. Overall a total of two policies (water policy and wildlife conservation policy) and 12 bills have been developed to various stages (Annex 1). Although most of these Bills had 27th August 2015 deadline, parliament extended the constitutional deadlines by one year to allow for more consultations on the same. The legislation are provided below;

1) Wildlife Conservation and Management Act 2013

Kenya has experienced a number of challenges in wildlife conservation. The challenges include increased poaching, high cases of human-wildlife conflict and limited participation of the public in wildlife conservation. The Wildlife Conservation and Management Act, 2013, which was enacted and became effective on January 10th 2014 provided for the protection, conservation, sustainable use and management of wildlife in Kenya. It addresses most of the challenges by providing for Public participation as an essential part of implementing sustainable governance in wildlife conservation which is expected to enhance transparency, accountability as well as give much needed guidance to conservation, increased compensation for wildlife related losses, enhanced wildlife security and regulation of wildlife conservancies. Kenya has, through the legislation, adopted the best practices in an effort to ensure that the country's irreplaceable wildlife heritage is preserved.

Enactment of the wildlife Act enhanced governance and decision-making on Wildlife matters through the formation of County Wildlife Conservation and Compensation Committees (CWCCC). KWS has since established the committees in all the 47 counties. The committees are responsible for among others: registering wildlife user rights, overseeing development and implementation of management plans on community and private land, ensuring benefits from wildlife are accordingly distributed, monitoring implementation of management plans for National Parks in their area in collaboration with KWS, developing and implementing mechanisms for human-wildlife conflict mitigation, reviewing and making recommendations on claims for compensation from wildlife damage or loss. Compensation for wildlife damage has been significantly increased e.g. Human Death – Ksh 5 million, Human injury with permanent disability – Ksh 3 Million, Other injury – up to Ksh 2 million depending on extent of injury and stiff penalties set for offenders e.g. make a false claim to the CWCCC with respect to wildlife damage (Ksh 100,000 or 6 months imprisonment), poaching or dealing in trophies of endangered species - a fine of ksh 20 million or imprisonment for life, Dealing in trophies or keeping trophies of wildlife (other than endangered species) - a fine of Ksh 1 million or imprisonment for 5 years etc.

2) Energy, Petroleum and Mining Laws

Parallel legislative processes were initiated for the Energy Bill, 2013, Petroleum (Exploration, Development and production Bill, 2013 and Mining Bill, 2013 were initiated in the year 2013. The Energy Bill covers upstream elements including resource management, granting of licenses, operations and oversight of the sector and extraneous issues such as revenue management. Mining Bill gives effect to articles 60, 62 (1)(f), 66 (2), 69 and 71 of the constitution and provides for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals. The Petroleum Bill on the other hand seeks to provide a framework for the contracting, exploration, development and production of petroleum, cessation of upstream petroleum operations. It gives effect to relevant articles of the Constitution regarding upstream petroleum operations. The enactment of the three Bills have delayed since the deadline for legislation was 5 years. The deadlines were however extended by an extra one-year to allow more time for consultation. The delays in the enactment of the proposed laws is attributed to internal political disputes and external political influence.

2.6.4 Other Legislation Required Towards Effective Management of Environment and Natural Resources

1) Environment Management and Coordination (Amendment) Bill, 2014.

This Bill amends the Environmental Management and Co-ordination Act of 1999 in line with articles 69 and 70 of the Constitution. It was passed by parliament, and is awaiting presidential assent

2) Forest Conservation and Management Bill 2015

This Bill gives effect to article 69 of the Constitution with regard to forest resources; to make provision for the conservation and management of forests; and for connected purposes. Seeks to amend the Forest Act, 2005 and align it with the constitution. It provides for domestication of international agreements and best practices, relating to natural resource management and prescribes a progressive way of handling natural resources.

3) The Irrigation Bill, 2015

The Bill seeks to amend and consolidate the law relating to sustainable development and management of irrigation for socio-economic development in the country; to align existing irrigation laws to the Constitution of Kenya 2010 and to repeal the Irrigation Act Cap 347 Laws of Kenya. The Ministry of Water and Irrigation withdrew the Bill to allow for further consultations. As of 9th November 2015, the Bill had been cleared by CIC and forwarded to the AG for tabling in Parliament.

4) Water Bill 2014

Provides for the regulation, management and development of water resources, water and sewerage services. This was passed by parliament and awaits debate at the senate

5) Seeds and Plant Varieties Amendment Bill 2015

Act of Parliament to amend the Seeds and Plant Varieties Act Cap 326 Laws of Kenya and for connected purposes. The Bill has been submitted to the AG for tabling in Parliament

6) Statistics Bill (Amendment) Bill, 2015

An amendment to the Statistics Act, 2006, which provides for the establishment of the Kenya National Bureau of Statistics for the collection, compilation, analysis, publication and dissemination of statistical information, and the coordination of the national statistical system. This was enacted.

7) The Agreements Relating to Natural Resources (Classifications of Transactions) Bill, 2015

The Bill gives effect to article 71 of the constitution and provides for the classes of transactions relating to natural resources subject to ratification by parliament. The Bill is with parliament.

8) The Prevention and Control of Marine Pollution Bill, 2014

To objective of the Bill is to give effect to article 2(5), 2(6) 69 (1) (a), (f), (g) and (h) of the Constitution and International Treaties and Conventions on Marine Pollution. It provides for the prevention, mitigation and control of pollution of the sea from ship transport operations, preparedness and response for pollution emergencies arising from ship transport operation, liability and compensation for pollution damage arising from shipping transport operations or pollution damage resulting from exploration and exploitation of seabed mineral resources and for connected purposes.

9) The National Sovereign Wealth Fund Bill, 2014

This Bill is to give effect to the provisions of article 201 of the Constitution. It seeks to establish Kenya's National Sovereign Wealth Fund to undertake diversified portfolio of medium and long-term local and foreign investment to build a savings base for purposes of national development, stabilization of the economy at all times, and enhance intergenerational equity in Kenya. Sovereign Wealth Fund investment framework is critical in ensuring stability in the economy by providing for means of handling excess revenue from natural resources. The Sovereign Wealth Fund Bill was withdrawn by OP and CIC is yet to receive it back

2.6.5 Land Policies

1) National Land Policy

In 2009 Kenya approved a National Land Policy as a blueprint for Kenya's eagerly awaited land reforms. One of the functions of NLC was to recommend a national land policy to the national government following a review of the existing policy in line with the Constitution. The review was necessary because national land policy of 2009 was not consistent with the Constitution This key activity has not been carried out leading to challenges in implementing the principles of land policy as given in article 60 of the Constitution and thereby slowing down the much needed reforms in the land sector.

2) Arid and Semi-Arid Lands (ASAL) Policy

The goal of the policy is to facilitate and fast track sustainable development in Northern Kenya and other arid lands to address developmental gaps in line with the region's realities. The policy seeks to; provide a framework for ASAL development coordination, resource mobilization, research, monitoring and evaluation; Strengthen cohesion and integration of ASAL with the rest of the country and address inequality including gender, youth and vulnerable groups; Improve the enabling environment for development in the ASAL by establishing the necessary foundations for development and bridge development gaps; develop alternative approaches to service delivery in pastoral areas; Provide a policy framework for enhancing synergy on ending drought emergencies; Promote sustainable utilization of existing land and land based resources to facilitate national economic development; and provide an enabling environment for sustainable agriculture, livestock, trade and tourism development in the ASALs. The policy is under review by CIC

2.6.6 Regulations Under Land Laws

The Land Act, 2012 requires the Cabinet Secretary to make regulations prescribing anything which may be prescribed under the Act generally and for the better carrying into effect the purposes and provisions of the Act. Such regulations may prescribe;

a) The forms to be used in connection with this Act;
b) The manner and form of the registries of land, the procedure to be followed by the registries and hours they are to be open for business;
c) Procedure for the transfer of land from one category to another;
d) Particulars and format to be contained in a register or other document required to be kept under this Act; and
e) Any other matter for the better carrying into effect of the provisions of this Act.

In making the regulations, rules or prescribing any matters required under the Act, the Cabinet Secretary is required to take into account the advice of the National Land Commission as required under the Constitution and such regulations or rules shall be tabled before Parliament for approval.

The National Land Commission may also make regulations generally for the better carrying into effect of any provisions of the Land Act and such regulations shall be tabled before Parliament for approval. The regulations developed so far are as follows;

a) The Land Act Regulations, 2013
b) Land Registration Act Regulations 2014
c) The National Land Commission (Review of Grants and Dispositions of Public Land) Regulations
d) Draft National Land Information Management System Standards And Guidelines
e) Practice Guidelines for County Land Management Boards on processing of development applications

2.6.7 Institutional Framework

1) National Land Commission

The enactment of the NLC Act brought change in the administrative structures for the management of land in Kenya with the National Land Commission established and given the power of management and administration of public land in line with the Constitution. The Commission has been operational and reported the progress[12]:

a) Participation in the preparation of various land Bills including Evictions and Resettlement Procedure Bill, 2013, Community land Bill, Physical Planning Bill. These Bills are at different stages in their development.
b) Development of institutional regulations, rules, guidelines and participation in policy formulation including;
c) **Creation of Committees to facilitate the operations of NLC law for guiding investigations into historical land injustices, Code of conduct and internal vetting tools as required by section 31 of the NLC Act;**
d) **Development of rules and regulations to operationalize the Land Act, Land Registration Act and the National Land Commission Act (2012),**
e) Operationalization of the County Land Management Boards (CLMBs) in line with the NLC Act, 2012 in 47 counties;
f) Prepared R**ules and Regulations on review of grants and dispositions of land,** Rules and Procedure of the Renewal and Extension of Leases;
g) **Carried out sensitization workshops to county executives in charge of lands and natural resources;**
h) **Resolutions of land disputes;**
i) Digitization of Land Records;
j) **Compulsory Acquisitions**

The Commission commenced the Assessment of Land Taxes and Compulsory Land Acquisitions where the Commission was at various stages of acquiring land following receipt of requisite applications, for different public projects such as the Standard Gauge Railway line and the LAPPSET Corridor, Outer Ring Road, Meru-Marimba road, Mau Summit-Kericho-Nyamasaria-Kisiani-Kisumu bypass, Muruny-Siyoi dam and Embu airstrip. This is an indication that the Commission has taken up the compulsory acquisition role and the process is expected to be fair and just.

a) Review of Grants and Titles.

The constitution mandates the Commission to establish the legality of the land in question. The National Land Commission has scanned documents of all public land with a view to ascertaining their legality. NLC has cancelled some title deeds that were illegally awarded in some regions including Nairobi, Kakamega, Nakuru and Mombasa, Kilifi, Machakos, Embu, Kisumu and Trans Nzoia counties. The move came after the executive ordered revocation of some grants and title deeds.

1) County Land Management Boards

The management and development of land, as a primary resource of production is crucial in the stability of the country. The role of citizens in decision-making should be strengthened in order to address the past and current problem over the use, ownership, management, allocation and alienation of land.

In order to carry out its functions effectively, NLC is required to devolve the administration of land by establishing committee, offices13 and County Land Management Boards (CLMBs) at the county level. Section 18 on the NLC Act, 2012 provides that the Commission shall, in consultation and cooperation with the national and county governments, establish County Land Management Boards for purposes of managing public land. The CLMB are fundamental devolved units of the National Land Commission purposed by policy and law to undertake important land management functions at the county level. The functions of CLMBs include: (a) subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal

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13 Section 16 of NLC Act, 2012

of leases; and (b) perform any other functions assigned by the NLC or by any other written law." The County Land Management Boards have been established and offices set in all the 47 counties, a measure expected to ensure that the Commission not only decentralizes its services to the counties as required by the NLC Act, 2012 but also promote transparent and cost effective administration of land while encouraging communities to settle land disputes through recognized local community initiatives consistent with this Constitution. Practice guidelines for CLMBs on processing of development applications were developed and gazetted by NLC on 24th October 2014.

2) The Ministry of Land, Housing and Urban Development

The Ministry of Land, Housing and Urban Development was established in May 2014, through Executive Order No. 2/2014 following the inauguration of the new government.

Five previous ministries of Land, Housing, Urban Development and Nairobi Metropolitan Development, were joined together to form the Ministry of Land, Housing and Urban Development. The Ministry is charged with the responsibility of providing policy direction and coordinating all matters related to lands, housing and urban development. The Ministry consists of three directorates each with distinct mandate and functions. They are:

a) Land Directorate

The Directorate of Land is charged with the responsibility of ensuring efficient administration and sustainable management of the land resource in the country. Its mandate is to formulate and implement land policy, undertake physical planning, register land transactions

b) Housing Directorate

The Directorate of Housing is charged with the responsibility of facilitating and coordinating the housing sector in Kenya. Its overall objective is to facilitate Kenyans to access quality housing

c) Directorate of Urban Development

The Directorate is responsible for policy formulation, coordination and monitoring of programmes concerning all matters of urban development in the country.

2.6.8 Classification of Land

Under the new laws, land has been classified into (a) Public Land; (b) Private Land; and (c) Community Land.

Public land is defined pursuant to article 62 of the Constitution and includes alienated land, land occupied by a State organ, land transferred to the State, land to which no heir can be identified, minerals, forests, reserves, national parks, water catchment areas, sea, lakes, rivers, land between high water mark and low water mark, any land not classified as private land or community land.

Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by The National Land Commission. Public land classified under article (62)(1)(f) to(m) in the constitution of Kenya 2010 shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by National Land Commission.

Community land is defined pursuant to Article 63 of the Constitution and includes land lawfully registered in the name of group representatives, land lawfully transferred to a specific community and any land declared to be community land by an Act of Parliament. Community land shall be managed in accordance with the law enacted pursuant to the Constitution.

Any unregistered community land shall be held in trust by county government on behalf of communities for which it is held. However, the law has not yet been enacted and the Constitution provides for a 5 year period but the period was extended by parliament for 1 year after the elapsed of the 5 years

Private land includes registered land held by any person under freehold tenure, land held by any person under leasehold tenure and any other land declared private land under any Act of Parliament.

2.6.9 Challenges and Recommendations

1) Overlap in roles and mandates regarding management of land resources

There is no Legislation in place to distinguish the overlap of mandate between the county government and NLC with respect to who manages resources and revenue, with respect to community land, and public land, where the role of the three bodies, the county government, national government and National Land Commission is not clarified. There is also an assumption that a county government and NLC can transact and dispose of community land. The National Land Commission has no role in community land. Community land is held in trust by county governments on behalf of the communities.

Recommendations

a) There is need to clarify the role of county government, national government and National Land Commission in public land and community land. .NLC has no mandate over community and public land, The Commission does not own land neither is ownership vested in it as a trustee on behalf of the public. All land belongs to the people of Kenya and public land is held in trust on behalf of the people by either the national or county governments. The role of the NLC is to administer public land, which involves three different levels of authority. First is the people as owners, second is both the national or county governments as trustees and thirdly the NLC as the manager.

b) There should be legislation specifying the nature and extent of the rights of the people as the Constitution provides that land cannot be disposed off or otherwise used except in terms of legislation specifying the nature and extent of the rights of the people.

1) Confusion in the operationalization of CLMBs

The CLMB is established by NLC Act 2012.While the establishment of these subnational institutions can be viewed as significant, the decentralisation of land governance remains imperfect given that the specific responsibilities of these institutions are not clearly spelled out in the relevant Acts. None of the Acts contain sufficient direction on land management and administration functions to be decentralised to CLMBs.

National Land Commission Act establishes committees and county offices in the 47 counties to perform their function effectively but this is yet to happen as the County Land Management Board is performing NLC function. This is not proper as CLMBs is a county function and not NLC function

Recommendation

The legal gaps identified in terms of decentralisation and land management should be urgently addressed through the adoption of regulations, another task vested in the NLC. Such regulations must at a minimum: (1) clarify further the role of CLMBs, and (2) contain schedules and timelines for decentralisation of functions and assets to county-level offices. More importantly, laws relating to the governance of natural resources must be urgently enacted, with the Senate playing a visible role in the process

2) Conflicts Between the Ministry of Lands, Housing and Urban Planning and the National Land Commission

Conflicts has occurred between National Land Commission and the Ministry of Land, Housing and Urban Development on renewal of leases and troles in relation to land tenure, commencement of the 99 lease period, procedure for renewal upon expiry and preemptive rights to the former lease holder where the holder is a foreigner.

This is attributed in part to misunderstanding of the roles and responsibilities and lack of regulations and policies to guide implementation. Lack of cooperation between the NLC and the Ministry has resulted in, (il) failure or delay in the development of administrative procedures. This is because some cannot

be done without consultation between the two offices, (ii) delay in the review of national land policy, (iii) confusion among the staff in terms of report, (iv) delay in processing of land related transactions e.g. signing of titles, leases and grants due to disagreement on mandate and negative impact on the credibility of both NLC and the Ministry. The current state of affairs between NLC and the Ministry has severely impeded the progress of implementation of land reforms in Kenya.

Recommendation

There is need to clarifiy the respective institutional roles and mandate of the two institutions. This can be done in the land laws and through regulations and amendment of those laws where there are conflicting mandates .It is also important that the confusion and wrangling between the NLC and the Ministry of Land, Housing and Urban Development is resolved so as to ensure smooth operations in the sector.

The recommendation by the Supreme Court that the two parties negotiate a settlement by the parties is in line with the constitutional requirement for consultation and cooperation. It is important that institutions reach a common agreement on mutual functional areas

CIC recommends the identification of specific role of each institution whether NLC or the Ministry in regard to particular land transaction. This can be done through a series of meetings on the various functions to be undertaken. Further CIC recommends that there should be agreement on management of records, sharing of information and lines of communication between the Ministry and NLC.

1) Delay in Development and reviewof Policies and Regulations

The Commission and the Cabinet Secretary both have powers to make regulations to better carry into effect the provisions of the Land Act and Land Registration Act. The matters that are to be regulated have been outlined (with respect to squatters) and include; regulations that "facilitate negotiations between private owners and squatters" and also those that deal with the " transfer of unutilized land and land belonging to absentee land owners to squatters". This had not been done despite the many consultative meetings between NLC, Ministry of Land, Housing and Urban Developments and CIC over the same. This delayed submission of policies and regulations in land laws has, in part, contributed to lack of clarity in the roles of the various structures including NLC and the Ministry, CLMBs and the District Land Boards. This has affected delivery of the much-anticipated land reforms.

2) Repeal of Existing Laws

An audit of existing laws related to land and environment by CIC revealed that over 65 policies and laws identified in the respective Ministries and the relevant State corporations in the sector had not been reviewed to align with the constitution. Some of the laws include; The Land Control Act Cap 302 Laws of Kenya, The Landlord and Tenant (Hotels, Shops and Catering Establishments) Act, The Sectional Properties Act, and The Distress for Rent Act. This poses a risk of duplication of reform initiatives or conflicts, with potential of slowing down the reform process. The effective application of new laws require all existing laws relating to land and environment to be repealed, or applied with the necessary alterations and adaptations, to give effect to the Constitution.

Recommendation: there is need to review the existing laws to align with the constitution. There is also need for integration of the various Bills, policies and administrative procedure from the various ministries, departments and State corporations in the environment and natural resources sector

3) Delay in the Enactment of the Bills and Limited Stakeholder Participation.

This not only results in a violation of chapter Five of Constitution, but also leads to continue exploitation of resources without fisrt putting in place a legal framework. This poses a risk of resource conflicts

Recommendations

There is need to fast-track the Bills and their enactment into law.

It is clear that the journey towards greater accountability and decentralisation of land and environment issues is far from ending. The law reposes overwhelming responsibility on the NLC in almost all land relating to public land. Successful land sector reforms, including decentralisation, will depend largely on

the co-operation rather than competition between the Cabinet Secretary for Land, Housing and Urban Development, the NLC and county governments.
Stakeholder consultations and meetings are critical in constitutional implementation. These are useful in forging a common approach to the process of developing the policies and legislation, identification of gaps and possible ways of filling the gaps. This leads to enhanced ownership, reduction in conflicts and faster implementation

CIC emphasizes the importance of public participation in the development of legislation and laws relating to land and environment. Civil Society actors are encouraged to continue with the push towards the establishment of a proper legal framework for public participation. Most of the Bills on land, environment and natural resources touch on concurrent and/or devolved functions and their delay affect the functions of the county governments. This is a recipe for inter-governmental conflict. These Bills have to be discussed by both parliaments

Further more Kenyans should work in a bipartisan manner in implementing the Constitution with respect to Land because reform in Land requires sobriety and should not be politicized. Land issues normally arise during campaigns, elections and unfortunately have led to conflicts. That is why there is need for land policy to address this problem

2.7 LEADERSHIP AND INTEGRITY

2.7.1 Introduction

One of the transformative aspects of the Constitution of Kenya 2010 is the provision on leadership and integrity addressed in Chapter Six,. This provision was informed by the fact that poor leading was one of the main reasons why Kenyans demanded a new constitution. Chapter Six sets a threshold for both elected and appointed.

Chapter Six (Article 73) spells out the responsibilities and conduct required of leaders including matters of integrity, impartiality and upholding dignity of State offices. It also provides for the operation of offshore accounts and conflict of interest and makes it clear that State Officers are expected to exhibit servant leadership in the execution of their duties. Further, the chapter requires parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission (EACC) to facilitate the implementation of the chapter.

This section of the report presents the status of implementation of Chapter Six of the constitution, focusing on achievements, challenges and recommendations. It also highlights the performance of key institutions established under the chapter.

2.7.2 Development and Implementation of Legislation

Article 79 of the Constitution requires parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission (EACC), with the status and powers similar to those of constitutional commissions and independent established by Chapter Fifteen of the Constitution. The core mandate of the EACC is to ensure compliance and enforcement of the provisions of Chapter Six of the Constitution. The Ethics and Anti-Corruption Act, 2011 was enacted in time and has been operational.

The Leadership and Integrity Act, 2012 was developed to govern all matters relating to State Officers as required by article 80. It was also expected that the Act would set the leadership and integrity standards applicable to State Officers who hold the highest level of responsibility in the management of public affairs. In addition, the legislation should have been informed by the provisions of the various regional and international instruments to which Kenya is a party, such as the African Union Convention on Preventing and Combating Corruption, the United Nations Convention Against Corruption as well as the United Nations International Code of Conduct for Public Officials.

The expectations of Chapter Six are that candidates vying for State Offices or candidates seeking appointment to State and public offices possess the required qualities as contemplated in the Chapter. Such qualities include objectivity and impartiality in decision making, ensuring decisions are not influenced by nepotism, favoritism and other improper motives or corrupt practices, selfless service based on public interest demonstrated by honesty in the execution of public duties and declaration of any personal interest that may conflict with public duties, accountability to the public for decisions and actions and, discipline and commitment to serve the people.

It was against this background that the legislation on leadership and integrity was developed. The Bill was processed and CIC ensured that there was adequate public participation during the review of the Bill. A key area of concern to CIC was for the Bill to have clear provisions on moral integrity, declaration of income, wealth and liabilities, compliance with the provisions of Chapter Six, vetting of officers who had been in key leadership positions before the promulgation of the Constitution and enforcement of Chapter Six by the EACC.

However, the tenth parliament watered down the Bill when it was tabled for debate and enactment. The Bill that was finally enacted did not consider key provisions for responsibilities, authority and standards for State Officers. For example, the financial probity of State officers was omitted leading to a lower threshold for occupants of these offices. Also deleted by parliament was the provision requiring one to get a compliance certificate from EACC before vying for elective posts. As a result of these omissions, some of the leaders elected in 2013 did not meet the high standards that Kenyans expected when they passed the Constitution and the provisions of Chapter Six.

Following the enactment of the Act, CIC sought court intervention on the ground that the Act did not meet the threshold and therefore did not adhere to the letter and spirit of the Constitution. Some of the shortcomings of the Act as passed by the tenth parliament include:

i) It lacked effective mechanisms for enforcing Chapter Six. The Act did not provide for an enforcement mechanism. It did not indicate how compliance or non-compliance will be carried out.
ii) It did not provide for the circumstances under which elected officers would qualify for or vacate their offices in line with Chapter Six. The circumstances are highlighted in article 99(1)(b), article 103(1) (c) 193(1) (b) and 194(1)(c) of the constitution.
iii) The Act did not provide the basis for selection of a State Officer through a vetting process to check for personal integrity, competence, suitability and election in free and fair elections.
iv) The Act did not recognize the Ethics and Anti-Corruption Commission as the primary institution for ensuring compliance with and enforcement of the provisions of Chapter Six, yet article 79 specifies that the Ethics and Anti-Corruption Commission is tasked with ensuring compliance with and enforcement of the provisions of Chapter Six.
v) The Act did not spell out penalties for contravention to Chapter Six and the disciplinary procedures and removal processes as contemplated in article 75(2)
vi) The Act failed to give a fair and transparent process of determining compliance by those seeking elective and appointive posts.

The Court held that Part IV of the Leadership and Integrity Act, 2012, which deals with enforcement of the Leadership and Integrity Code provided for the procedures and mechanisms for enforcing the general leadership and integrity code and by extension the principles set out in Chapter Six.

The Court also held that the mechanisms could be supplemented by rules and regulations passed by the EACC. The Court indicated that Part V of the Act provides criminal and civil penalties for infraction of the provisions of the Act. Apart from these, reference to the Public Officer Ethics Act, includes disciplinary action to an officer who contravenes not only the General Code on Leadership and Integrity but also the Code of Conduct and Ethics of the relevant public entity. Whether to have a "one stop-shop" or have various public entities involved in the implementation of Chapter Six under the umbrella of EACC is a policy decision

A National Anti-Corruption Policy was developed and promulgated by the EACC to supplement legal provisions and other government initiatives for fighting and preventing corruption in Kenya. The policy

seeks to provide a framework for efficient and effective detection and prevention of corruption at the workplace.

2.7.3 Establishment of Ethics and Anti-Corruption Commission

The Ethics and Anti-Corruption Commission was duly established as required by the Constitution, following the enactment of Ethics and Anti-Corruption Act. The recruitment of commissioners was through a competitive process that commenced in September 2011. The process was however delayed by failure to meet the two thirds gender principle in the first round owing to few women applicants. Subsequent advertisements produced the right mix, and interviews were held. The successful applicants were appointed in May 2012. The operations of the Commission were interrupted after the chairperson's appointment and integrity were challenged on the basis of the then on-going court case against him. The chairperson eventually took up office in July 2013 after a lengthy court process. The Commission was properly constituted from July 2013 to April 2015.

One of the challenges faced in establishing the Commission has been on its membership, which currently stands at three. CIC proposed that the membership of EACC be expanded to improve its operational efficiency and decision-making. This proposal was made through the Statute (Miscellaneous) Amendment Bill, 2015. The proposal by CIC has been effected. Names of Four people have now been submitted to parliament for vetting as Commissioners. If approved the Commission will have four commissioners and a chairperson.

2.7.4 Challenges and Recommendations

Challenges

i) The enforcement of this chapter faces a number of challenges. Among the major challenges are:Limited civic education prior to the 2013 general elections. Civic education including voter education was conducted only for a very short time. However to be effective civic education should be continuous and intensified before elections.
ii) The Leadership and Integrity Act, 2012 was enacted seven months before the 4th March, 2013 general elections. There was a lot of interest by parliament that passed the law and most of the members of parliament had interest in seeking elective positions in the next election. This conflict of interest largely accounts for the watering down of the Act by parliament.
iii) Weak enforcement mechanism for the Act. With weak enforcement mechanism and absence of regulations, there has not been any drastic measures taken against those who have violated and continue violating Chapter Six.
iv) Removal of EACC members and allowing the secretariat to operate without the Commissioners, weakend the operations of the Commission in delivering on its mandate. The Commission continued to operate without commissioners, a development that was challenged in court on the grounds that without commissioners EACC is not constitutionally constituted. The secretariat lacks security of tenure and independence and this may undermine the independence of the Commission.

Recommendations

i) Civic education on the constitution and in particular Chapter Six should be mandatory and should form part of the school curriculum.
ii) Due process on cases of corruption should be followed and respected.
iii) The independence of the Ethics and Anti-Corruption Commission must be guaranteed and exercised by the institution.
iv) Whenever there is a vacancy in the EACC, the recruitment of the same should be done immediately through an outlined procedure to avoid a lacuna at the leadership of such a critical institution.

Conclusion

Promotion of good leadership and integrity should be cultivated as early as possible and there is need for political goodwill to rid the country of corrupt practices. This will only be achieved when Kenyans

embrace Chapter Six of the Constitution and when appro, legal and administrative action is taken against those who violate the provisions of Chapter Six.

2.8 REPRESENTATION OF THE PEOPLE

2.8.1 Introduction

Elections is an important process through which Kenyans exercise their political rights[14] and hence is an important component of democracy. To facilitate this, the constitution provides for an inclusive electoral system. The constitution also provides a number of principles that should guide the electoral system. Chapter Seven of the Constitution spells out the electoral system, the electoral process to be used, the institutional framework and requirements for political parties.

The part on electoral system and process entails the general principles for the electoral system, the laws, policies and administrative procedures to guide the registration of voters, the nomination of candidates and the conduct of elections and referenda. The entire electoral system and process is subject to the provisions of the constitution, including the national values and principles of governance, the Bill of rights, the requirements on leadership and integrity and the general principles under article 81 of the Constitution. Key aspects of the electoral process as enshrined in the Constitution include:

i) The delimitation of electoral boundaries for national assembly and county assemblies[15];
ii) Nomination of candidates;
iii) Continuous registration of voters, including the progressive registration of and realization of the right to vote by citizens residing outside Kenya;
iv) The conduct of elections and referenda;
v) Voting; and
vi) The resolution of electoral disputes.

This section of the report presents an analysis of the implementation of the electoral system in the context of the standards set out by the constitution. In addition, the section discusses the institutional framework for elections and the successes and challenges of the electoral system. The section also makes recommendations to address the challenges and ensure efficiency and effectiveness of the electoral system.

2.8.2 Legal and Institutional Framework for the Conduct of Elections

In order to ensure that the chapter on elections is effectively implemented, the constitution outlines the mechanisms that need to be put in place before any election or referendum under CoK 2010. In this regard a number of steps have been taken to ensure that the electoral processes are aligned to the letter and spirit of the constitution. The steps include the, enactment of relevant legislation, the development of administrative procedures for the implementation of these laws and the establishment of the relevant institutions including the IEBC and the Office of the Registrar of Political Parties.

a) Legislative Framework

The legal framework of an electoral system should be structured so that it is readily accessible to the public, transparent, facilitates democratic elections and is adopted in good time prior to its implementation[16]. The Fifth Schedule to the Constitution required the laws relating to the representation of the people and the vacation of office by members of Parliament to be enacted by 27th August 2011. The legislation on the removal from office of governor and vacation of office by MCAs was to be enacted by February 2012. The laws were:

i) The Independent and Electoral Boundaries Commission Act, 2011: The Act makes provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by article 88 of the Constitution.

14 Article 38 of the Constitution
15 The delimitation of boundaries for Senators and governors is by Parliament – Article 188
16 OSCE, Handbook for Domestic Election Observers, pg. 36.

ii) The Elections Act, 2011: The Act provides for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; provides for the conduct of referenda and provides for election dispute resolution.
iii) The Political Parties Act, 2011: The Act provides for the registration, regulation and funding of political parties and creates the office of the Registrar of Political Parties.
iv) The Petition to Parliament (Procedure) Act, 2012: The Act gives effect to article 37 and 119 of the Constitution on the right to petition Parliament and enhances public participation in the parliamentary and legislative process.
v) The Election Financing Act, 2013: The Act provides for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns.

Since coming into effect, there has been several amendments to some of the aforementioned legislation. The amendments include:

i) The Statute Law (Miscellaneous Amendments) Act, 2012;
ii) The Elections (Amendment) Act, 2012;
iii) The Elections (Amendment) (No.2) Act, 2012;
iv) The Elections (Amendment) (No.3) Act, 2012;
v) The Statute Law (Miscellaneous Amendments) (No.2) Act, 2012; and
vi) The Political Parties (Amendment) Act, 2012.

b) Administrative Procedures

The Regulations to implement the Elections Act, 2011 were developed and gazetted in November 2012. The regulations include:

i) The Elections (General) Regulations, 2012;
ii) The Elections (Registration of Voters) Regulations, 2012;
iii) The Elections (Voter Education) Regulations, 2012;
iv) The Elections (Parliamentary And County Elections) Petition Rules, 2013.

Regrettably, the delay in the development of these regulations and those for the Political Parties Act, 2011 was delayed. This delay partly explains the failure to commence the implementation of key electoral processes in time.

c) Institutional Framework

The Constitution provides for the establishment of an institutional framework to facilitate the implementation of the electoral systems and processes in Kenya. This framework comprises the Independent Electoral and Boundaries Commission and electoral units, discussed below.

1) The Independent Electoral and Boundaries Commission

The Constitution[17] establishes the Independent Electoral and Boundaries Commission (IEBC) with the mandate of conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament[18].

17 Article 88
18 Article 88 (4)

Case Study: Delay in Establishment of IEBC

Given that the first general elections were initially expected to be held in August 2012, it was imperative for IEBC to be set up within the shortest time possible following the promulgation of the Constitution. Section 29 of the Sixth Schedule to the Constitution required that the process of appointment of persons to fill vacancies arising in consequence of the coming into force of the Constitution was to have been finalized within one year, i.e. by 27th August 2011. Due to this, implementation partners (AG, CIC, KLRC, CIOC) agreed on suitable timelines for the enactment of enabling legislation that would eventually lead to the establishment of IEBC within the required timeline.

The process of setting up IEBC was however delayed for a number of reasons. First, there was a delay in the enactment of the IEBC Act. 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 on the 5th of July 2011 (over a month later) and 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 with the Commission members being sworn in November 2011, months after the deadline of 27th August 2011 (see Section 29 of the Sixth schedule). All these happened despite constant reminders by CIC of the need to processed on the matter with speed taking into account the constitutional deadline and the then impending August 2012 general elections.

These series of delays was prejudicial to the preparations necessary for the implementation of the electoral system and process, the delimitation of the electoral units for the National Assembly and County Assemblies and the preparedness of political parties for the impending elections. For example, it meant that the lengthy process of delimitation of boundaries for the election of members of the national and county assemblies was also delayed and caused a consequential ripple effect on other processes, which partly led to IEBC's eventual admission that it was not ready to hold the general elections on the constitutional date of the second Tuesday of August of 2012.

The IEBC Commissioners were appointed through an open and transparent process in compliance with the requirements of the constitution. Upon taking office, the Commission embarked on discharging its mandate in readiness for the first general elections under the Constitution of Kenya 2010. The Commission's functions are:

i) Delimitation of Constituency and Ward Boundaries

Articles 82(a), 88(4)(c) and 89 of the Constitution mandates IEBC to delimit the boundaries for constituencies and Wards for the election of members of the National Assembly and County Assemblies respectively. The delimitation of constituencies and Wards was undertaken prior to the general elections of March 4th 2013.. Subsequent to the delimitation of electoral boundaries, a number of disputes were filed in the High Court.

The matter involved various applications contesting the delimitation of constituency and Ward boundaries by the IEBC as published in the National Assembly Constituencies and County Assembly Wards Order, 2012 through Legal Notice No. 14 of 2012. As a result of the publication of the Order, complaints were raised regarding the manner in which some of the newly delimited constituencies and the 1450 county assembly wards were created. The main issue was whether the IEBC decision on delimitation of constituencies and Wards was in line with the constitution. The Court acknowledged that the IEBC was indeed within the law in reviewing the report of the Interim Independent Boundaries Review Commission as mandated under Section 27 of the Sixth Schedule to the Constitution and the Fifth Schedule to the IEBC Act.

Under Paragraph 105 of its ruling, the Court stated that Kenya's delimitation has traditionally been carried out on the basis of sub locations, the smallest administrative units, whose precise plans are to be found in survey plans deposited with the Director of Surveys in accordance with the Survey Act (Cap 299). While the IEBC report gave names and boundaries of constituencies by reference to sub – locations, the court held at paragraph 109 of the judgment that ' for purposes of article 89(9) the details

of constituencies and Wards by reference to sub – locations is sufficiently descriptive of a defined area.' The Court affirmed the decision of the IEBC . However the High Court recommended that:

i) There is need to develop a legal framework for the creation and determination of sub-locations. Failure to deal with this issue would open a door for indirect gerrymandering by those who have influence to create sub-locations to suit their own tastes. The process adopted to determine sub-locations must take into account the obligation of the IEBC to progressively achieve population parity.
ii) Parliament must also address the issue of county boundaries. In some instances we had conflicting or inaccurate information as to the counties where certain sub-locations were located. The constitution lists the names of 47 counties but does not define the boundaries of each county. The definition of these boundaries in the constitution is an imperative, and will of necessity address the various disputes as to county boundaries including those we encountered in the cases we considered[19].

ii) Voter Registration Mechanisms

The constitution provides that voting is a fundamental right20. To enable citizens exercise this right, IEBC is required to continuously register voters pursuant to Articles 82 and 88. In addition, article 83(3) stipulates that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

Despite the above constitutional requirements, voter registration for the March 4th 2013 general elections was conducted for a period of only one month, November 19th to December 18th, 2012. About 14.3 million voters were registered against IEBC's target of 18 million. The delay in the voter registration and the failure to meet the target was attributed to the following:

i) Procurement challenges: IEBC opted for electronic registration using biometric voter registration kits (BVR kits). Unfortunately the procurement of the kits was marred in a lot of controversies, delaying the delivery of all the required kits until November 2012. Consequently, the commencement of the voter registration process was delayed resulting in the amendment of Section 6 of the Elections Act 2011, to reduce the requirement for voter registration period from 90 to 60 days before the elections;
ii) Delayed issuance or replacement of identity cards to facilitate voter registration. The national ID card was statutorily (Section 10 of the Elections Act, 2011) made the document to be used to identify one's citizenship, for voter registration and actual voting. CIC advised that the provision was unconstitutional in as far as it could lead to the denial of citizens of their right to be registered and to vote through ineffective administrative measures put in place to facilitate the issuance of IDs and passports.
iii) Inadequate voter education on the nature of biometric voter registration kits making voter apprehensive to use them
iv) Infrastructural challenges;
v) General voter apathy.

Recommendation

The Commission for the Implementation of the Constitution recommends that both the Executive and the IEBC should ensure the effective implementation of Articles 38(3) and 83(3) through the establishment of mechanisms that promote efficient, open and transparent registration of voters. This includes ensuring that the process of issuing National Identity cards does not deny citizens the right to vote. This can be done through: (i) early issuance of IDs, e.g. by the age of sixteen and (ii) creation of a centralized national database (including citizen registration, births and deaths, etc.) which IEBC officials are able to access in order to ensure the efficient registration of voters. The database should automatically avail to the IEBC certain details such as name, registration number and biometric data to an IEBC database, upon a citizen turning 18 years of age. Such a system would significantly reduce costs of multiple registration and be more efficient and reliable than the use of IDs and passports, which are prone to physical loss. It would also eliminate the current practice of last minute registration just before elections. The proposed system would greatly enhance the effectiveness of the registration of voters.

19 The rulings on the disputes for each county are contained in Miscellaneous Application 94 of 2012.
20 Article 38 of the Constitution and Article 25 of the U.N., International Covenant on Civil and Political Rights

i) The Progressive Realization of the Right to vote for the Diaspora

Article 82 (1) (e) of the constitution requires Parliament to enact legislation to provide for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote. Article 20 of the constitution envisages that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights, to the greatest extent consistent with the nature of the right or fundamental freedom. 'Progressive realization' therefore means incremental facilitation of the right or the opportunity to exercise the right to vote. Consequently it means that the facilitation of the right is likely to begin with only some of the right holders enjoying it but mechanisms must be put in place to allow others to enjoy the right over time.

The IEBC and the government have taken some steps towards the implementation of the right to vote by those in the diaspora. This has been done in the following ways:

i) During the 2013 general elections, arrangements were made that enabled Kenya citizens in Rwanda to vote.
ii) The Cabinet Secretary-Foreign Affairs and International Trade, on 4th February 2015, issued a Gazette Notice (No. 1091) establishing "The Task Force on the Implementation of the Constitution to facilitate voting in General Elections and Referenda by Kenyans in the Diaspora." Although a noble programme, CIC opined that it was unconstitutional for the Cabinet Secretary for Foreign Affairs and International Trade to establish a taskforce to perform duties, which are constitutionally the mandate of IEBC.
iii) On 20th February 2015, IEBC launched an online portal for mapping of Kenyans in diaspora that are eligible to vote.
iv) In November 2015, IEBC circulated[21] a draft policy on voter registration and voting for citizens residing outside Kenya (Diaspora).

Recommendation

A crucial step towards achieving the realization of the right to vote in the diaspora includes undertaking the relevant baseline research including the mapping of accessibility of the right in question, the development or review of implementation guiding frameworks including policy and regulations as may be necessary. In addition, there is need to establish adequate and effective infrastructural and administrative systems, processes and mechanisms to aid in the implementation of this right.

The Commission for the Implementation of the Constitution recommends that the national government works with IEBC and other relevant institutions to finalise a comprehensive national policy for registration and voting by Kenyans in the diaspora. The policy should broadly give guidance on:

i) Defining who qualifies to register and vote and for what elections and the resources available for the conduct and supervision of registration and voting by citizens in the diaspora
ii) Mapping of all Kenyans in the diaspora to determine how many live in which parts of the world, how many are eligible to vote, plus how many have valid identification documents;
iii) The most effective, transparent, democratic and efficient way to facilitate voter registration, voter education and voting by Kenyans in the diaspora;
iv) The objective criteria to determine the first stations/locations and voters to exercise the right to vote, when others are expected to exercise that right in the roadmap for progressive realisation of the right for Kenyans in the diaspora to vote; and
v) Any other matters related to the exercise of the political rights of citizens in the diaspora

i) Voter Education

Article 88(4)(g) of the Constitution mandates IEBC to conduct voter education while section 40 of the Elections Act, 2011 requires voter education to be a continuous process. Though the IEBC launched its voter education material on 1st October 2012, this was quite late, especially given that the general elections were to be conducted under a new constitutional dispensation. The time IEBC allocated for voter education was not adequate and therefore citizens were not accorded sufficient time and training to understand the new electoral system and process.

21 http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/press-releases-statements/item/policy-on-voter-registration-and-voting

Recommendation

The Commission for the Implementation of the Constitution recommends a concerted and continuous voter education by IEBC. This will ensure that voters are better informed about the electoral system and processes in readiness for the next general elections including knowledge of the obligations of the people they vote into elective bodies.

2) Nomination of Candidates

a) Qualifications to Vie for Elective Seats

For a person to exercise his/her political right to vie for elective bodies within a political party, the electoral system and process demands that they are first selected by a registered political party. Further, they first must qualify as required by articles 99, 193, 137, 180 and 90, together with section 22 of the Elections Act, 2011.

Despite the constitutional requirement (Article 99) on educational requirements, two amendments were made to section 22(1)(b) of the Elections Act, 2011 to lower the threshold of the educational requirements. As a result no educational qualifications are required for those wishing to seek elective positions as members of the national assembly.

In June 2012, in the High Court Petition No. 198 of 2011, Judge Mumbi Ngugi, ruled that section 22(1)(b) and section 24(1)(b) of the Elections Act 2011 which bar persons not holding a post secondary school qualification from being nominated as candidates for elective office or for nomination to Parliament to be unconstitutional and in violation of rights under the Constitution. In summary, it was ruled that the Act was discriminatory on the basis of status, social origin and gender (women) who have been historically marginalised in Kenya in terms of access to education, and thereby limiting the exercise of political rights..... "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation."

In November 2013, in the High Court Petition No. 26 of 2012, Judge Isaac Lenaola, declared that while articles 99(1)(b) and 193(1)(b) of the Constitution did not set out the specific educational requirements for MPs and MCAs, Parliament would do so in legislation. This was done in section 22(1)(b) of the Elections Act, 2011. The judge declared that the post-secondary education as enshrined under section 22 (1) (b) of the Elections Act is attainable, sufficient and constitutional, on the basis of article 99(1)(b) of the Constitution and that .... "the nature of the duties and functions performed by the National Assembly and the Senate in my view require higher educational qualifications, skills and wide exposure which is gained through higher education."

b) Nomination of Candidates by Political Parties to vie for Elective Seats

Political parties are the main instruments through which most elected public officers get into office. Prior to18th January 2013, the date set for the nominations, CIC issued an advisory to political parties, IEBC and the RPP on issues that needed to be adhered to during the exercise, pursuant to the Constitution, the Elections Act, 2011 and the Political Parties Act, 2011. In the previous general elections, the procedure for the exercise was left to the constitutions of political parties. The Commission for the Implementation of the Constitution monitored the political parties' nominations process in Homa Bay and Embu counties to assess the level of knowledge and participation by members and the level of transparency and accountability in the nomination process. The monitoring exercise also sought to establish whether the exercise was carried out in accordance with the Constitution and the political parties' regulations.

The Commission for th Implentation of the Constitution observed that there was little knowledge of the electoral laws and the party nomination rules among the voters. There was also widespread disregard of the national values and principles, Chapter 6 of the Constitution and the Political Parties Act, 2011; in matters relating to the nomination of political party candidates. Generally, lack of internal party democracy and poor organization of the nomination process by the political parties was evident. These issues may be a pointer to the weak regulatory framework on political parties.

The last-minute political party primaries did not allow for adequate time to resolve disputes. Overall,

this greatly delayed the printing of ballot papers and in certain cases IEBC had to re-print new ones to accommodate candidates who had won their cases in the high court.

c) Nomination of Candidates Under Article 90 of the Constitution

Article 90(1) of the Constitution is about nomination of members by a political party for consideration for the affirmative action elective seats provided for in articles 97, 98 and 177. These special interests groups to be represented include women, youth, persons with disability, minority and marginalized groups. Sections 34, 35, 36 and 37 of the Elections Act, 2011 outline the requirements of the nomination of party list members,

The constitutional and legal frameworks relating to the nomination of special interest groups were not fully respected as IEBC did not play its role in the conduct and supervision of the parties' elections of candidates. The process was left to the discretion of political parties. Regulations 54 and 55 of the Elections (General) Regulations 2012 simply required political parties to submit party lists, prepared in accordance with party rules. CIC is of the opinion that these regulations fell short of the requirements of the Constitution.

The confusion in the conduct of the elections under article 90 led to a number of court cases challenging the process with the attendant high cost implications. This is exemplified by Election Petition No. 13 of 2014, in which two nominated senators lost their seats. The ruling in part read:

> *This court finds that the 1st Respondent (IEBC) contravened the provisions of Article 90 (2) (b) of the Constitution and the sections 34 (5) (6) (8) and 36 (2) of the Elections Act such that the contravention affected the results of the elections and that the gazette persons in Gazette Notice No.3508 did not reflect the will of the people.*
>
> *I therefore declare that the election of the 2nd (Linet Kemunto Nyakeriga) and 3rd (Herold Kimunge Kipchumba) Respondent contravened the provisions of Article 90 (2) (a) (b) (c) of the Constitution as representatives of persons with disability in Senate pursuant to Article 98 (1) (d) of the Constitution. The election of the 2nd and 3rd Respondent is therefore nullified. Gazette Notice No 3508 to the extent of the gazettement of the 2nd and 3rd Respondents is nullified. I find that the 1st (Ben Njoroge) and 2nd (Godliver Nanjira Omondi) Petitioners as representatives of persons with disability were duly nominated and qualified to be elected pursuant to Article 98 (1) (d) of the Constitution. IEBC shall publish a Gazette Notice electing the 1st and 2nd Petitioners to the Senate.*

Recommendations

1) The constitutional imperative to legislate on educational requirement should be met and a high threshold, at the minimum a university degree, is necessary given the crucial functions bestowed upon legislative assemblies. This recommendation is based on CIC's observation that a cross-section of members of the various legislative bodies, and in particular MCAs, are in some instances unable to effectively carry out their mandates due to inadequate capacity in understanding their functions.

2) To avert the confusion of having to resolve a huge number of disputes from political party primaries, a number of things need to be done:

   a) The IEBC and the Registrar of Political Parties should review the political party regulatory frameworks to ensure that party constitutions and nomination frameworks are compliant with the constitution.
   b) The IEBC should set a deadline, for party nominations, that will provide ample time for dispute resolution for effective and efficient preparation for the general elections.

3) In order to ensure that the process for nomination of candidates is aligned to the letter and spirit of the Constitution, the Commission recommends that:

   a) All political parties review their constitutions and party regulations to comply with the letter and spirit of the constitution.

b) The office of the Registrar of Political Parties should not, in accordance with the Political Parties Act 2011, register any political party whose constitution violate CoK 2010
c) Political Parties must strengthen internal democracy as required by COK 2010
d) IEBC should define its responsibility in the regulation of the nomination process.
e) The Elections Act 2011 be amended to ensure that county assemblies reflect the cultural diversity of a county as required by article 197.

2.8.3 The 2013 General Elections

Pursuant to its constitutional mandate, CIC monitored the 2013 mock elections and the actual March 2013 general elections. The aim was to find out the extent to which the actual electoral system and process was aligned to the letter and spirit of the Constitution. The Commission participated in the observation of the general elections in 13 counties, namely Nairobi, Meru, Machakos, Mombasa, Taita Taveta, Kajiado, Nyeri, Kisii, Kiambu, Nandi, Kericho, Bomet, Siaya and one East Africa Country, i.e. Rwanda.

The table below gives a summary of some of the observations made by the Commission and includes a summary of recommendations submitted to IEBC to improve the election process and system.

summary of key observations and recommendations to improve the election process

Observations	Recommendations
Use of Identity Cards(IDs) to vote: Despite being of 18 years of age and having applied for national Identity Cards (IDs), some people did not vote because they had not been issued with IDs.	Parliament and IEBC should ensure that every adult citizen who wishes to exercise their right to vote is not denied because of delay in issuance of IDs. Parliament should consider issuing of IDs at age 16 to provide adequate time to process IDs and allow alone to vote upon turning 18.
Polling Rooms: The placement of some booths was in a position and in such a way that did not enhance the right of a voter to vote in secrecy. Such booths exposed a voter's marking to being detected by anybody in the room	a) Provide appropriate facilities with adequate room for voting and observation b) Provide opaque screens for each polling booth so that voting is truly secret
Voter Assistance: IEBC officials assisted those who required assistance to vote. They explained that on voting day, they would assist those who would arrive without assistants, in the presence of two agents. This strategy raised two issues: a) The involvement of a second person, whether IEBC staff or those brought by a voter violates the constitutional requirement that voting should be in secret b) For people with disabilities: i) Some rooms were not accessible to persons with physical disabilities. ii) There were no signs to help persons with disabilities iii) Due to the size of a voting booth, agents were not able to verify that the preference of an assisted voter was clearly marked as per instruction. iv) People who were not able to go to a polling station did not vote	a) IEBC should facilitate the illiterate to vote in secrecy e.g. through the use of pictures. b) IEBC should provide appropriate voting procedures, facilities and materials for persons with disabilities.

Observations	Recommendations
Vote Counting, Tallying and Announcement of Results a) There were attempts to relay the results electronically to the Constituency and County tallying centre. b) The results transmission system is dependent on a mobile service provider network. This may have made the system open to manipulation and/ or interference by regulators of the communication network. There are also some parts of Kenya where network challenges were experienced.	a) The system should be updated and rectified so that results are transmitted immediately and seamlessly; b) Simultaneously email a copy to the party. This will in turn provide material that candidates may need in case of a dispute. c) There should be prompt and open announcement of results at the polling stations, prior to transmission to the tallying centres. In addition, consideration should be made to incorporate the use of technology at the polling centres, e.g. screens, so that all activities can be recorded and viewed by members of the public. This will enhance transparency and possibly assist with evidence during court challenges.

In addition to these recommendations and in order to enhance the efficiency and effectiveness of the electoral process and system, the Commission recommends the following:

a) Thorough testing of the electronic devices in an electoral format and their use should be carried out at least a month in advance.
b) Election officials should be adequately trained prior to deployment.
c) IEBC should disclose information submitted by election observers on its systems and the changes it proposes to make.

2.8.4 Electoral Dispute Resolution Mechanisms

Efficient and effective electoral dispute resolution mechanisms are an integral part of the electoral system. Disputes regarding the electoral system and process are mainly handled by two institutions; the IEBC and the Judiciary.

a) The IEBC Dispute Resolution Committee

Article 88(4)(e) gives IEBC the mandate to settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. In order to implement this mandate, IEBC established a Disputes Resolution Committee, The Committee handled over 2000 disputes revolving around party lists and more than 200 disputes touching on internal Political Parties' nominations[22]. Additionally, IEBC published Rules of Procedure on the settlement of such disputes under the powers conferred by Regulation 99 of the Elections (General), Regulations, 2012, to operationalize the settlement of disputes arising out of political party nominations.

The IEBC Dispute Resolution Committee reported a number of challenges that hindered the effective discharge of its duties. These include:

i) the statutory timeline of 7 days to hear and determine over 200 nomination related disputes was insufficient to fully cover the due process of the law and would require further interrogation and amends.
ii) There was lack of clarity in the overlapping jurisdiction to hear and determine disputes arising out of nominations between IEBC, High Court and the Political Parties Tribunal.

b) Judicial Determination of Electoral Disputes

Articles 105 and 140 of the Constitution set the foundation of the role of the Judiciary in hearing and determining electoral disputes relating to the election of Members of Parliament and the President respectively. In relation to elections, the Judiciary set out to align its systems with the aspirations of the Constitution through the following means:

22 IEBC Case Digest: Decisions of the IEBC Dispute Resolution Committee

i) Development of rules to govern election petitions;
ii) Holding intensive trainings for judges and magistrates who were expected to handle election offences and disputes in order to enhance their skills and knowledge;
iii) Appointment of an eight-member team to design and execute a Judiciary programme to build the capacity of judges, magistrates and other judicial officers on electoral matters, and suggest ways of working with other stakeholders;
iv) Appointment of more judicial officers and establishment of more judicial stations in the counties to give aggrieved voters and candidates access to the judicial system as and when the electoral disputes arise during the process; and
v) Creation of the Judiciary Working Committee on Elections.

Though there were a high number of cases and complaints submitted to the courts before and after the 2013 elections, the Judiciary was able to effectively and efficiently determine the electoral cases.. The judicial institutions and framework for managing electoral disputes generally met the country's obligations to provide citizens with the right to appeal in a timely manner. For example:

i) The distribution of petitions between the magistrates courts for county representatives, High Courts for parliamentary, senatorial, governorship, and women's representative contestants, and the Supreme Court for the presidential elections enabled a timely resolution of disputes, such that all cases that were heard in the respective courts of original jurisdiction were dispensed with within the required timelines;
ii) Appeals were allowed in a majority of cases; and
iii) The proceedings of the presidential election petition were held within the timeframe required.

The Judiciary has since reviewed its experiences relating to the 2013 general elections and proposed some legal and constitutional changes aimed at improving the judicial system in the next election.

Recommendations

a) In relation to disputes arising before the general elections, it is recommended that prior to seeking Court intervention, affected parties should use other dispute resolution mechanisms, e.g. the Political Parties Disputes Tribunal, and IEBC. However, due to overlaps of roles created by section 40 of the Political Parties Act, 2011, CIC recommends that Parliament reviews the Political Parties Act, 2011 so that any role on disputes related to nominations that the Constitution has given to IEBC is removed from the ambit of the political parties tribunal. IEBC is free to administratively delegate the same to the political parties dispute tribunal.
b) Section 74(2) of the Elections Act, 2011 should be reviewed to allow IEBC adequate time for dispute resolution.
c) The Judiciary should:

    i) work with IEBC on an efficient way of sharing information as need arises and create systems that facilitate efficiency and expediency;
    ii) Review its administrative procedures relating to dispute resolution to enhance time management, so that the seven-day period prior to a filing of a presidential dispute can be used for anticipatory preparations, among others. This would enable the Judiciary to do sufficient background work before the commencement of the fourteen days allocated to it for hearing and determination of presidential petitions under article 140 of the Constitution.

d. With regards to electoral appeals to the Supreme Court, the Court should limit itself to hear matters relating to constitutional interpretation of electoral disputes, and should not make a decision on the Court of Appeal on determination on the outcome of an election.

2.8.5 Challenges in Implementing the Electoral Process and System in Kenya

While there has been significant progress in the implementation of the electoral system and process, it has not been without its fair share of challenges that if not addressed, could hinder the effective implementation of the Constitution. These include:

1) Lack of Policies and Standards on National Elections

The Constitution assigns the function of national elections to the national government and the conduct and supervision of election to IEBC. This means that the national government's role is the development of policies, standards and laws. Given the radical changes required by the Constitution in the management and implementation of the electoral system and process, delimitation of electoral units for NA and CAs and for political parties, policies and standards should have been developed before the enactment of any legislation and administrative procedures related to elections. However, this was not done and has resulted in a number of gaps in the electoral system and process. The gaps include absence of :

a) guidelines on the funding of political parties, which should take into account the obligation for affirmative action measures to promote the representation of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities.
b) The need to address gaps regarding referendums

Recommendation

The Commission recommends that the national government should urgently develop policies and standards to broadly guide the electoral system. This will go a long way in boosting voter confidence, and achieving some of the principles of a democratic electoral system.

2) Failure in Appointing the Registrar of Political Parties

Despite the enactment of the Political Parties Act in August 2011, the Office of the Registrar of Political Parties has not had a substantive office holder to date. Consequently, the Commission issued advisories prior to the election and after to both Parliament and the President to commence the recruitment process of the Registrar of Political Parties. However, there has been no action yet.

Recommendation

As part of ensuring free and fair implementation of the electoral system and the democratization of political parties, the position of the Registrar of Political Parties should be competitively sourced and filled without further delay. This will also enhance confidence in the Office among stakeholders.

3) Late Amendments to Electoral Legislation

Good practices in elections that meet international standards ensure that no substantial changes are made to the electoral laws within six months to an election[23]. Prior to the 2013 general elections, there were stringent timelines between the establishment of IEBC and the commencement of the implementation of the Elections Act, 2011 and the Political Parties Act, 2011.There were however amendments to approximately 30 Sections (out of 109) of the Elections Act, 2011 and 15 (out of 51) sections of the Political Parties Act, 2011. Some of this changes were made as late as late as two months to the date of the general elections. An example is the Elections (Amendment) (No. 3) Act, 2012 and the Statute Law (Miscellaneous Amendments) (No. 2) Act, 2012 which were assented to on 31st December 2013.

Although Parliament was within its right to move the amendments, it was clear that a majority of the members put their political interests above national interest. They did this in a bid to qualify for the March 2013 elections in disregard of the national values and principles. The situation was further complicated by the Executive, which used its members in Parliament, to pass and amend laws tailored to suit its political ends. The law-making powers of the National Assembly were therefore used to subvert the Constitution. Some of the consequences of this amendments being:

a) The amendments permitted last minute party-hopping, making it difficult for the Registrar of Political Parties to keep an updated database of party membership.

23 Final Report of the Carter Center on Observing Kenya's March 2013 National Elections Carter Institute Report, pg. 25

b) The amendments rendered the goal of strengthening political parties as envisioned in articles 91 and 92 of the Constitution a lost cause at the time
c) The amendments negated the constitutional principle of public participation in the legislative process, as the people of Kenya were generally not consulted before the unilateral passage of these amendments by Parliament.

Recommendations

The Commission recommends that:

a) There should be wholesome review of the Elections Act, 2011 and the Political Parties Act, 2011 so that the aforementioned gaps are rectified.
b) That Parliament passes a law barring the institutions amendments to the elections laws six months before a general election. The amendment should require any amendment to be by a two-thirds majority vote in each House.

4) Lack of Regulations to Effect the Campaign Financing Act, 2013

Article 88(4)(i) of the Constitution requires IEBC to regulate the amount of money that may be spent by or on behalf of a candidate or political party in respect of any election. The Election Campaign Financing Act was enacted on 24th December 2013 long after the 2013 general elections. However, to date the Regulations to effect the Act are yet to be developed.

Recommendation

The Commission recommends that IEBC develops the required regulations prior to the 2017 general elections.

5) Election Malpractices

IEBC is expected to monitor election campaigns to ensure that electoral malpractices are eliminated. The Elections Act 2011 defines what election malpractices are and the consequences. This includes penalties that bar IEBC officers (permanent, contractual and temporary) from holding public office for a given period of time if found guilty of the malpractices. Some court rulings implicated IEBC officers in

malpractices, those of petitions to do with Siaya elections for governor (High Court Election Petition 2 of 2013), and, Nyaribari Chache constituency elections (High Court Election Petition 5 of 2013).

Further, each person has a responsibility to report any election malpractices observed to the relevant bodies, and if possible, take the matter to court, even if they are not implicated in the case. However, citizens have not vigilantly to observed and electoral malpractices.

Recommendations

The Commission recommends the following to be undertaken to enhance monitoring, reporting and dealing with election malpractices.

i) Citizens should be educated on their responsibility to defend the Constitution and the exercise of their right to institute court proceedings, under crticle 3 and 258 of the Constitution respectively.
ii) IEBC to effectively play its role ofMonitoring election malpractices and instituting necessary measures against persons found guilty.
iii) The Director of Public Prosecutions and the National Police Service should play their roles in the prosecution of electoral offences.

6) Policy &Legislative Gaps for the Conduct of a Referendum

Articles 255, 256 and 257 anticipate the possibility of amendments to the Constitution, and thus provide broad guidelines for such a possibility. One of the avenues of amending the Constitution requires direct participation of the people in a referendum process. However, the Elections Act, 2011 does not adequately address a number of issues that may arise in a referendum process. In view of this observation, the Commission wrote to IEBC, the Office of the Attorney General, the Kenya Law Reform Commission and Parliament on a number of occasions requesting them to develop legislation relating to a referendum process. Some of the issues raised by the Commission were:

a) Absence of a sound policy and legal framework to guide the conduct of a referendum.
b) Handling of possible consequential effects of an amendment on various articles of the Constitution: While the Constitution provides for the right of any citizen to propose an amendment to the Constitution, there is need for guidelines on what needs to be done when a proposed amendment affects other articles of the Constitution. The proposed legislation should require every proposed amendment to the Constitution to include an explanation of any consequential effects of the proposed amendment on other parts of the Constitution.
c) Lack of clarity in the role of IEBC and the limits of its powers in the management of a referendum process: There is need to develop a formal position on the entirety of the role of IEBC in a referendum process.
d) Meaning of the term "general suggestion" as used in article 257(2) of the Constitution: In the case of a referendum by a popular initiative, there is need for clarity of the term 'general suggestion' as used in article 257(2) of the Constitution. Questions to be clarified here would include:

    i) What constitutes a general suggestion?
    ii) Who is in charge of ensuring that the threshold of a general suggestion is met?
    iii) The signatures should be collected, at the point of formulating the general suggestion or after having formulated the particulars of a draft Bill?

d) Handling of parallel or back to back referendum questions by different parties: There may be instances when more than one party initiates a referendum process separately and the issues raised may be the same or contradictory.. There should be clarity on how such situations should be handled in order to ensure prudent use of resources. Clarity in this regard ia also necessary for the successful management of parallel or back to back successive and/or parallel referendum processes that may nullify, duplicate or contradict each other.
e) Guidelines for the collection of signatures for different scenarios of a popular initiative: If more than one issue or referendum question are proposed to be put to the electorate, there should be clarity on whether the law requires one million signatures to be obtained for each question or draft bill or whether the one million signatures are sufficient to support a set of questions..

Recommendation

The Commission recommends that the relevant bodies urgently develop a law to guide referendum process.

2.9 THE LEGISLATURE

2.9.1 Introduction

The legislative authority of the people of Kenya is delegated to Parliament (the National Assembly and the Senate) at the national level and to the County Assemblies at the county level. Chapter Eight of the Constitution provides for the establishment, roles, composition and membership of Parliament; offices of Parliament; and Procedures for enactment of legislation. Chapter Eleven of the Constitution establishes a county government for each county consisting of a county assembly and a county executive, and goes ahead to provide for how members of a county assembly come into office and the functions and other requirements of each assembly.

This section of the report presents the status of the implementation of the chapter on the Legislature in the Constitution. It discusses the development of a legal framework, establishment of an institutional framework, the successes and challenges in implementation of the Legislature. Further, the section discusses the establishment of county assemblies and recommendations to address the challenges in the implementation of the chapter.

2.9.2 Legislative Framework

The Constitution provides for legislation to be enacted to implement the various provisions of the establishment of Parliament and County Assemblies. A majority of these laws were enacted prior to the 2013 general elections. They include:

a) The Elections Act, 2012: The Act provides for the conduct of elections to the office of the President, the national assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution.
b) Political Parties Act, 2012: The Act provides for the registration, regulation and funding of political parties. It also seeks to ensure that political parties are established with respect to article 91
c) The Petition to Parliament (Procedure) Act, 2012: The Act gives effect to article 37 and 119 of the Constitution on the right to petition Parliament and makes provision for the procedure for the exercise of the right pursuant to those articles. The Act also seeks to enhance public participation in the parliamentary and legislative process.
d) County Governments Act, 2012: The Act provides for the makeup of county assemblies, public participation and county assembly powers among others.

1) Review of Bills

The Commission reviewed other Bills that are yet to be enacted but which are meant to enhance the role of the legislative assemblies. These include:

a) The Parliamentary Powers and Privileges Bill, 2015 and the County Assemblies Powers and Privileges Bill, 2014 which respectively aim to give effect to articles 117 and 196(3) of the Constitution. The Bills provide for powers, privileges and immunities of Parliament and County Assemblies, and their corresponding committees to make provisions regulating admittance to and conduct within the precincts of Parliament and County Assemblies.
b) Article 100 of the constitution requires the State to enact legislation to promote the representation in Parliament of women, persons with disability, youth, ethnic and other minorities and marginalised communities. A Bill for the implementation of article 100 went through article 261 process and is currently before Parliament.

The Commission also reviewed a number of proposed amendments to the Constitution. They amendments on status of MPs as State officers, elections date, their management by the Speaker, the management of public funds and the relationship between Senate and National assembly members, among others

2) Administrative Procedures

Administrative procedures developed under this section are meant to facilitate the effective implementation of functions and roles of legislative assemblies. Key administrative procedures that have been developed include:

a) Standing Orders of both Senate and National Assembly
b) Procedure for enacting legislation
c) Procedure for dealing with Bills concerning county governments
d) Procedure for passing money Bills
e) Appointment of clerks and staff of Parliament

Notably, county assemblies have also developed various administrative procedures to guide them in discharging their mandate.

3) Institutional Framework

The Constitution provides for the establishment of legislative assemblies at national and county level and other institutions to support the assemblies in discharging their mandates. These institutions include:

a) Offices of the Speakers and the Deputy Speakers
b) Office of the Leader of Majority
c) Office of the Leader of Minority

d) Parliamentary Service Commission

A significant change introduced in the Constitution is in the structure of Parliament and the establishment of county assemblies Unlike in the repealed Constitution, Parliament is now made up of two Houses, the National Assembly and the Senate.

4) Legislative Assemblies

The 2013 general elections ushered in a bicameral system of Parliament in the National government. County Assemblies are also established in the County governments.

Parliament: Parliament is composed of two Chambers, the National Assembly and the Senate. The National Assembly has a total of 350 members of which 290 were elected from constituencies, 47 women representatives elected from the counties and 12 members nominated to represent special interests which include: youth, persons with disabilities, and workers and the Speaker, who is an ex officio member.

Senate: The Senate has a total 68 members of which 47 are elected from the counties; 16 women nominated on the basis of party strength; two members representing the youth and two persons with disabilities (a man and a woman for each of the two) and the speaker.

County Assemblies: The members of county assemblies range from thirteen (Lamu County) to eighy-five (Nairobi County). The lowest and highest number of members nominated through article 90 are eight (Laikipia County) and forty-two (Nairobi County) respectively. Each assembly at the county level is compliant with respect to the not more than two-thirds gender principle, representation of the youth as an affirmative action measure.

Table below presents a summary of the composition[24] of the National Assembly, Senate, and County Assemblies. Further, Figure 1 presents an analysis by FIDA of the number of women elected[25] to various offices in the 4th March General Elections and the current representation of women in the legislative assemblies.

2.9.3 Inclusion of Special Interest Groups in the Legislative Assemblies

The Constitution provides for gender equality and requires that affirmative action measures be employed to redress any disadvantage suffered by individuals or groups because of past discrimination. To address gender inequality,article 81(b) sets the minimum thresh hold for the gender composition into elective or appointive bodies, at not more than two thirds of either gender. Further, articles 177(1) (b) and 197 specifically requires county assemblies to comply with this threshold.. However, there is no similar clause provided for in articles 97 and 98 for the national assembly and the Senate. This may be the reason why Parliament as currently constituted does not meet the threshold on gender composition.

The AG, after consultations on the implementation of the not more than two thirds gender principle, sought the advisory opinion of the Supreme Court as to whether the principle was to be implemented immediately or progressively. The Supreme Court advised that the principle is to be implemented progressively to the extent that its implementation is expected to be guided by legislation and policy and the development of such policies and laws necessarily takes some time. The Court then required that the legislation for implementing the principle be in place by 27th August 2015. This law is yet to be enacted. Once enacted, it will include amendment to articles 97 and 98, to implement the principle in parliament. Before 27th August 2015, two constitutional amendment Bills were before parliament seeking to review the principle in article 81(b) to be progressive and another by the leader of majority seeking to provide for the nomination of members necessary to ensure the implementation of the principle. These are yet to be debated in parliament.

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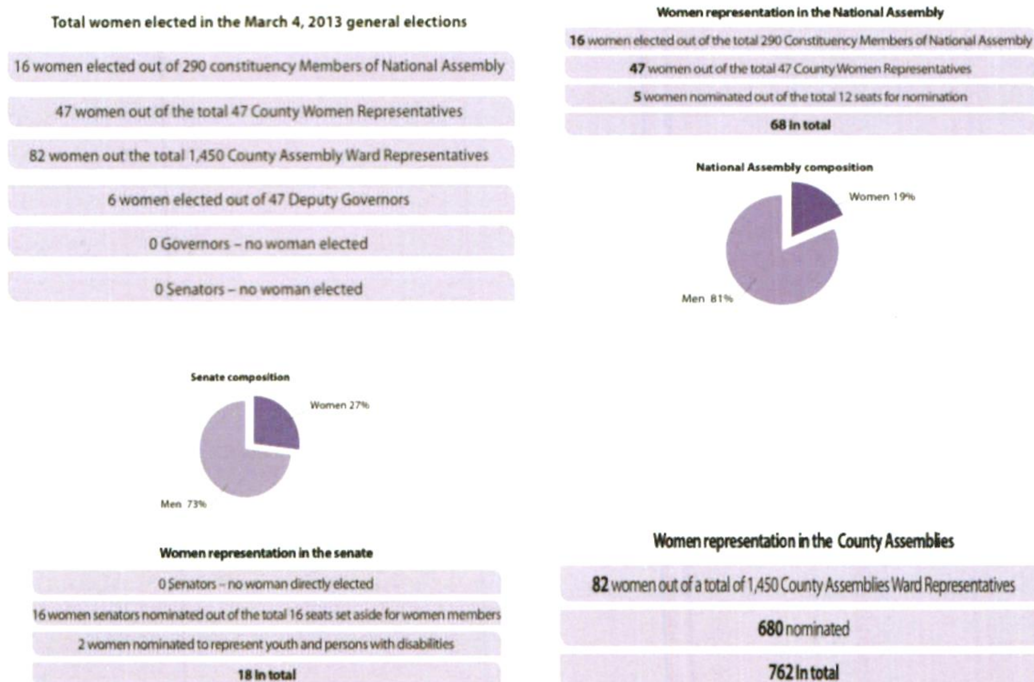
24 Gazette Notice No. 3156 of 2013, Gazette Notice No. 3157 of 2013, Gazette Notice No. 3159 of 2013, Gazette Notice No. 3160 of 2013,
25 FIDA- Gender Audit of the 2013 Elections Process

Summary of composition[26] of the National Assembly, Senate, and County Assemblies

National Assembly		Senate		County Assemblies	
Elected Members – Constituencies	290	Elected Members – Counties	47	Elected Members – Wards	1450
Elected Members- Women Representatives	47	Nominated Members - women only	16	Nominated Members - Marginalized Male	95
Nominated Members	12	Nominated Members – youth	2	Nominated Members -Marginalized Female	93
Speaker	1	Nominated Members - persons with disabilities	2	Nominated Members - Women Article 177(1)(c)	589
		Speaker	1	Speakers	47
Total	**350**	**Total**	**68**	**Total**	**2274**
Total Elected Members	337	Total Nominated Members	20	Total Nominated Members	777
Percentage of Elected Members	96.3%	Percentage of Elected Members	69%	Percentage of Elected Members	64%
Percentage of Nominated Members	3.4%	Percentage of Nominated Members	29%	Percentage of Nominated Members	34%
Percentage of Appointed Members, i.e. Speaker	0.3%	Percentage of Appointed Members, i.e. Speaker	1%	Percentage of Appointed Members, i.e. Speakers	2%

Figure 1: Women elected to various offices in the 4th March General Elections and the current representation of women in the legislative assemblies.



26 Gazette Notice No. 3156 of 2013, Gazette Notice No. 3157 of 2013, Gazette Notice No. 3159 of 2013, Gazette Notice No. 3160 of 2013,

2.9.4 Offices in Legislative Assemblies

The various offices in legislative assemblies provided by the Constitution have been established.

a) Speakers of Legislative Assemblies: A speaker is the head of a legislative assembly and presides over the sitting of an assembly (articles 107 and 178). The Constitution creates the Office of the Speaker and Deputy Speaker for each of the Houses of Parliament and a Speaker for each county assembly. In Parliament, the deputy speaker presides over the business of the House in the absence of the Speaker. In the absence of both, another member of the House is elected by the House to preside over. In the case of absence of the speaker in a county assembly, the assembly members appoint one of the members to preside over the House. The Constitution does not provide for a deputy speaker for a county assembly.
b) Committees of Legislative Assemblies: The legislative assemblies at both levels of government have created committees as required by the Constitution (article 124 & 196) and other laws.
c) Party Leaders: Majority and minority party leaders are in place in all the assemblies as required by article 108 of the Constitution and the County Governments Act 2012.
d) Appointive Offices: The officers appointed into these offices provide services and facilities to ensure efficient and effective functioning of each assembly. A clerk heads the appointed officers of each assembly. Offices for Non-State public officers (appointive officers), in parliament, have been established by the Parliamentary Service Commission, as required by article 127. At the county level, each of the 47 county assemblies have established a County Assembly Service Board as required by law and a number of officers have been appointed into office.

Legislative Assemblies (Parliament and county assemblies) were established in accordance with the Constitution and with specific mandates.

1) Legislative Authority

The legislative authority of the Republic is derived from the people At the national level, this authority is vested in and exercised by Parliament while at the county level it is vested in, and exercised bycounty assemblies Articles 109-113 and in the CGA 2012 stipulate how parliament and the county assemblies respectively may legislate.

Notably, though both the National Assembly and Senate have legislative power, the National Assembly has a legislative mandate on all laws, the Senate is limited to legislative matters affecting counties.

Since January 2011, Parliament has legislated a total of 189 laws with the current Parliament having legislated a total of 93 laws. 47 of these are laws required under the Fifth Schedule to the Constitution. Most of the laws enacted by Parliament without CIC's review had, and some still have a number of unconstitutional provisions. Key among these is the Basic Education Act, 2013 that structures the function of education given to county governments as subsidiaries of the Ministry of Education, Science and Technology. This is in violation of the distinctiveness of the two levels of government as asserted by article 6.

Some of the notable observations made by CIC in respect to the implementation of the legislative authority by the parliament and county assemblies include:

i) Parliament also passed a number of Bills that have clawed back on gains made by the Constitution. For example, security amendment laws which the courts ended up expunging from the Act.
ii) The Revision of Laws Act (Cap.1 Laws of Kenya) requires that miscellaneous amendments be only for aspects that improve the implementation of a law as it is not for making substantive changes. Specifically, Section 8(4) of the Act states that "**Nothing in this section shall empower the Attorney-General to make any alteration or amendment in the substance of any law". Contrary to this,** the Tenth Parliament made a number of significant changes to various laws through Miscellaneous Amendments Acts. The effect of this was that: (i) some of

the amendments generally regressed the gains made by Constitution as they were mainly for the benefit of MPs and did not respect the functional assignment between the national and county governments (ii) such legislative process violated the rule of law and participation of the people in the law making process.

iii) County assemblies have enacted various legislation to help each county government perform their functions and hence deliver services. Discussion on the legislation enacted by the assemblies is in the section of this report on devolution and public finance management in later in this report.

Amendment of the Constitution of Kenya 2010: Article 94 gives Parliament the power to consider and pass amendments to the Constitution as detailed in articles 255, 256 and 257. To date, no amendment has been made to the Constitution. However, various attempts, through articles 256 and 257, have been made.

A majority of the 5 Bills published by Parliament to amend the Constitution were on provisions meant to directly benefit the MPs.. These were: the Constitution of Kenya (Amendment) Bill, 2013, the Constitution of Kenya (Amendment) (No.2) Bill, 2013, the Constitution of Kenya (Amendment) Bill, 2014, the Constitution of Kenya (Amendment) Bill, 2015, sponsored by the Senate. Some, for example, the Constitution of Kenya (Amendment) Bill,2013 which proposed to remove MPs from the category of being State officers, besides being for MPs self-interest, would have fundamentally altered the Constitution.

2) Oversight Function of Legislative Assemblies

Legislative assemblies are charged with the responsibility of overseeing State organs at both levels of government. The National Assembly and Senate have oversight powers over the executive. While the two Houses have oversight powers which are shared between them, the Senate has oversight powers on specific matters which affecting counties.

3) Representation of the People

The Constitution recognizes Parliament as an institution that represents the will of the people, and exercises their sovereignty. Specifically, the National Assembly is assigned the role of representing the people of the constituencies and to deliberate on and resolve issues of concern to the people. In a devolution assessment study conducted by the Commission in June 2015 majority of the county assemblies indicated that they had set up structures and mechanisms to facilitate implementation of their representation role. The various members representing special interests groups in the legislative assemblies are expected to present the concerns of their respective groups in the assemblies as envisaged in the Constitution.

2.9.5 Facilitation of Members of the Public to Participate in Assemblies' Businesses

The Constitution requires legislative assemblies to facilitate public participation and involvement in the legislative and other business of the assemblies and their committees .This includes the development of laws to facilitate members of the public to exercise their right to petition Parliament (Article 119) and the other assemblies (Section 88 of CGA 2012), to consider any matter within its authority, including to enact, amend or repeal any legislation.

2.9.6 Recall of MPs and MCAs

Article 104 of the Constitution gives power to the people to recall their elected Member of Parliament at any time prior to the end of the term of the House of Parliament. The right of recall is provided for in the Elections Act, 2011 for Members of Parliament and in the County Governments Act 2012 for Members of County Assemblies. However, the following has been observed as limitations in the two laws:

a) There is a limitation of the number of times that a petition can be filed against an MP or MCA to only once during their term in office.

b) The laws bar a person who unsuccessfully contests for an election from being eligible to directly

or indirectly initiate a petition for a recall. It should be noted that upon one unsuccessfully contesting in an election, the person becomes an ordinary member of the electorate, whose rights are protected by articles 38 and 104 of the Constitution; hence, should be able to file a petition for a recall without undue restrictions.

To ameliorate theses limitations, there is need to:

a) Expand the grounds for recall to include incompetence, physical or mental incapacity, bankruptcy and committing criminal offences under the Constitution as opposed to under the Elections Act only;
b) Amend section 45 of the Elections Act to:
    i) Repeal the provision on the number of times that an individual MP may be recalled during his or her life in office, notwithstanding any previous failed petitions against the member.
    ii) Repeal the provision that bars an unsuccessful contestant from initiating a petition for a recall.

Challenges

1) Duplicity of roles of committees where more than one committee of a House separately undertake oversight of the same issue e.g. the Transport Committee of the national assembly and the Public Accounts Committee of the Senate investigating the tendering process of the Standards Gauge Railway.

2) The implementation of article 90 of the Constitution, and more so, of the not more than two-thirds gender principle affirmative action measure

    i) In county assemblies, the principle has been met mainly through nominations and hence increasing the burden on the tax-payer.
    ii) At the national assembly level the legislation and constitutional amendment to enable the realisation of article 81 (b) is work in progress

3) The current setup of two public service boards (County Assembly Service Board and County Public Service Board) in each county may lead to idleness and result in imprudent use of resources. County Assembly Service Board, consisting of the Speaker, Leader of Majority Party, Leader of Minority Party and one other person. This means that the board is controlled by members of the assembly, who may end up influencing the decisions and operations of the board in their interest.

4) Legislative gaps on selection of party leaders in situations whereby:

    i) Some county assemblies are comprise of members from a one party. The current existence of minority party leaders in such situations is illegal.
    ii) A county assembly has no party with a majority number of members. In one county this has lead to a situation where the only independent member has coalesced with political parties, which is unconstitutional, to form a majority party. In future there may also be a tie in Parliament.
    iii) Some county assemblies have too few members of the opposition to justify the creation of an opposition. In some assemblies there is only one members of the opposition.

6) Holding of proceedings without meeting quorum. Time and again, it has been noted that quorum to debate essential matters is hardly ever met in the National Assembly, despite the fact that quorum is only 50 out of the 349 members. Some county assemblies have also been accused of holding sessions without the requisite quorum, as set out in the CGA 2012.This can only be interpreted to mean that members lack discipline and commitment to serving the people;

7) Violation of Chapter 6: This has been mainly characterized by fights within the precincts of legislative assemblies. The notable incidence include those in the County Assemblies of Wajir, Machakos, Makueni, Nandi, Nakuru, Siaya, Kisumu, Nairobi and the National Assembly;

8) The right to petition

   i) Although Parliament enacted the Petition to Parliament (Procedure) Act, 2012, CIC is of the view that the Act does not meet its required constitutional imperatives. For example, with respect to Parliament, the Act requires the people to only exercise their constitutional right through their MP and only in writing. The use of the former as the only avenue is unconstitutional and both the former and the latter may end up violating a citizen's rights.
   ii) Not all county assemblies have enacted legislation on the right to petition as required by section 88 of the CGA 2012

9) The national assembly and some county assemblies have usurped the role of establishing and abolishing offices in the executive, including the creation of public entities for the executive. This, is a dangerous practice as the assemblies end up tying the hands of the executive and determining how the executive should run its affairs. In certain cases, the established offices are a duplication of existing ones and in other cases they are meant to implement a devolved function.

10) Supremacy conflicts between the Senate and the National Assembly, which have negatively affected the implementation of the Constitution.

11) Gazettement of county laws by the Government Printer is delayed. This affects county governments' legislative activities

12) Vetting and Removal of State Officers: The requirement of approval by the national assembly was to guard against arbitrary appointment of State officers. Chapter 6 is to guide and Article 47 are to guide the approval of State Officers. However, the process has faced challenges that can potentially render it ineffective. These challenges include:
   a) Allegations of graft among members of departmental committees charged with vetting of nominees.
   b) The issues raised during vetting have sometimes gone beyond what is meant to determine suitability and compliance with Chapter 6 to matters relating to personal beliefs, dress codes and other unrelated matters.
   c) Politicisation of the vetting process is a serious concern as it is possible for an unqualified nominee to be approved by virtue of political patronage and likewise, otherwise qualified nominees not being approved.
   d) Politicisation of issues relating to the removal of State officers from office.

Recommendations

1) It is noteworthy that if citizens voted in more women, youth and persons with disability, they would save their taxes from being spent on the more seats occasioned by the nomination to fill the special seats. It is therefore important to educate the public on the cost of exclusion or failure to vote for members of these interest groups, hence the need of citizens to elect women into the legislative assemblies.

2) Review of standing Orders and other procedures guiding legislative assemblies in order to align them to the provisions of the Constitution. In particular, such review should address the following issues:
   i) Where necessary a joint committee should be formed to investigate matters of common interest to the National Assembly and the Senate
   ii) Each Speaker should ensure that quorum is met at all times during any debate in a legislative assembly. They should not wait to be alerted by a member before taking action, as they need to preside over a constitutionally constituted assembly. If need be amend the standing Orders to accommodations recommendation.

3) County Assembly Service Boards should be abolished and instead, pursuant to article 235 of the Constitution, one body, independent of the two arms of a county government, be mandated to establish and abolish offices in a county public service, appoint persons into

those offices and exercise disciplinary control. The recommendation is made in light of the fact that employees to service a county assembly are few, and do not therefore warrant the creation of a whole body to play the article 235 roles.

4) Amendment of Section 10 of the County Governments Act to provide for (i) a threshold for the determination of a leader of minority (ii) what to do when there is a tie in numbers of party members elected to an assembly. Further, a law should be developed at the national level to address various issues to do with the functioning and processes of Parliament, including guidelines on article 110 (3), on what happens when there is a tie in either House of Parliament, fair administrative action in approving, vetting and removal of State officers, among others.

5) Enforcement of the provisions relating to Chapter Six of the Constitution by the respective speakers of legislative assemblies. Each Speaker of an assembly should take action, based on the code of conduct, whenever a member violates it or the Constitution.

6) MPs and MCAs need to implement the requirements of article 73 of the Constitution on the responsibility of leadership, and in particular, the practice of selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties and the declaration of any personal interest that may conflict with public duties.

7) Given the prevailing situation, it is proposed that:
   a) The Petition to Parliament (Procedure) Act, 2012 should be reviewed so that the procedure to exercising that right is made constitutional;
   b) Legislative assemblies should put in place adequate mechanisms to facilitate the people to exercise their right to petition in ways that do not end up derogating the right;

8) Where and when necessary the establishment and abolishment of offices and bodies should be done in consultation with the executive and should be sanctioned by the Public Service Commission (Article 234) and County Public Service Boards at the national and county government level respectively.

9) The vetting process should be reviewed to guard against factors that undermine the process. Vetting must be restricted to clear parameters relating to relevant laws and the Constitution. Likewise, the proposal to remove public officers from office should not be politicized, but only guided by the respective grounds provided in the Constitution, for various offices. The grounds include physical and mental incapacity, gross violation of the Constitution, gross misconduct or misbehaviour, non-compliance with Chapter Six, bankruptcy, incompetence, while adhering to fair administrative action.

2.10 THE EXECUTIVE

2.10.1 Introduction

Chapter nine of the Constitution provides for the structure and establishment of the national executive, including the institutions, offices, powers and processes by means of which executive authority is to be exercised. National executive constitutes the President, the Deputy President and the Cabinet, with the President as Head of State and Government, exercising executive authority over the Republic, pursuant to article 131 of the Constitution.

The chapter establishes a presidential system of government. In addition, it provides for the functions, powers and responsibilities of the President and Deputy President. It also prescribes that the President may exercise the Power of Mercy in accordance with the advice of the Advisory Committee. Furthermore, the Chapter provides for the election of the President and Deputy President, qualifications for one to be elected President as well as the procedure to be followed in a presidential election. The chapter also stipulates the term of office of the President. Moreover, it outlines the decisions, responsibilities and accountability of the Cabinet. It further establishes the office of Secretary to the Cabinet and that of Principal Secretary. Finally, the chapter establishes the office of the Attorney General and Director of

Public Prosecutions and prescribes for the qualifications and procedure for removal from office of these officers.
The Constitution fundamentally changed the structure and role of the executive in governance. The national executive established under chapter nine is subject to the values and principles of the Constitution and conforms to a prescribed structure of government. This change is premised on the principle of popular sovereignty, in accordance with which the people of Kenya have delegated their sovereign power, and which must be exercised on their behalf and primarily for their benefit.

This section of the report presents an assessment of the implementation of chapter nine of the constitution. It focuses on the structure of the national executive and the performance of various institutions in discharge of their respective mandate and compliance with the letter and spirit of the Constitution.

2.10.2 Progress in the Implementation of Chapter Nine

The implementation of chapter nine of the constitution requires enactment of legislation and review of existing structures of government to ensure their alignment with the Constitution. As regards the establishment of the national executive, the implementation of articles 129 to 155 (with the exception of the provisions on election of the President), was scheduled to commence after the 1st general election. This meant that the structure of the executive remained in place as provided for in the repealed constitution until the conclusion of the first election under the Constitution of Kenya 2010. The elections were conducted on 4th March 2013.

a) Legislative Framework

Two pieces of legislation required under chapter nine of the Constitution, and which were crucial in the establishment of the national executive, were enacted within the timeline stipulated in the Fifth schedule to the Constitution. These were (a) the Assumption of Office Act, 2012 (art. 141(4)); and (b) the Power of Mercy Act, 2011 (art. 133(3)). However, the regulations required under these statutes have not been published. Other pieces of legislation were also enacted to give effect to Chapter 9 as discussed below.

i) The Assumption of the Office of the President Act 2012

This Act was enacted to provide for mechanisms to facilitate smooth transition from one president to the next, giving effect to article 141(4). In addition, the Act established the Assumption of the Office of President Committee as well as the powers and functions of the committee. The Act outlines the arrangements for assumption of office by the President-elect and the swearing in ceremony.

ii) The Power of Mercy Act, 2011

The Power of Mercy Act, 2011 was enacted to give effect to article 133(1) of the Constitution relating to the exercise of the prerogative of mercy. It establishes the Power of Mercy Advisory Committee and prescribes its composition, functions and powers. The Act further provides for the eligibility and procedure to file a petition for the exercise of power of mercy as well as the criteria used by the Committee in making its determinations.

iii) Office of the Attorney-General Act, 2012,

Even though article 156 does not require the enactment of legislation for the establishment, organisation and administration of the Office of the Attorney General, an Act was enacted to provide for clarity of the role of the office, it structure and operations. The Act outlines the administration of the Office of the Attorney General and the performance and functions of the Attorney General.

iv) Office of the Director of Public Prosecutions Act, 2013

The Office of the Director of Public Prosecutions (ODPP) is established under article 157 of the Constitution. The Office of the Director of Public Prosecutions Act, 2013 was enacted to give further effect to article 157. The Act prescribes the powers and functions of the Director, the independence of the Director and accountability and reporting of the Office of the Director of Public Prosecutions.

v) The National Honours Act, 2013

The National Honours Act, 2013 was enacted to give effect to article 132 (4) of the Constitution that prescribes that the President may confer honours in the name of the people and the Republic. The Act seeks to provide for an objective criterion in making the awards and transparency in sharing information on recipients of Honors. In addition, it provides for the establishment of advisory committees that make recommendations on persons on whom Honours are to be conferred.

b) Institutional Framework

The implementation of articles 129 to 155, led to the establishment of the national executive. Significantly shifting from the previous dispensation, the Constitution established a presidential system of government where the executive is no longer part of the legislature. Under the repealed constitution, the Cabinet was made up of ministers who were appointed by the President and did not require approval or vetting for suitability by the National Assembly. Under the previous parliamentary system of government, the ministers were also members of parliament.

1) The Presidency

Articles 131 – 151 provides for the establishment, authority, functions and powers of the office of the President.

Assumption of Office

The Assumption of the Office of President Committee was established by the Constitution and the Assumption of Office of the President Act 2012, to provide for mechanisms to facilitate smooth transition from one president to the next. The Committee undertook this mandate effectively, culminating in the swearing in of the new president on 9th April 2013 following .

Executive Authority of the President

The President is required to exercise executive authority with the assistance of the Deputy President and Cabinet Secretaries. This requires clear procedures and systems that allow for collective responsibility in the exercise of executive authority. They include regularly scheduled meetings of the Cabinet and a coordinated approach to the issuance and notifications of cabinet decisions to the wider public service. This has been generally complied with. In effect, the institutional framework for implementation of chapter nine is in place. The office of the President, including that of the Deputy President, has been established and requisite staff appointed to serve in those offices.

On December 30th 2008, President Mwai Kibaki was sworn in shortly before 7p.m. after a highly contested election that did not give room for petition against the electoral decision. The swearing in ceremony took place in State House where security forces had sealed off the area where no member of the public was invited.

In contrast, the new Constitution lays down procedures for the assumption of Office of the President. Article 141 prescribes that the swearing in ceremony shall take place in a public place and only after fourteen days of the declaration of the result, if no petition has been filed. If a petition has been filed in court, a president-elect shall be sworn in on the seventh day following the date on which the court renders a decision declaring the election to be valid.

Article 132 assigns the functions of the President. Among these is the conferment of Honours and direction and coordination of the functions of ministries and government departments. The President may also exercise the Power of Mercy, in accordance with the advice of the Advisory Committee, pursuant to article 133.

Conferment of Honours

Prior to the promulgation of the Constitution, national Honours were awarded in an arbitrary manner and at the discretion of the President without any attempt to establish the merit of the Award. The

Constitution significantly changed the manner in which national Honours can now be conferred. Although article 132(4)(c) provides for the role of discretion and prerogative by the President, the process also requires the application of article 10 on the national values and principles in the exercise of this power.

Power of Mercy

The successful implementation of article 133 has ensured that this prerogative power is not exercised in an arbitrary and discriminatory manner. In addition, the Prisons Act, Cap 90 was amended in 2014 to support the Committee in the effective discharge of its mandate and to ensure compliance with article 133. The amendment repealed section 48 on the establishment of a Board of Review, whose mandate was to review the sentences of all prisoners serving sentences of beyond seven years and to advise the President on the prerogative of mercy.

Implementing National Values and Principles

Article 132(1) (i) prescribes that the President shall once every year report, in an address to the nation, on all the measures taken and the progress achieved in the realisation of the national values, referred to in article 10. The President is further required to publish in the Kenya Gazette the details of the report.

The government has made some strides in promoting national values and principles. The steps in this regard include the incorporation of the principles in the operations of all Ministries, Departments and Agencies (MDAs) and reporting on the progress of implementation. These initiatives are meant to harness the capacity of the government in addressing social and economic inequalities, management of ethnic and other social and cultural diversities and prevention, management and reconciliation of conflicting situations.

The Ministry of Interior and Coordination of National Government published and forwarded to the National Assembly Sessional Paper No. 8 of 2013 on National Values and Principles of Governance and Sessional Paper No. 9 of 2013 on National Cohesion and Integration. The two documents await deliberation by the National Assembly. Further, the Ministry through the Directorate of National Cohesion and National Values trained Focal Point Persons from MDAs who would be responsible for overseeing the mainstreaming of national values and principles of governance in their respective MDAs and the performance contracting processes. The Ministry also conducted training for 32 County Public Service

Boards (CPSBs) and held stakeholder sensitisation forums in 32 counties on their role in the promotion of national values and principles of governance.

In promoting good governance, integrity, accountability and transparency, the President issued Executive Order No. 6 of 6th March 2015 on Ethics and Integrity in the Public Service. The Order cautions MDAs on breaches of ethical standards, instances of pilferage and outright thefts involving civil servants, State and public officers. This Order requires all relevant institutions in the ethics and anti graft war to act swiftly, without fear or favour to detect, investigate and prosecute all perpetrators irrespective of social status.

Fulfilling International Obligations

Article 132(1)(c)(iii) prescribes that once every year, the President should submit a report for debate to the national assembly on the progress made in fulfilling the international obligations of the Republic.

The national government has taken steps towards fulfilling international obligations. These include the development of a national foreign policy that was launched on the 20th of January 2015. This policy outlines the evolution of Kenya's foreign relations and engagements with partners over the last five decades. It further outlines the country's future strategic directions to ensure the achievement of the collective aspirations of Kenyans.

Some of the treaties that the national government has ratified include the Protocol on the Establishment of East African Community Monetary Union, the African Maritime Transport Charter and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from

Their Utilization.

Kenya has also made significant strides since the promulgation of the Constitution, by incorporating provisions of various international laws and principles into Kenyan law. These include the National Police Service Act, 2011 and the Independent Police Oversights Authority Act, 2011. These laws have adopted various international treaties such as the International Convention on Civil and Political Rights (ICCPR) and International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD).

2) The Cabinet

On assumption of office, the national government complied with the requirements on the size of the cabinet, heralding the dawn of the era of a lean government. Article 152(1)(d) requires that the number of cabinet secretaries should range between 14 and 22. In compliance with this requirement, the President, by executive order no. 2, set out a structure of the national government made up of 18 ministries and appointed 18 cabinet secretaries. On April 17 2015, the ministry of environment and natural resources was split and a new ministry of water was created. With the appointment of a cabinet secretary to that ministry, number rose to nineteen cabinet secretaries. This number was raised to twenty on 24th November 2015, which is still within the constitutional requirement of a maximum of twenty-two cabinet secretaries.

The appointment of Cabinet secretaries and principal secretaries was generally in compliance with article 152 and article 155 respectively. However, the appointments were not fully compliant with the requirement for the composition of the national executive to reflect the regional and ethnic diversity of the people of Kenya27.

Other appointments made included ambassadors and chairpersons of various State organs. These appointments were subjected to approval by the national assembly to ensure suitability of the nominees to perform the relevant functions. In adherence to the two-thirds gender principle, there was a significant increase in the number of women in these key leadership positions. It is noteworthy that women were appointed to ministries, such as defence, foreign affairs and devolution. Some of these ministries were traditionally the preserve of men.

a) Secretary to the Cabinet

Article 154 establishes the office of the Secretary to the Cabinet who has charge of the Cabinet office, is responsible for arranging the business and keeping minutes of the Cabinet and conveys the decisions of the Cabinet to the appropriate persons or authorities.

On April 16th 2015, the President suspended the then Secretary to the Cabinet, rendering the position vacant. It is noteworthy that this crucial position is yet to be filled. The Secretary to the Cabinet is responsible for ensuring that the functions of the Cabinet Office are carried out effectively, therefore the vacancy of this office greatly hinders the effectiveness of Cabinet.

b) **Coordination of National Government**

1. Departments and Agencies

Article 132(3)(b) assigns to the President the function of coordinating national government ministries and departments. This has been done through the National Government Coordination Act, 2013, which provides, in section 7, for an administrative structure that coordinates national government functions. With the President at the helm, coordination is done through the cabinet, the cabinet office and lastly the coordination committees at the county level. The Act further establishes offices for County Commissioners, Sub-county Commissioners, Chiefs and Assistant Chiefs who are charged with the responsibility of chairing the coordination committees at county, sub-county, ward and village level respectively.

Through Executive Order No. 3 issued to strengthen the National Government Co-ordination function at the county level, the president delegated powers to County Commissioners to direct and co-ordinate the national government functions at the county level. Among the delegated functions are (a) the chairing of county security committees; (b) supervision and co-ordination of the performance of

27 Article 30 (2)

national government functions; and (c) monitoring and evaluation of national government projects and programmes at the county level.

ii. Restructuring of the System of Provincial Administration

Section 17 of the Sixth Schedule to the Constitution required the restructuring of the system of provincial administration within five years from the date of the promulgation of the Constitution. The onus of restructuring the provincial administration is on the national government. The section prescribes that the restructuring shall be done in order to accord with and respect the system of devolved government.

To this end, the Ministry of Interior and Coordination of National Government has developed a policy to guide the restructuring of the provincial administration. In addition to the policy, the ministry has prepared and submitted a report on the status of restructuring of the provincial administration to the national assembly. A copy of the report was also submitted to CIC for review.

The policy outlines the objectives of restructuring of the system of provincial administration. These include promoting good governance for service delivery; improving operational, logistical, capacity and work environment; promoting inter-governmental relations and promoting gender and equity in national government administration services.

Specific thematic issues and strategies were identified in the policy, such as ensuring citizen participation in national government programmes, ensuring integrity in service delivery, improving staff welfare and mobility and promoting intergovernmental relations and cooperation.

The progress report highlighted the steps taken by the Ministry to restructure the system of Provincial Administration. It outlined the functions of national administration officers, which include management of security and management and coordination of national government functions in the county.

Upon review of the policy and status report, CIC found that,the policy failed to adequately outline the ways in which the provincial administration would be restructured to comply with the system of devolved government. Consequently the Commission recommended that the two documents be redrafted to conform to the letter and spirit of the Constitution.

iii. Parastatal Reforms

On the 23rd of July 2013, the President appointed a Taskforce on Parastatal Reforms to review the policies on the management and governance of Kenya's parastatals. The aim of the review was to link the government owned entities to the national development agenda and reorganize them to conform with the Constitution of Kenya, 2010.

One of the key recommendations made by the Taskforce was the enactment of one overarching law to govern government owned entities. This law would apply to GOEs in addition to other sector specific laws including the Capital Markets Act, The Banking Act, and the Companies Act. Subsequently, the Government Owned Entities Bill was developed to provide a legal framework that would lead to the effective management, operation and regulation of government owned entities in line with the values and principles of the Constitution.

The Commission for the Implementation of the Constitution reviewed and forwarded the Bill to the Attorney General in April 2014. The Attorney General forwarded the Bill to Cabinet. However, It is noteworthy that action is yet to be taken on the Bill by the Executive.

1) Office of the Attorney General and the Director of Public Prosecutions

The President appointed the Attorney General and the Director of Public Prosecutions in accordance with articles 156 and 157 respectively. However, in exercise of its mandate under article 249 to "secure observance by all State organs of democratic values and principles", CIC advised that the nomination of a candidate to the office of the Attorney General without any reference to the values of public service, such as merit as a basis of appointments and affording equal opportunities to members of all ethnic groups, was unconstitutional. The political backlash for this unprecedented engagement with the Presidency was swift and strong, but the Commission did not relent. The candidates were withdrawn and fresh nominations done in compliance with the Constitution.

2) Office of the Attorney General

Among the key achievements is the separation of the roles of the Attorney General from those of the DPP. The Attorney General is now restricted from acting for the government in criminal matters in compliance with the Constitution.[28] Unlike in the repealed Constitution, the DPP is now independent and may commence criminal proceedings against any person without the approval of the Attorney General. Previously, the Attorney General was required to consent to prosecution in criminal cases. The Attorney General also had power to enter nolle prosequi and consequently terminate criminal prosecutions at any time. This power was routinely abused to the benefit of politically connected individuals.

One of the functions of the Attorney General is to act as the principal legal advisor to government. The AG performs this function generally by giving legal advice on various matters, specifically through legal opinions requested by government agencies. The Supreme Court recognized this crucial role of

the AG in the Constitutional Application no. 2 of 2011[29]. The Supreme Court ruled that seeking the advice of the Attorney General, or being required to do so by a rule of procedure, does not compromise the independence of a State organ in any way, nor does it vest a veto power in that office. While the applicant after obtaining advice from the Office of the Attorney General is not necessarily bound by the same, for the purpose of the Court, the fact that such advice was sought in the first place will demonstrate the applicant's commitment, as well as fidelity to due process.

1) Office of the Attorney General

a) Legal Opinions

There has been an increase in requests for legal opinions to the AG by government agencies. Most of these requests were made subsequent to the exercise of executive authority which the legal opinion was meant to prevent.

b) Membership in State Corporations

The appointment of the Attorney General or his or representative to the boards of various state corporations was to facilitate the advisory role. However this membership presents a conflict of interest where the Attorney General is part of the decision-making process and is at the same time required to give an impartial and objective legal opinion. The Presidential Taskforce on Parastatal Reforms noted this concern and recommended the removal of AG from membership of state corporation boards.

1) Office of the Director of Prosecutions

The constitution sanctions the appointment of an independent Director of Public Prosecutions with security of tenure to guard against interference in discharge of the functions of the office.

The implementation of article 157 has resulted in the following key achievements:

a) The DPP has decentralized its prosecutorial services in line with article 6(3) of the Constitution. It has a presence in all the 47 Counties and 117 Court Stations in the Republic. Previously there were only police prosecutors.

b) The DPP has taken over prosecutions from the Police in all the Court Stations in the Republic which is unprecedented in Kenya's legal history. The DPP has, as a result, instilled professionalism in prosecutions,

c) To ensure conformity with the Constitution, the DPP has as report indicating that the office has reviewed and revised the National Prosecution Policy and the Code of Conduct and Ethics for Public Prosecutors. The report also indicates that the office has also developed new General Prosecution Guidelines and thematic prosecution guidelines on Economic Crimes, Terrorism, SGBV, Wildlife Crimes, Hate-Speech, and Trafficking in Persons.

d) Through its Delegated Prosecutions Division, the DPP is now exercising control over all State Agencies exercising delegated prosecutorial authority. It has vetted, trained and gazetted qualified officers from these agencies to serve as public prosecutors.

e) To promote specialization in the discharge of the prosecution mandate, the DPP has established specialized thematic Divisions, Sections and Units for areas, such as Economic

28 Article 156(4)(b) and 157(10) which insulates the DPP from seeking consent to commence criminal proceedings or to perform his or her functions.

29 In the matter of advisory opinions of the court under article 163(3) of the constitution and In the matter of section 21(2) of the sixth schedule of the constitution and In the matter of the interim independent electoral commission as the applicant

Crimes, Counter-Terrorism, Homicide, SGBV, Cybercrime, Wildlife Crimes, Anti-Narcotics, Money-laundering, Piracy, Hate-speech, and Anti-FGM.

f) The DPP has established a Public Complaints Section and developed an automated complaints management system to process complaints from the public. Moreover, hotlines for receiving complaints and information relating to commission of offences such as FGM have been set up.

2.10.3 Service Delivery

Executive authority must be exercised in a manner that is compatible with the principle of service to the people of Kenya.[30] This principle marks a turning point from a highly centralized government, whose key feature was the inequitable distribution of services. Development often followed voting patterns and occurred primarily in the areas connected to the politically correct and powerful political elite. One major achievement of the implementation of the principle of service delivery by the executive is the Huduma Centre initiative for which Kenya won the 2015 United Nations Public Service Award. The centres breathe spirit and meaning to the letter of article 6(3) that requires a national State organ to ensure reasonable access to services in all parts of the republic. While the centres are still being rolled out to different parts of the country, they have brought key services of national government that were only available in Nairobi or provincial headquarters closer to the people in a one stop centre.

2.10.4 Challenges and Recommendations

1) Overlap in Human Resource Administrative Responsibility

There is currently lack of clarity regarding the responsibility for control of the workforce establishment. This has resulted from diffusion in human resource administrative responsibility between the Principal Secretaries and Cabinet Secretaries.

Articles 152-153 provide for the structure, decisions, responsibilities and accountability of the cabinet. While the Constitution makes the Cabinet Secretary responsible for policy and accountability[31] to parliament on matters falling under their respective ministries it also expressly makes the Principal Secretary, the administrative head of a government department.[32] Further, the Cabinet Secretary to the National Treasury has appointed the Principal Secretaries as accounting officers[33].

In addition, there is an authorized officer, who manages administrative matters such as human resources. Until December 2014, this role was given to Principal Secretaries. This notwithstanding, the PSC in December 2014, delegated their powers of recruitment to Cabinet Secretaries.[34] This presents a challenge as to which office is charged with administrative control and creates an overlap. This has resulted in lack of clear accountability over the workforce to ensure effective, efficient, equitable and ethical discharge of specific mandates.

30 Article 129 of the Constitution of Kenya
31 Article 153 the Constitution of Kenya
32 Article 155 the Constitution of Kenya
33 Section67 of the PFM Act, 2012
34 Policy on Decentralisation of Human Resource Management in the Civil Service

Case Study - Huduma Centres

Article (6) of the constitution provides that national State organs shall ensure reasonable access to its services in all parts of the republic. Additionally, article 46 (1, (a)) on the Bill of Rights states that consumers have a right to goods and services of reasonable quality, including those offered by public entities. The constitution also requires public servants, in compliance with article 73, to render services with respect, fairness, as well as objectively and impartially. Such values are critical to efficient and effective service delivery. Public officers are required to demonstrate high standards of professional ethics in the course of their duties, providing services that are responsive, prompt, effective, impartial and equitable.

It is in recognition of these requirements and in pursuance of article 129 of the Constitution, that the Executive, through the Ministry of Devolution and Planning, established Huduma Centres, which are envisaged to be primary service delivery channels in all the 47 counties. The Centres are a one-stop shop where citizens can obtain government services under one roof. The services that are currently provided include application and renewal of passports, land title deeds, National Identity Cards, business name search and registration, application for birth certificates, issuance of personal identification numbers, driving licenses and certificates of good conduct. These services are offered at county levels, saving citizens from having to travel to Nairobi or to visit different offices in search of the offices.

The Centres have been established in 11 different counties, namely Nairobi, Machakos, Kajiado, Kisii , Kisumu, Eldoret , Kakamega , Nakuru, Embu ,Nyeri ,and Mombasa.

In recognition of the impact of this concept in the transformation of service delivery, the government, through the Ministry of Devolution and Planning was nominated and won the 2015 United Nations Public Service Awards – Category II on Improving Public Delivery of Services.

2) National Values and Principles

a) Conflict over institutional Mandates

Public institutions have applied varying understanding of their Constitutional and legal mandates on promotion of national unity and exercise of sovereign power. For instance, the incessant conflicts between the Ministry of Lands, Housing and Urban Development and the National Land Commission over management of land have negatively impacted on national unity.

b) Inadequate Capacity

Public institutions have inadequate physical and human resource capacities necessary for the promotion of national identity, a key pillar of patriotism.

c) Inadequate Public Awareness

Considerable progress has been made in creating public awareness on the national values and principles. However,lack of sustained and coordinated civic education on these constitutional principles has led to low levels of awareness among the general public.

d) Inadequate Resources

The Constitution requires that constitutional offices including Constitutional Commissions be adequately funded. The Commission, in its interaction with the AG and KLRC on processing of legislation pursuant to article 261(1) and (4), has also experienced the effect of inadequate human capacity in these institutions. Despite these challenges, the AG and KLRC have done their level best in delivering on their constitutional mandate. The Commission recommends that Parliament prioritizes the implementation of the Constitution by ensuring that the implementing agencies are adequately funded to perform their functions. This is necessary not just because it is a constitutional requirement but also because these offices play a significant role in promoting accountability and integrity in both public and private sectors.

e) Prosecutorial Powers

Article 157(12) allows other authorities to be given prosecutorial powers through legislation. However, this provision has led to a proliferation of attempts by various State agencies to amend their enabling legislation to provide for this power. A majority of these authorities have investigative powers. While not unconstitutional, these attempts fail to take account of the fact that the Constitution has itself separated the roles of investigation from that of prosecution. Investigative powers rest with the National Police

Service and prosecutorial powers with the DPP. To vest both investigative and prosecution powers in one agency presents serious risks of abuse of power, conflict of interest and mandate. CIC subsequently recommends that prosecutorial powers granted through legislation be restricted to agencies that do not have investigative powers.

f) Consultation and Cooperation

The constitution transformed the mode of governance from an authoritarian to a consultative one in which decision-making ought to be primarily by consensus. The requirement of consultation permeates the constitution even though there is no explanation as to what such consultation involves. The challenge presented by the need for consultation within the framework of coalition government was illustrated when nominations of AG, CJ, DPP and CoB were made by the President. The meaning and scope of consultation as a process of decision-making continues to present a challenge in the discharge of functions by statutory bodies. A clear example of the challenge this presents is found in the implementation of the land laws that provide for consultation between the Ministry of Lands and the National Land Commission. At this point in time of the fifth year of implementation the two institutions are before the Supreme Court on matters relating to their roles and responsibilities, which matters could have been resolved merely by both offices working together through consultation and in cooperation with each other.

g) Appointment of Principal Secretaries

The Commonwealth tradition envisions a cabinet supported by a civil service bureaucracy organized into departments. Each department is headed by a principal secretary. This traditional structure informed the provision of article 155 on the establishment and appointment to the office of principal secretaries. Article 155(3)(b) requires the President to nominate persons for the position of Principal Secretaries recommended by the Public Service Commission (PSC). This is despite the fact that article 234 relating to the functions and powers of PSC expressly excludes the Commission from performing functions relating to State offices such as principal secretary. Notably, no other office appointed by the President under article 132(2) requires the involvement of PSC. Further, the organizational structure of the public service has a principal secretary in the highest job group in the public service, which constitutes the bureaucracy exclusive of State offices. There is therefore no clear demarcation of the role of the PS as a State officer and that of being the administrative head of the civil service bureaucracy.

The process of appointment of Principal Secretaries has faced challenges as evidenced by the requirement by the Executive for PSC to submit other recommendations for appointment as the initial recommendations by PSC were found not to meet the needs of the president. The contracts of service are issued by PSC despite PSC being expressly excluded by the Constitution from exercising its functions with regard to State officers.

h) Executive Orders

Article 132(3)(b) confers on the President powers to direct and coordinate the functions of ministries and government departments. Further, article 135 requires that all Presidential decisions are put in writing, sealed and signed by the President. This requirement seeks to ensure that there is transparency, accountability and legality in his/her decisions. Since assuming office, President Uhuru Kenyatta has exercised this power through the issuance of Executive Orders. One of the most publicized Executive Orders issued is Executive Order No.1 that sets out the structure of government and assigns functions to cabinet secretaries.35

In view of the binding effect of Executive Orders or directives issued by the President, a challenge has arisen regarding the validity of Orders that are in contravention of the law. An example is Executive Order No. 3 of May 2014 that provided for the Strengthening of the National Government Co-ordination function at the county level. The Order was in violation of the National Government Coordination Act, 2012 with regard to its directives on the coordination of national government functions within counties. The Executive cannot through orders usurp the role of parliament to make law or to undermine the implementation of a law.

35 Article 132(3)(b) on directing ministries and article 135 on decisions of the President.

Recommendations

1) Legal Opinions

One way to address this challenge would be to provide for the mandatory requirement of a legal opinion in certain matters by way of regulations issued by the AG as provided by section 32 of the Office of the Attorney General Act of 2012.

2) Membership of the AG in State Corporations

The Commission proposes that this recommendation be effected through legislation to guard against conflict of interest and ensure objectivity and impartiality in decision making as required by article 73(2)(b)[36].

3) National Values and Principles

a) The national government and county governments should enhance capacities at both levels of government to ensure that their officers are equipped to effectively implement programmes, projects and activities for the promotion of national values and principles.
b) Further, the national government should partner with county governments and other stakeholders to enhance a coordinated and sustained national civic education programme to sensitize the public on national values and principles.
c) Existing laws and policies should be reviewed and audited to provide for the application of the national values and principles.

1) Resources

The Commission recommends that the national assembly prioritize the adequate funding of implementing agencies as they play significant roles in promoting accountability and integrity in both public and private sectors.

2) Prosecutorial Powers

It is recommended that prosecutorial powers granted through legislation be restricted to agencies that do not have investigative powers.

3) Consultation and Cooperation

It is recommended that the executive develops clear guidelines on cooperation between it and other institutions such as other arms of government, county governments, constitutional commissions and independent offices and other State agencies.

4) Secretary to the Cabinet

CIC recommends that the executive ensure that the position of Secretary to the Cabinet is filled without further delay, in order to ensure that the activities of the Cabinet are not adversely affected.

5) Appointment of Principal Secretaries

To resolve this challenge, the Commission recommends that a decision be made as to whether the office of Principal Secretary is part of the public service or a State office. If it is part of the public service then the role of PSC in recommending possible nominees is acceptable. However, if this office remains a State office, then the constitution should be amended to exclude the PSC from playing a role in the appointment of Principal Secretaries and to allow the President to nominate Principal Secretaries in a manner similar to that in which he or she nominates and appoints cabinet secretaries.

36 A Government Owned Entities Bill was developed in 2014 but is yet to be enacted into law.

6) Executive Orders

It is recommended that this power be exercised with caution and in full compliance with the Constitution and the law. Further, in view of the far reaching and binding effects of the order or directive, a consultative process should be followed in reviewing the order to ensure that it does not infringe on the law or conflict with the powers of other constitutional or statutory bodies.

Conclusion

The Constitution of Kenya 2010 has transformed the Executive from a centralized authoritarian and unaccountable form of government to one which places constitutional constraints on the size of government and its exercise of authority. While the requisite laws, systems and institutions are in place and measures have been put in place to implement chapter nine, crucial steps remain to be taken to facilitate its full implementation. The steps include (a) unreserved respect for the rule of law and compliance with court orders; (b) ensuring that legislation developed by the Executive complies with the letter and spirit of the Constitution; (c) ensuring that the restructuring of government is completed through the parastatal reform programme in order to reduce the size of government and take into account devolution of functions to county government; (d) requisite policies and administrative procedures be developed; and (e) ensure prudent use of resources and access to services to all parts of the country.

The effective implementation of the Constitution requires that each arm of government undertake its functions in a timely and efficient manner. The people of Kenya have legitimate expectations that they would reap the fruits of a constitutional democracy within a reasonable time. To this end, it is incumbent upon the Executive, as the law enforcement organ, to do so in a timely manner and within the constitutional constraints placed on it to achieve full implementation of the Constitution.

2.11 THE JUDICIARY

2.11.1 Introduction

Article 1(1) of the Constitution recognizes the underpinning principle that all sovereign power belongs to the people of Kenya and is delegated to the State organs specified in clause (3). These organs include; (a) the Judiciary, which is established under Chapter 10 of the Constitution; and (b) independent administrative and quasi-judicial tribunals established under other statutory instruments designed to give effect to the Constitution.

Following the re-organization of the Judiciary under the 2010 Constitution, there have been far-reaching institutional reforms backed by policy and legislation. The establishment of the Supreme Court, the Employment and Labour Relations Court and the Land and Environment Court are significant features of the transformational change attributable to the new constitutional order. The transparency and accountability mechanisms evident in the recruitment of judges and other judicial officers, and the vetting of sitting judges and magistrates conducted openly, has gone a long way in boosting public confidence in the Judiciary. The Judiciary continues to conduct its business in an open and transparent manner and regularly convenes public forums at which it publishes its reports on the course of its transformation from the hitherto insular, to the present open institution that engages the public in its activities. These activities include periodic open days during which its State officers and staff interact with ordinary members of the public and stakeholders in the administration of justice. In addition, the establishment of the Judiciary Ombudsman and an accessible complaints mechanism has resulted in increased trust and confidence in the institution.

The openness in the manner in which judicial services are delivered has had positive effects on its performance. Efforts have been made to demystify the courts by opening its doors to the public and by engagement with members of the public and non-state agencies through court user committees, all of which have played a significant role in enhancing access to justice. The enactment of the proposed High Court and Court of Appeal (Organisation and Administration) Bills in the next one-year is expected to substantially enhance the Courts' performance in the administration of justice.

The ongoing programme to enhance the geographical spread of court stations will undoubtedly enhance access to judicial services at all units of service delivery in the counties. In the last five years, seventeen additional High Court stations have been established with more stations underway. This project is complemented by the operationalization of circuit courts and the decentralisation of the Court of Appeal to towns, such as Nairobi, Kisumu, Malindi and Nyeri. The establishment of the Judicial Training Institute (JTI) and the continuous training of judges and magistrates has greatly contributed to enhanced capacity of judicial officers in all court stations.

This chapter looks at the framework for the judicial system in the country, including the judicial authority, independence, and different levels of the courts that facilitate access to justice, as provided in Chapter Ten of the Constitution.

2.11.2 The Legislative Framework

a) System of Court Legislation

The Constitution requires enactment of legislation to, among other things, restructure the Judiciary and enhance access to justice. Annex 1 summarizes the status of legislation developed to give effect to the various provisions in Chapter 10. Notably, not all Bills reviewed by CIC and submitted to the Attorney-General for Cabinet approval, publication and tabling in Parliament have been enacted. Bills submitted to Parliament and pending enactment include: (a) the Court of Appeal (Organization and Administration) Bill, 2015; (b) the High Court (Organization and Administration) Bill, 2015; (c) the Magistrates Courts (Amendment) Bill, 2015; (d) The Judiciary Fund Bill, 2015, designed to comprehensively reenact and enhance the provisions of Section 27 of the Judicial Service Act relating to the establishment and administration of the Judiciary Fund pursuant to article 173 of the constitution. While these Bills ought to have been enacted before the 27th day of August 2015, parliament extended time for a further period of one year (to 27th August 2016), which effectively delays the process of implementation of chapter ten of the Constitution.

b) The Vetting of Judges and Magistrates Act, 2011

In addition to the mandate of the Judicial Service Commission specified in article 172)1(c), section 30 of the Judicial Service Act, 2011 establishes a mechanism for transparent recruitment of judges. With regard to serving judicial officers, section 6 of the Vetting of Judges and Magistrates Act, 2011 established the Judges and Magistrates Vetting Board. The Board's statutory mandate is to vet and ascertain the suitability of the then sitting judges and magistrates to continue in office under the 2010 Constitution.

The Board's term of office was initially limited to one year in accordance with section 23(1), subject to extension by parliament. That term has since been extended from time to time and the Board is still in office. Five years down the line, the Board is yet to finalise the vetting of numerous judicial officers and conclude its operations. The long period taken by the Board in performance of its functions is attributable to, among other things, (a) judicial intervention by way of review pursuant to article 47 of the Constitution; and (b) numerous applications for review by the Board pursuant to section 23(2) of the 2011 Act.

Following the vetting of judges and magistrates, which was conducted openly, the Judiciary reports that there has been renewed public confidence in its judicial officers. Trust and confidence in the Judiciary is also augmented by the transparent recruitment of judges during which the public is invited to provide information and assist the Commission in determining their suitability.

c) Legislation on the Superior Courts

Article 162 establishes the system of superior courts in respect of which CIC fully discharged its constitutional and statutory mandate by consulting with the Judiciary, the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in parliament the necessary legislation and administrative procedures required to give effect to article 162. These courts include:

a) the Supreme Court established under article 163 of the Constitution and administered in accordance with the Supreme Court Act, 2011;

b) the Court of Appeal established under article 164, to be organised and administered in accordance with the legislation required to be enacted pursuant to article 164(1)(a) and (b) of the Constitution;
c) the High Court established under article 165, and to be organised and administered in accordance with the legislation required to be enacted pursuant to article 165(1)(a) and (b) of the Constitution;
d) the Industrial Court established under the Industrial Court Act, 2011 (subsequently revised and renamed as the Employment and Labour Relations Act, 2014) to meet the requirements of article 162(2) of the Constitution; and
e) the Land and Environment Court established under the Land and Environment Court Act, 2011 to meet the requirements of article 162(2) of the Constitution.

The Industrial Court and the Land and Environment Court, both of which enjoy the status of the High Court as contemplated by article 162(2) were duly established with such jurisdiction as is specified in their respective founding statutes. The Commission duly discharged its mandate by undertaking technical review of the aforementioned Bills.

Technical review by CIC of the relevant Bills and legislative proposals was conducted in a participatory manner and in conformity with the national values and principles prescribed in article 10(2)(a) of the Constitution. In addition, the Commission ensured that the five statutes comply with the requirements of articles 166, 167 and 168 of the Constitution, which respectively provide for (a) procedure for the appointment of the Chief Justice, Deputy Chief Justice and other judges; (b) the tenure of office of Chief Justice, Deputy Chief Justice and other judges of superior courts; and (c) the procedure for their removal from office. The challenges originally faced in the appointment of the Chief Justice and the subsequent vetting of sitting judges and magistrates to determine their suitability to remain in office under the 2010 Constitution are highlighted below.

Despite timely review and submission by CIC of various Bills, parliament has extended the time within which they are to be enacted. The extension of time for a further period of one year (i.e., to 27th August 2015) leaves the Bills listed in Table 2 pending. These Include: (a) the Court of Appeal (Organisation and Administration Bill, 2015; and (b) the High Court (Organisation and Administration) Bill, 2015. It is also proposed to legislate for the retirement benefits accruing to judges, and the draft Judges Retirement Benefits Bill, 2015 has been submitted by the Judiciary to the office of the Attorney-General and CIC for technical review and preparation for tabling in parliament in due course.

d) Legislation on the Subordinate Courts

According to article 169(1) of the Constitution, the subordinate courts are: (a) the Magistrates Courts; (b) Kadhis' Courts; (c) Courts Martial; and (d) any other court or local tribunal as may be established by an Act of parliament, other than the courts established as required by Article 162(2).

Clause (2) mandates parliament to enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1). The requirements of article 169(2) have not been fully met or implemented. Even though the Kadhis' Courts Act (Revised 2012) 1967 is in force, the Magistrates Courts Act (Revised 2012) 1967 requires substantial review to align the Courts with the constitutional standards for the organisation and administration of subordinate courts. The proposed Magistrates Courts Bill, 2015 was cheduled to be enacted within one year ending 27th August 2015. On the other hand, the Courts Martial were re-established under the Kenya Defence Forces Act, 2012.

e) The Contempt of Court Bill, 2013 (Maintaining the Dignity of Courts)

Respect for the dignity of both superior and subordinate court has been a matter of concern since the establishment of the Judiciary. While all statutes under which the courts are established, organised and administered impose sanctions for contempt of court in specific circumstances, it was considered necessary to consolidate the law on contempt of court. This prompted the formulation of legislative proposals that led to the draft Contempt of Court Bill, 2015. Presently, the law on contempt is contained in diverse statutory instruments including: (the Law Reform Act Revised 2012 (1956); (b) the Judicature Act Revised 2012 (1967); and (c) English law, including the rules of procedure observed in the High Court of Justice in England.

Following concerns expressed in various sessions of the National Council on the Administration of Justice (NCAJ) at which CIC is represented, the Commission was charged with the responsibility of convening a technical team to review legislative proposals, draft and prepare the Contempt of Court Bill for enactment. The draft Bill, which is scheduled for enactment in 2016 is designed to consolidate the law on contempt of court with a view to providing a defined legal framework for, among other things, (a) the promotion and protection of the dignity of courts and tribunals; and (b) punishment for contempt. The Bill is also designed to enhance, among other things (i) respect for the rule of law; (ii) obedience to court orders and awards; (iii) respect for and defence of the Constitution; and (iv) access to justice.

If enacted, the proposed law will be handy in combating impunity among private individuals, State officers, the public service and State organs and agencies that frequently disregard court orders and awards with the effect of undermining the rule of law and thus eroding public trust and confidence in the judiciary. It is also expected that the enactment of the proposed Bill will not only consolidate the law but will also lend clarity to and limit the jurisdiction of both superior and subordinate courts in punishing for contempt in various circumstances.

2.11.3 Administrative Framework

In addition to policy and legislation, the following administrative procedures, among other rules of procedure and practice rules issued by the Chief Justice from time to time, have been formulated to guide court users and judicial officers in the administration of justice:

a) the Supreme Court (presidential election petition) rules, 2013;
b) the Court of Appeal rules, 2010;
c) the Civil Procedure rules,2010 and other rules of procedure in courts having the status of the High Court;
d) the Civil Procedure Act Revised 2010 (1924);
e) the Criminal Procedure Code Revised 2010 (1930) and
f) the Defence Forces Standing Orders that regulate the procedure at Courts Martial.

2.11.4 Institutional Framework

a) Standards of Access to Justice

The requirements of articles 48 and 159(2) have been effectively met through, among other reform measures, (a) enabling legislation enacted during the period between 2011 and 2015 to regulate the organisation and administration of all superior and subordinate courts; (b) the adoption of appropriate policy guidelines to facilitate expeditious delivery of judicial services at proportionate costs; (c) the on-going establishment of court stations at various units of service delivery at the county level to enhance geographical access to judicial services; and (d) the publication of appropriate rules of procedure in both superior and subordinate courts to facilitate expeditious and effective case management. The proposed legislation on the organization and administration of the High Court and the Court of Appeal is designed to enhance expeditious and efficiency in the delivery of judicial services by superior courts. However, the draft High Court (Organisation and Administration) Bill, 2015 and the draft Court of Appeal (Organisation and Administration) Bill, 2015 are still pending in parliament. The two Bills are now scheduled for enactment in 2016.

Challenges

In addition to review of policy, legislation and administrative procedures on access to justice, CIC conducted a study in 2014 and 2015 to ascertain the extent to which the right of equal access to justice had been realized. The study revealed the following, among other challenges:

a) Mounting case backlog;
b) Solemnity of court proceedings compounded by use of legalese language;
c) Complex rules of procedure which render judicial services inaccessible to the majority of court users, who are unable to meet the cost of legal representation;
d) Inadequate financial and human resources, which continues to limit the ability of the judiciary to ensure fair geographical spread of court stations; and

e) Limited decentralization of judicial services to the smallest units of service delivery at county level.

The Commission's recommendations to address the foregoing challenges are highlighted below.

The rights of arrested persons guaranteed under article 49 are given effect by, among other instruments: (a) the recently published Bail and Bond Policy; (b) the Sentencing Guidelines and Policy; and (c) the Persons Deprived of Liberty Act, 2014. The policy document and legislation are designed to supplement the provisions of the Criminal Procedure Code Revised 2010 (1930) and give effect to the constitutional guarantees for the promotion and protection of the rights of persons held in detention or other lawful custody. The 2014 Act is designed to provide the legal framework for the realization of international standards and treaty obligations, which form part of the law of Kenya by virtue of article 2(5) and (6) of the Constitution.

The common misconception that access to justice is a right to which only accused persons and disputants in civil cases are entitled was recently dealt with. The enactment of the Victims Protection Act, 2014, which seeks to give effect to article 59 of the Constitution, provides the means for compensation and other support mechanisms for victims of offences, who hitherto played the role of mere witnesses in trials of offenders whose conduct resulted in their injury, loss or damage without any legal recourse for compensation. The 2014 Act also applies to cases where the perpetrators of the offence complained of, have not been identified or apprehended for trial. In effect, the Act imposes a primary duty on the State to guarantee protection and compensation for victims of certain crimes and offences in terms and conditions specified in the Act.

In the past, fair trial of offenders was often undermined by reluctance on the part of witnesses to testify for fear of reprisal by the accused. The enactment of the Witness Protection Act Revised 2010 (2006) and the establishment of the Witness Protection Agency in 2008 provide a framework for the protection of witnesses, who may also be victims of offences and who require protection from possible retaliation by accused persons. The enactment of the Victims Protection Act and the Witness Protection Act will go a long way in enhancing access to justice not only by accused persons but also by witnesses to and victims of such offences.

In addition to the foregoing guarantees, article 22 provides a constitutional framework for the enforcement of the Bill of Rights of which access to justice is an integral part. In addition to the right of action in person by anyone acting in their own interest, clause (2) permits court proceedings to be instituted by any of the following: (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members. Clause (3)(c) provides that "no fee may be charged for commencing the proceedings" in the enforcement of the Bill of Rights. In addition, paragraph (d) and (e) require that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and that an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

The current practice in the superior courts demonstrates respect for the Bill of Rights and adherence to the standards of access to justice set out in Articles 22, 48 and 159 of the Constitution, save for the apparent gap in policy and legislation to address the conditions for the promotion of ADR, including traditional dispute resolution mechanisms (TDR) prescribed in article 159(3) and to which we will shortly return.

b) Public Participation and Court User Committees

The notion of popular or public participation in decision-making is premised on the general principle that every citizen has the right to participate in decision-making. Even though this model of citizen participation has changed over the years as it adapts to the ideals of modern democratic governance, public participation may nonetheless be viewed as a fundamental element of planning and decision-making and to which the Judiciary is obligated to adhere.

Participation of the people is one of the national values and principles enshrined in article 10 of the Constitution, which every State organ is enjoined to respect, uphold and defend. To this end, the Judiciary has taken appropriate steps to ensure public participation in all its activities. Accordingly, it has demonstrated respect for the letter and spirit of the Constitution.

The establishment of the National Council for the Administration of Justice (NCAJ), under section 34 of the Judicial Service Act, 2011 is the statutory mechanism designed to facilitate cooperation between State and Non-State agencies in the delivery of justice. As a consultative forum, NCAJ is the means by which Court User Committees (CUCs established in all court stations at the county level pursuant to section 35 (c) find linkage with the governance, Justice, Law and Order sector.

NCAJ is required under section 35 (3) (b) of the 2011 Act to review and implement the reports of the CUCs. Its membership ensures meaningful participation and collaboration among (a) all State departments and agencies in the governance, Justice, Law and Order Sector; (b) civil society organizations; and (c) other key stakeholders involved in the administration of justice, such as the Law Society of Kenya (LSK), the International Commission of Jurists (ICJ), the Federation of Women Lawyers (FIDA), and various human rights organizations.

The primary responsibility of CUCs is to, among other things, (a) identify challenges that hinder the expeditious delivery of justice and propose effective solutions; (b) ensure an accountable, co-coordinated, efficient, effective and consultative approach in the administration of justice; (c) promote information sharing and learning among stakeholders; (d) implement policies and strategies of NCAJ; (e) identify the specific needs and challenges of various agencies for intervention by NCAJ; (f) propose stakeholder training on various fields of concern; (g) propose policy and legislative intervention for the effective and expeditious disposal of cases; (h) organize and hold open days, make visits to prisons, remand homes and other custodial facilities; (i) take appropriate measures to facilitate meaningful participation by all stakeholders in the administration of justice; and (j) promote alternative dispute resolution (including traditional dispute resolution) in accordance with the provisions of article 159 of the Constitution

Court User Committees provide a much-needed forum at which all stakeholders convene with judicial officers at their respective court stations to address matters of concern in the administration of justice in those stations. Accordingly, CUCs are the vehicles for meaningful public participation in the administration of justice. In addition, CUCs serve to promote accountability and improvement of performance by Courts and all State and non-state agencies that have a stake in the Governance, Justice, Law and Order sector. The Commission in the discharge of its mandate engaged with CUCs in Bungoma, Tharaka Nithi and Kisumu Couties and ascertained their effectiveness as a means of entrenching public participation in the Judiciary

In discharge of its mandate, CIC has engaged with Court User Committees in Bungoma, Tharaka-Nithi and Kisumu counties to ascertain the extent to which the Judiciary has succeeded in engaging meaningful public participation in the administration of justice.

c) The Judicial Service Commission

The Judicial Service Commission was established in accordance with article 171(1) of the Constitution. Its primary function is to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice as required by article 172(1). In particular, the Commission is mandated, among other things, to:

a) recommend to the President persons for appointment as judges;
b) review and make recommendations on the conditions of service of- (i) judges and judicial officers, other than their remuneration; and (ii) the staff of the Judiciary;
c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
d) prepare and implement programmes for the continuing education and (d) of judges and judicial officers; and
e) advise the national government on improving the efficiency of the administration of justice.

The Judicial Service Commission came into operation in 2010 immediately upon the enactment of the Judicial Service Act, 2010 and has since continued to discharge its constitutional mandate. In effect, the requirements of article 172 have been duly implemented subject, however, to the development of appropriate policy and administrative procedures to guide and ensure proper conduct of the business of the Commission.

d) The Judiciary Fund

Article 173(1) establishes the Judiciary Fund to be administered by the Chief Registrar of the Judiciary. The Fund is meant to be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary. It was thus meant to facilitate the independence of the judiciary, which is a new concept in the current constitutional dispensation. The Judiciary now presents it's own budgetary estimates to Parliament.

The Fund was originally brought into operation by enactment of section 27 of the Judicial Service Act, 2011. In July 2015, the Commission for the Implementation of the Constitution reviewed the draft Judiciary Fund Bill, 2015 and recommended its enactment as a separate statutory instrument with enhanced provisions designed, among other things. (a) to give effect to article 173(5) of the Constitution; and (b) to align the Act with the provisions of the Public Finance Management Act, 2012.

In effect, the provisions of article 173(5) of the Constitution have been duly implemented subject, however, to the establishment and continued review of policy and administrative procedures to ensure the effective regulation and administration of the Fund in accordance with the Constitution, the Act and the law relating to public finance management

e) Restructuring the Courts

The judiciary was re-reformed in 2010 pursuant to chapter ten of the Constitution. This in turn required far-reaching reform of the judicial system and the underpinning legal framework in accordance with which courts and tribunals exercise their judicial authority and a diverse range of enabling legislation. In doing so, those courts and tribunals are enjoined by article 159(2) and (3) to adhere to the specified principles of judicial authority so as to guarantee (among other things) fairness of process, full and equal access to judicial services and effective remedies by all at proportionate costs.

The restructuring of the judicial system and the subsequent enactment of the underpinning legal framework was intended, among other things, (a) to uphold the independence of the Judiciary, which is guaranteed by article 160(1); (b) to secure the tenure of office and protection of judges of superior courts; and (c) to facilitate the realisation of the fundamental right of access to justice guaranteed by article 48.

In addition to the institutional framework established under chapter ten of the Constitution, article 161 of the Constitution establishes various judicial offices and provides the basis for the appointment of various judicial officers and staff of the judiciary. According to article 161(1), the Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff appointed by the Judicial Service Commission in accordance with clause (3) and the Judicial Service Act, 2010.

Various other subordinate courts, administrative and quasi-judicial tribunals have also been established under a range of statutes pursuant to article 169(1)(d) to determine disputes peculiar to the different sectors of service delivery by the respective State organs. However, these tribunals are yet to be rationalized and streamlined to facilitate effective organization and administration by the Judiciary, as are other judicial institutions. Although there are legislative proposals to set standards for the establishment, organization and administration of administrative and quasi-judicial tribunals, the proposed legislation is far from enactment.

In addition to the existing subordinate courts, there is a proposal to establish Small Claims Courts under the proposed Small Claims Courts Bill, 2015 pursuant to article 169(2). This is to be done in order to enhance access to informal and more accessible judicial services in determination of small claims lodged in accordance with the proposed Bill. Despite timely technical review and submission by the Commission to the Attorney General, of this Bill in April 2015, Parliament extended time for its enactment to 27th August 2016 along with several other Bills in the justice sector.

f) Appointment of the Chief Justice, the Deputy Chief Justice and Other Judges of Superior Courts

Notwithstanding public expectation that the President would strictly adhere to the constitutional procedure for the appointment of the Chief Justice, the first attempt to appoint the Chief Justice, the Attorney-General and the Deputy Public Prosecutor in 2011 was not flawless. President Mwai Kibaki un-procedurally attempted to appointed the Chief Justice in 2011, and was prevailed upon to nullify the appointment. Subsequent appointment of the Chief Justice, the Deputy Chief Justice and other judges of the superior courts was properly carried out on the recommendation of the Judicial Service Commission in accordance with article 166 of the Constitution.

For the first time in the history of Kenya, the appointments made under article 166 were preceded by public examination of all candidates to ascertain their suitability. The participatory manner in which the public was engaged satisfied the constitutional requirement for participation of the people in accordance with article 10(2)(a). In addition, the appointments were designed to ensure respect for the constitutional right to equal treatment and non-discrimination, ethnic diversity, gender equity and equalization of opportunity for persons with disabilities and marginalized groups and communities.

The diversity in the backgrounds and abilities of these judicial officers testifies to the conscious effort made by the Judicial Service Commission and the appointing authorities to respect, uphold and live up to (a) the national values and principles set out in article 10; and (b) the guiding principles of leadership and integrity set out in article 73(2) of the Constitution. The participation of the people in the process of appointment was appropriately designed and conducted in such a way as to ensure public notice that all appointees met the prescribed qualifications for appointment and that they satisfied the requirements of chapter six of the Constitution.

The fidelity of those State officers to the guiding principles of leadership and integrity set out in chapter Six of the Constitution was put to test barely one year after the appointment in 2011 of the Deputy Chief Justice.

g) Decentralization of Judicial Services

Article 6(3) of the Constitution mandates every national State organ, including the judiciary, to "... ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service". To this end, the judicial transformation highlighted in this report is designed to ensure full and equal access to judicial services in every county and in all decentralised units of service delivery in harmony with the objects of devolution set out in article 174. In particular, article 174 (f) expresses the need "to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya". The Judiciary has taken appropriate reform measures to ensure decentralisation of judicial services and enhance access to justice. The establishment in recent years of seventeen new High Court stations to enhance the geographical spread of superior courts with many more planned for establishment and expansion demonstrates the Judiciary's commitment to decentralise and ensure reasonable access to judicial services in all counties.

h) Alternative Dispute Resolution Mechanisms

The Constitution of Kenya, 2010 recognizes the application of TDR and ADR mechanisms in dispute resolution for efficient dispensation of justice.[37] Chapter Four of the Constitution contains a comprehensive

Bill of Rights, which guarantees fundamental rights and freedoms to which all are entitled. However, the fundamental rights and freedoms cannot be realized in the absence of an enabling framework for their enforcement. To this end, the Constitution provides for the right of access to justice under article 48 and enjoins the State to ensure access to justice for all persons. The Constitution further stipulates that if any fee is required, the same shall be reasonable and not impede access to justice. The Constitution contemplates 'justice in many rooms' and promotes access to justice through informal systems such as TDR and ADR mechanisms in addition to the conventional judicial system. Indeed, a high percentage of disputes in Kenya are resolved either out of court or before they become the subject of judicial proceedings. This is achieved through TDR and other ADR mechanisms. TDR and other community justice systems are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

37 The Constitution of Kenya, 2010 art 159 (2) (c).

In order to guarantee access to justice in Kenya, the Constitution embraces dynamism in justice systems by encouraging the utilization of formal and informal justice systems. To this end, article 159 recognizes the use of TDR and ADR mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya. It stipulates that in exercising judicial authority, the courts and tribunals shall be guided by the following principles: (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

Clause (3) provides that TDR mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights; (b)is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality; or (c) is inconsistent with the Constitution or any written law.

2.11.5 Challenges and Recommendations

Operational Challenges in the Reform Process: Even though the policy, law and institutional reforms designed to reaffirm the judicial authority of courts and tribunals and the underpinning legal system under the 2010 Constitution have enjoyed notable success, the reform process has not been free from operational challenges. Indeed, the implementation of Chapter Ten of the Constitution has resulted in judicial transformation that has been the subject of periodic reports that reveal significant milestones and challenges. A few of such challenges are highlighted below.

Inadequate Budgetary Allocation: As a general rule, the independence of the Judiciary and its ability to effectively exercise its judicial authority is largely dependent on adequate budgetary allocation. . No doubt, strained financial resources hamper plans to enhance geographical access to judicial services and to optimise the much-needed human resource and the capacity to deliver on its constitutional functions.

In addition to placing limitations on its human resource capacity, the financial constraints in the Judiciary have an adverse effect on its operational systems. Indeed, lack of efficient information management systems stands in the way of efficient records management, which in turn impacts negatively on service delivery and on the general performance of judicial officers. More often than not, poor record management results in needless adjournments attributable to untraceable files and this ultimately results in poor case management and mounting backlog.

Inadequate budgetary allocations to the Judiciary has also affected the ability of this arm of government to ensure full decentralisation of judicial services by, among other things, (a) enhancing the geographical spread of both superior and subordinate court stations; (b) enhancing human and technical capacity; and (c) implementing appropriate case management programmes to ensure expeditious handling of cases and equalisation of opportunities to access judicial services.

Disregard for the Rule of Law: The failure on the part of some State officers, including the executive and members of parliament, to obey court orders has had the effect of undermining judicial authority. This is compounded by the lack of respect for the independence of the judiciary by parliament as evidenced by reductions in budgetary allocation to the judiciary as a reaction to a series of judgments that have faulted parliament.

Lack of Clarity on the Retirement Age: Article 167 of the Constitution provides that a judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty five years. However, the provision does not address a situation where a judge is appointed to another office, leading to contestations on retirement age. The apparent resistance to change by a section of judicial officers in respect of matters relating to their terms of service and retirement is a case in point.

Corruption: Whereas judicial reforms, including the vetting of judges and magistrates, were intended to eliminate corruption in the judiciary, corruption remains a matter of grave concern. The Chief Justice

has on several occasions expressly admitted that this vice continues among judicial officers and that decisive steps will be taken to combat corrupt practices by, among other things, undertaking a lifestyle audit of judicial officers who appear to be living beyond their means. However, no active investigations or prosecutions have been carried out in this regard, raising questions as to the judiciary's commitment to eradicate corruption.

Lack of Clear Timelines for the Appointment of Judges: Whereas the Constitution and Judicial Service Act has provided the process for the appointment of Judges, it does not provide timelines within which the President, once he has received the names of the nominees from the Judicial Service Commission, should make the appointments. This has led to a delay by the President in appointing judges nominated by the Commission, raising concern as to the President's respect for the judicial institution.

Additionally, whereas Article 166(1) empowers the President to appoint the Chief Justice and the Deputy Chief Justice on the recommendation of the Judicial Service Commission, the lack of statutory procedure, and the nomination by the Commission of one candidate for each office, raises questions as to whether the process is tantamount to making the Commission the appointing authority. This is in view of the fact that the President is left with no option but to appoint the single candidate nominated by the Commission in each case.

Challenges in the Administration of Justice

Below are a few of the Commission's observations and challenges that require administrative intervention by relevant State departments and agencies to enhance effective administration of justice:

a) Inadequate hygienic holding facilities in courts and police stations, some of which are inappropriately used to hold men, women and children together;
b) limited space and overcrowding of cells and holding facilities leading to detention of hardcore criminals together with petty offenders;
c) lack of separate prisons for women and juvenile detention facilities, as a result of which women and children remandees are detained in common cells at police stations;
d) lack of proper and secure means of transportation for persons held in prison custody, posing the risk of escape by prisoners or assault on prison officers by such detainees;
e) persistent delay in production of prisoners and accused persons and late arrival in court due to lack of transport facilities leading to delays in hearing and determination of cases;
f) prolonged detention in prison of Death row convicts without commutation of sentence to life or pardon to ensure that they are gainfully engaged in productive occupation as opposed to idle detention that burdens prison facilities at which they are held;
g) shortage of prosecutors, resulting in inordinate delay in determination of criminal cases;
h) insufficient and inaccessible court facilities in many parts of the country leading to overcrowding of courtrooms;
i) lack of effective secretarial services for CUCs at county level compounded by inadequate funding, which impacts negatively on their performance;
j) shortage of magistrates in various counties resulting in case backlogs and general inefficiency in the administration of justice;
k) lack of funds to meet Medical Bills for remandees and for victims of offences, including payments levied by public hospitals to issue P3 forms to victims of offences and to carry out post-mortem examinations on murder victims;
l) lack of witness protection and legal aid programmes in various court jurisdictions;

Even though CUCs submit their reports to NCAJ regularly, it takes far too long for such pressing issues to be addressed. The slow pace with which the concerned State departments respond and intervene in these challenges is attributable to inadequate budgetary allocations and human resource capacity constraints, which should be addressed as a matter of urgency.

Recommendations

In order to realize full access to justice by all on an equal basis, CIC recommends the following reform measures:

i) Decentralization of superior and subordinate court stations; appropriate steps should be taken to decentralize judicial services to the lowest units of service delivery at the county levels

in accordance with article 6(3) of the Constitution. Steps should also be taken to establish mechanisms for the promotion and regulation of community-based justice systems, including traditional dispute resolution mechanisms.

ii) Clear policy guidelines should be formulated to guide meaningful public participation by all stakeholders in the justice sector so as to give effect to the principle of "participation of the people" set out in article 10 of the Constitution;

iii)

iv) Simplification of the rules of procedure to facilitate expeditious handling of cases fairness of process, party control and exclusion of legal counsel in small claims. This should also be done to ensure that courts and tribunals focus on substantive rather than procedural justice pursuant to article 159(2)(d) of the Constitution, which obligates courts and tribunals to dispense justice without undue regard to procedural technicalities;

v) Legal and policy reforms should be introduced to entrench the pending legislative proposals for the organisation and administration of superior and subordinate courts. The continuous monitoring and evaluation of such programmes should be undertaken to appraise the efficacy of the existing legislation, policy and administrative procedures;

vi) The policy, legal and institutional frameworks be augmented to establish a strong foundation for the realization of the right to equal access to justice. Further, appropriate programmes, plans and actions be implemented to facilitate innovative strategies that guarantee full and equal access to judicial services;

vii) There is need to formulate policy and legislation to guide the promotion and application of ADR (including traditional dispute resolution mechanisms) and to ensure that informal justice systems meet the conditions prescribed in article 159(2)(c) and (3) of the Constitution;

viii) Institutional strengthening: Administrative measures should be taken to harness information technology and to train all judicial officers and staff of the judiciary so as to facilitate expeditious delivery of judicial services and efficient record management in all court stations. The National Council on the Administration of Justice should also be strengthened by reconstituting it as a body corporate with defined linkages with court user committees in all judicial stations so as to facilitate effective response to the needs and concerns of all court users in consultation with the relevant state departments;

ix) A constitutional amendment or statutory reform to clarify the process for nomination of candidates to be appointed to the position of Chief Justice or Deputy Chief Justice should be introduced.

x) To address the challenge on the appointment of the Chief Justice and the Deputy Chief Justice, the law should be amended to allow the Judicial Service Commission to send names of more than one nominee to the President for his consideration.

xi) Chairmanship of the Judicial Service Commission: The Chief Justice currently plays a triple role. He is the Chief Justice and Head of the Judiciary; He is a Supreme Court Judge and the President of the Supreme Court and is also the Chair of the JSC. Firstly, these roles compromise the effectiveness of the Chief Justice in any one of these roles, thus prejudicing the effectiveness of the judiciary generally. The dual role of being CJ and Chair of JSC can also lead to conflict of interest where the CJ is both an employee of, and accountable personally and on behalf of the Judiciary to the JSC, but also chairs this same body he is accountable to.

2.12 DEVOLVED GOVERNMENT

2.12.1 Introduction

The Constitution of Kenya 2010 divides the territory of Kenya into 47 counties and introduced two levels of distinct but interdependent governments, namely the national and the county governments {(Article (1)-(2)}. The decision to adopt a devolved system of government was influenced by Kenya's experience with a centralized system of government, under which decisions including allocation of development resources were made at the capital without the active participation of the people. Communities were certainly not in control of their governance. One of the consequences of this mode of governance was that some regions of the country received more resources than others. Service delivery was skewed thus leading to the marginalization and under development of some regions.

Article 174 of the Constitution lists the objectives of devolution as: the promotion of democratic and accountable exercise of power; fostering national unity by recognizing diversity; giving powers of self-governance to the people and enhancing the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognizing the right of communities to manage their own affairs and to further their development; protecting and promoting the interests and rights of minorities and marginalized communities; promotion of social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensuring equitable sharing of national and local resources throughout Kenya; facilitating the decentralization of State organs, their functions and services, from the capital of Kenya; and enhancement of checks and balances and the separation of governmental powers.

It was expected that the implementation of the devolved system of government would bring the challenges associated with centralized governance to an end. In particular it was envisaged that service delivery would be greatly improved under the devolved system of government.

Article 175 deals with the principles of devolved government. Specifically, the article states that County governments established under this Constitution shall reflect the following principles;

a) County governments shall be based on democratic principles and the separation of powers;
b) County governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and
c) No more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

This section of the report outlines key achievements, in terms of national policies and laws developed by Parliament, and the institutional framework established under the Constitution and Acts of Parliament to facilitate implementation of the system of devolved government. It also reviews the status of development of polices and laws by county governments, establishment of institutions at the county government level and other measures undertaken at this level to ensure the effective implementation of the system of devolved government. The section also highlights key challenges facing devolution and recommendations thereof.

2.12.2 Legislative and Policy Framework for Devolution

1) National Policies

The Constitution envisaged that appropriate policies would be passed to give effect to the provisions on devolution. The Fourth Schedule to the Constitution confers the national government with policy making and standard setting responsibilities in various sectors such as, health, tourism, agriculture, energy and education. It is a trite principle of good governance that policy should precede legislation i.

However, there was no policy developed by the national government prior to the enactment of devolution laws required under Chapter 11 of the Constitution. Following the first general elections under the Constitution, the National Executive set out to develop a national policy on devolution through the a Sessional Paper on Devolution , which had not been adopted by the time of writing this report.

The adoption of the Constitution and the advent of the system of devolved government call for review of policies that were in existence and the development of new ones, where necessary, to accommodate the new governance structure and principles of governance enshrined in the Constitution.

2) National Legislation

The Constitution, under Chapter 11, required the enactment of a number of laws to operationalize the system of devolved government. Most of these laws were required within a period of between 18 months and 3 years from the date of the promulgation of the Constitution. This was necessary due to the importance of the envisaged laws in facilitating the transition from a centralized to a devolved system of government. Specific legislation identified in the Fifth Schedule to the Constitution for enactment are:

a) Elections of Speaker of a county assembly (article 178)
b) Urban Areas and Cities (article 183)
c) Support for county governments (article 190)
d) Removal of a county governor (article 181)
e) Vacation of office of member of county assembly (article 194)
f) Public participation and county assembly powers, privileges and immunities (article 196)
g) County assembly gender balance and diversity (article 197)
h) Legislation to effect Chapter eleven (article 200 and Sixth Schedule, section 15)

The following devolution related laws, which address the above requirements, were enacted in accordance with the timelines specified in the Constitution to facilitate implementation of the devolved system of government:

a) **The County Governments Act 2012**, which generally gives effect to Chapter 11 of the Constitution and provides county governments' with powers, functions and responsibilities to deliver services.
b) **The Transition to Devolved Government Act 2012**, which provides a framework for transitional arrangements to devolved government. The Act establishes the Transition Authority to facilitate the transition, and sets out the criteria and procedure for the phased transfer of functions to county governments.
c) **Urban Areas and Cities Act 2012. This is an Act of parliament** that gives effect to article 184 of the Constitution by providing for the classification, governance and management of Urban Areas and Cities and the criteria for their establishment.
d) **Inter-Governmental Relations Act 2012.** This Act establishes a framework for consultation and cooperation between the national and county governments and amongst county governments; provides mechanisms for the resolution of inter-governmental disputes; establishes a number of inter-governmental relations structures in line with the principles of cooperative and interdependent governance between the national and county governments and within each of the two levels of government.
e) **Public Finance Management Act 2012** that provides for the effective management of public finances by the national and county governments and the exercise of the oversight responsibility by parliament and county assemblies. (Details of this Act are found in section 2.13 of this report).

2.12.3 Administrative Procedures

The following regulations/Administrative procedures were developed under various devolved government laws to give effect to the provisions of the laws.

a) Transition to Devolved Government (Transfer of Assets and Liabilities) Regulations, 2013
b) Transition to Devolved Government (Assumption of Office of County Governor) Regulations, 2013
c) The Transition to Devolved Government Act, Transfer of Functions, 2014

2.12.4 Institutional Framework

The Constitution establishes various institutions to implement the devolved system of government. Most of these institutions have been created and running, as discussed below.

1) County Executive Committees

Article 176 of the Constitution designates a county government for each county. County governments comprise of a county assembly and a county executive. The executive authority of a county is vested in county executive committees (CECs) comprising the Governor, the Deputy Governor and County Executive Committee members. The Governor and Deputy Governor are elected State officers while CEC members are appointed by county governors with the approval of county assemblies. The county executive is mandated to implement county legislation, national legislation within the county to the extent that the legislation so requires, manage and coordinate the functions of the county administration and its departments and report to the county assembly on matters relating to the county.

County executive members are answerable to the Governor in the discharge of their mandate and vacate office when the office of the governor becomes vacant. As county executive teams, CECs should take collective responsibility in their decisions and ensure consultation and cooperation in decision-making.

Article 179 of the Constitution provides the composition of County Executive Committee members. In addition to subjecting the appointment of these public officers to regional, ethnic and gender balances, sub-article 3 requires that the number of executive members shall not exceed; one-third of the number of members of the county assembly, if the assembly has less than thirty members; or ten, if the assembly has thirty or more members. The devolution assessment38 carried out by CIC found that a total of 448 CEC members had been appointed in the 47 counties. Of these 33% were female and 67% male. Overall, the CEC members were about 20% of the total number of county assembly members. The number of CEC members per county ranged between 7 and 10, the majority of counties having 10 CECs. All counties had complied with article 179(3)(b), as none had more than 10 CECs. Similarly, all counties with less than 30 MCAs, had the number of CECs that were within the required one-third of their MCAs.

The Constitution dictates that all public appointments at the national and county government levels respect principles of equity, equality and affirmative action for special interest groups, minorities and the marginalized. A number counties have challenges in meeting these requirements.

2) Decentralized Units of Government, Urban Areas and Cities

Devolution is about moving services closer to the people. Article 176 of the Constitution requires all county governments to decentralize their services. The basic decentralized units are outlined in section 48(1) of the County Governments Act 2012. The units are: sub-counties, wards and villages. Most county governments have established sub-counties and wards while a few established villages and zones. However, the sub- counties and wards are not yet operating at optimal levels. There is need for county governments to ensure that the decentralised units are well resourced with technical personnel, all systems and structures are devolved and that decentralisation is undertaken in all departments.

Article 184 of the Constitution and the Urban Areas and Cities Act, 2012 provides for governance and management of urban areas and cities. Despite the Act giving criteria for classification, most counties have not carried out the classifications. The main reasons given by county governments was the high threshold set in the Urban Areas and Cities Act 2012, the expected high cost of running the structures and lack of resources. Some county governments have called for a review of the Act with view to changing the criteria for classification. The Transition Authority has proposed amendments to the Act to address these concerns

3) County Assemblies

The County Assemblies are the legislative arms of county governments (article 176). The Assemblies comprise of elected State officers each representing a ward. The other category of MCAs is the nominated members who represent special interest groups such as the youth, persons with disability, marginalized communities and women. In total, there are 2,222 members of county assemblies of whom 1,450 were directly elected and 772 nominated under article 90 of the Constitution. The county assemblies are therefore properly established, each with a speaker. County assemblies are mandated to legislate for counties, represent their constituents and oversee the discharge of functions of the executive.

The Constitution envisaged that the county executive committees and county assemblies would, while respecting the principle of separation of powers and functions, work together in the delivery of services to the people. However, this has not always been the case. Within two years of commencement of implementation of the devolved system of government, there have been cases of county assemblies misusing their oversight powers. This was evident during the vetting for approval of county public officers appointed by governors and in the numerous attempts to impeach governors and CECs. In most cases, this is done for political considerations rather those objective criteria as set out in the Constitution and the law. The effect of this was that some counties, such as Nakuru, remained without properly constituted county executive committees for a long time after county governments were established. This no doubt adversely affected service delivery.

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38 Assessment of the Implementation of the System of Devolved Government, "From Steps To Strides", June 2014

Functions and Powers of County Governments

Article 186 of the Constitution sets out functions and powers of the national governments and county governments. The Fourth schedule to the Constitution spells out functions for the national government and for county governments under Parts A and B of the schedule respectively. Some functions or powers are conferred on both levels of government while others are exclusive to either level of government. The national government has residual powers for functions or powers that were not assigned to any level of government.

Section 15 of the Sixth Schedule to the Constitution requires Parliament to enact legislation to make provision for the phased transfer of functions assigned to county governments from the national government. This would take a period of not more than three years after the first general elections under the Constitution. The legislation under this section was required to establish criteria that must be met before a function is transferred as a guarantee that county governments are not given functions beyond their capability. The envisaged law is the Transition to Devolved Government Act 2012.

The Transition to Devolved Government Act 2012, establishes elaborate criteria for the transfer of functions to county governments. The Act sets out phase one activities, to be undertaken, prior to the first general elections and, phase two activities, to be undertaken in the period after the elections. The Transitional Authority was established under this Act to spearhead activities of the two phases.

A review of the TA reports39 submitted to CIC and assessment of the implementation of county government functions showed that, while TA discharged some of its mandate, most of phase one activities were not done before the first general elections as required by the Constitution. At the date of publication of this report, two and a half years after the commencement of the system of devolved government, some phase one activities such as costing of functions and audit of assets and liabilities had not been completed.
TA did well in preparing for the initiation and ushering in of county governments by reviewing legislation, creating rules and procedures, preparation of County Standing Orders, recruitment and posting interim clerks to county assemblies, the purchase of hansard equipment for the assemblies, among others. It also succeeded in the creation of county treasuries in collaboration with the National Treasury.

However, TA did not accomplish most of the critical mandates such as functional analysis and competency assignment, which were central to the transition process. This mandate entailed determination of functions to be transferred to the county and national governments, development and utilization of a framework for the transfer of functions, and establishment of criteria for the transfer of functions to ensure no county was given functions it could not perform. Despite this elaborate process, TA transferred virtually all the functions from the Fourth Schedule to county governments, which defeated the purpose of functional analysis and transfer based on competency.

The progress in the transfer of functions to county governments, progress made by county governments in setting up legislation, institutions and structures required to discharge their mandate and the extent to which county governments are discharging transferred functions, is summarized below.

a) Analysis and Transfer of functions

The Transition Authority, in exercise of the powers conferred to it under sections 23 and 24 of the Transition to Devolved Government Act, 2012 transferred the functions in one go, vide Gazette Notice No. 116 of August 2013. This followed a political decision reached at the National and County Government Coordinating summit. The transfer disregarded the spirit of the Constitution, the law and the fact that counties were at different levels of preparedness.

This transfer, (known as "big bang") might have had adverse effects on the performance of some of the transferred functions; (i) some counties did not have adequate capacity to perform the transferred functions, (ii) the functions were not costed hence resource allocation was not commensurate with the functions, (iii), some functions, especially the concurrent ones, were not unbundled leading to conflict and mandate over-laps between the national and county governments.
The transfer of functions was generally marked with controversy. Even after the big bang transfer

39 Analysis of Transition Authority Progress Reports and Evaluation of Performance, December, 2013

twenty-nine counties were not satisfied with the transfer process. These counties appealed to the Senate for intervention and determination, including transferring parts of the functions that they deemed as still outstanding. The Senate directed that the outstanding aspects of the functions be transferred to the counties40.

In view of this, there is need to finalize the analysis and costing of functions and further unbundling of concurrent functions before the end of the three-year transition period.

b) Audit and Transfer of Assets and Liabilities

As provided in the Transition to Development Government Act, 2012 TA was required to prepare and validate an inventory of all existing assets and liabilities of government, other public entities and the defunct local authorities. Specifically TA was required to:

a) Make recommendations for the effective management of assets of the national and county governments;
b) Provide mechanisms for the transfer of assets which may include vetting the transfer of assets during the transition period;
c) Develop the criteria to determine the transfer of previously shared assets and liabilities of the government and defunct local authorities

The audit of assets and liabilities was to facilitate their transfer to county governments together with the transferred functions. However, the audit of assets and liabilities was not completed in phase one as required. As a result, counties faced serious challenges relating to liabilities incurred by the defunct local authorities with some receiving court summons and petitions over the debts. The apparent indebtedness of counties stemmed from inheritance of accounts of the defunct local authorities and the inability to accurately determine opening and closing balances.

Cases of illegal transfer of some public assets, mainly buildings and land, by some former council officials were reported to TA by county governments. Consequently, TA issued a circular stopping any dealings in public assets before the completion of the Audits. This was in line with the Transition to Devolved Government Act, 2012 that provided for a moratorium barring all public entities from transferring assets and liabilities before March 2016. The Transition Authority further developed regulations on Transfer of Assets and Liabilities to deal with special cases where there is justifiable need to transfer assets and liabilities during the transition period.

The TA and the Auditor General, through the Integrated National and County Assets Register Centre (INCAR) should strive to finalize the assets and liability register.

c) Audit of Human Resources

Public Service delivery is about meeting the needs of the citizens and the delivery should be in an efficient, effective, accessible manner, good quality at affordable costs and within shorter waiting periods. The realization of these objectives requires a motivated and well-trained human resource. At the national government level, the management of the human resource function is the responsibility of the Public Service Commission. At the county government level this function is performed by County Public Service Boards. The County Assembly Service Board manages the human resource requirement of County Assemblies. Similarly the Parliamentary Service Commission manages the human resource function of Parliament.

The County Public Service Boards and the County Assembly Service Boards are body corporates established under the County Governments Act, 2012 to, among others, appoint persons to hold offices in the county public service and appoint persons to hold offices in the county assembly, respectively. County executives and county assemblies established the Boards respectively after the commencement of the devolved system of government in line with the law.

40 The Senate Report of the Sessional Committee on Devolved Government on the Appeals for the Transfer of Functions to the Counties pursuant to Section 23(7) of the Transition to Devolved Government Act, 2012 dated 10th April 2014.

To address the staffing and human resources issues in the transition period, section 138 of the County Governments Act, 2012, provides for secondment of officers who were employees of the Public Service Commission and were serving in a county government on the date of the establishment of the county government. Further, The Fourth Schedule to the TDGA required TA to audit government staff in counties and provide mechanisms for transition of government and former local authority employees.

Notwithstanding the legal requirement for sequencing of activities, TA did not undertake the audit before the March 2013 general elections. Consequently, by default, defunct local authority employees were inherited by county governments while PSC employees who were based in counties were seconded to county governments. TA hired some staff dubbed 'County interim teams', who included interim county secretaries, ICT officers, Principal Finance Officers, Payroll Managers and Hansard Officers. On their part county governments recruited their own staff even before the staff audit. As a result of the failure to undertake the audit on time and the rash by county governments to hire staff without rationalizing the existing staff, county governments faced huge wage bills due to a bloated workforce. There is also a high level of discontent among county government staff due to disparities in terms of service, delayed or missed promotions and job insecurity due to the different modes of engagement. Unresolved staffing issues by county governments are the proverbial 'white elephant in the room' and the issue must be resolved expeditiously.

In 2013, the national executive, PSC and TA introduced the Capacity Assessment and Rationalization of the Public Service (CARPS) programme. It is expected that some of these challenges will be resolved once the CARPS programme is completed. However, there has been concern that even before the CARPS exercise was completed, SRC commenced the Job Evaluation Exercise. Delayed finalisation of evaluations and assessments of staff issues has left county governments in limbo with regard to staff rationalisation and harmonisation of pay structures.

Nevertheless, the establishment of County Public Service Boards has seen improvements in the management of human resources by county governments. An assessment by CIC in June 2015[41] showed that some County Public Service Boards had recruited key personnel and officers, developed strategic plans, adopted codes of conduct and commenced training and staff sensitization on their mandate. They had also started developing human resource policies and manuals to guide recruitment, promotions and human resource development and management.

To ensure that devolution lives up to the promise of a nation united in diversity and to promote national cohesion, section 65 of the County Governments Act, 2012 requires county governments to ensure that at least 30 per cent of their workforce is filled by members who are not from the dominant community in the county. The assessment by CIC revealed that most county governments did not meet that requirement.

The Transition Implementation Plans prepared by county governments pursuant to the requirements of the TDGA indicated that most county governments had proposed a number of polices for development. However, reports from the counties indicated that a few policies had been developed, most of the policies identified by counties were being developed, and a number of counties were yet to identify specific policies for some functions. Most county governments attributed the slow pace of development of policies to inadequate technical personnel, limited time for policy development, financial constraints and differing opinions on activities to be prioritized.

Legislation by County Governments

Article 185 of the Constitution mandates county assemblies to make laws necessary for the effective discharge of devolved functions and powers. Data collected from county governments during CIC monitoring activities indicated that most county governments had developed some laws. Though the

enacted laws were instrumental in enabling service delivery in various sectors, the legislation process, in many counties, were faced with delays.

The delayed enactment of laws was attributed to skills and knowledge gaps required to originate, draft and review Bills. The Government Printer was also blamed for delaying publication of laws after

41 Assessment of Implementation of Transferred Functions to County Governments, Sustaining the Momentum, by CIC, August 2015

enactment. The impression created by counties is that the government gives priority to laws passed by parliament.

The legislative process at the county government level was, in some counties, marred by political exigencies. For instance, some county governments were late in the development of Appropriation and Finance Acts due to disagreements on how the county budget should be shared between the executive and the legislature.

Some county governments had also enacted some unconstitutional laws such as Ward Development Funds modeled along the County Development Fund Act, even after the courts found CDF to be unconstitutional[42]. Regulations and administrative procedures required to provide procedures for implementation of county government laws are not developed in most counties.

4) Citizen Service Centres

Article 232 of the Constitution provides for responsive, prompt, effective, impartial and equitable provision of services as a principle of public service. Section 119 of the County Governments Act, 2012 requires counties to establish citizen service centres to serve as central office for the provision by the county executive committees and the national government of public services to the citizens. Not many counties have established these centres. Some rely on the Huduma centres established by the National Government while others established service desks and dubbed 'Huduma Bora Centres' as points of service delivery.

In some counties, for instance Migori County, citizen service centres and the Huduma centres have been established in the same town. While this is expected to improve service delivery, it is likely to lead to unhealthy competition between the county government and the national government and may amount to duplication of roles between the two levels of government. There is therefore need to streamline the establishment of the centres. The two levels of government should explore possibilities of collaboration in the establishment and management of the centres.

5) Public Participation

COK 2010 under article 10(2) (a) recognizes participation of the people as one of the principles of governance. Moreover, section 91 of the County Governments Act, 2012 requires the establishment of modalities and platforms for citizen participation. Article 174(c) provides that the object of devolution is to "enhance the participation of people in the exercise of the powers of the State and in making decisions affecting them." Article 184(1)(c) further requires for national legislation to provide for mechanisms "for participation by residents in the governance of urban areas and cities."

As the country embraces a fully devolved system of governance where planning, coordination, budgeting, execution, monitoring and evaluation are done at county level, enhanced citizen participation is critical in order to ensure transparency, accountability and ownership. Counties apply various tools and approaches to facilitate citizen participation, which include but not limited to:

i) Holding town hall meetings;
ii) Receiving complaints and memoranda from members of the public;
iii) Holding community meetings;
iv) Use of ICT platforms;
v) Use of notice boards;

These mechanisms are meant to spur the interest of citizens and enhance their participation in governance processes.

6) Civic Education

For effective public participation, citizens require an understanding of the Constitution and other laws. Civic education ensures that citizens are well informed and thus can effectively participate in governance including planning and resource utilization. In the August 2015 CIC Assessment Report43, most counties had not yet established civic education units as required by law. In view of the importance of civic education it is recommended that all counties should put in place mechanisms for the conduct of civic education.

42 High Court (Constitutional and Human Rights Division) Petition No. 71 of 2013
43 CIC, (2015 August), Second Assessment Report: "SUSTAINING THE MOMENTUM", Nairobi.

In Sections 99-101 of the County Governments Act, 2012 the national government is required to design a framework of civic education and to determine the contents of the curriculum for civic education in consultation with county governments, including the public and institutional stakeholders. On the other hand, county governments are required to develop county legislation to provide the requisite legal and institutional framework for purposes of facilitating and implementing civic education programmes.

7) County Boundaries

In establishing the 47 counties, the Committee of Experts on Constitutional Review, in its final report, proposed the adoption of the boundaries of the administrative districts enacted in 1992 through the Districts and Provinces Act, 1992 as the boundaries of the 47 counties of Kenya. The Constitution only makes provision for alteration of county boundaries by a Commission set up for that purpose and approved by at least two thirds of members of county assemblies and by at least two thirds of the county delegations of the Senate. While there is no express provision on delimitation of county boundaries, in 2012, the IEBC, in delimiting constituency and ward boundaries used sub-location boundaries as defined in the Districts and Provinces Act, 1992 to delimit ward and constituency boundaries.

Since there is no express provision for the first delimitation of county boundaries under the Constitution, guided by the recommendations in the Final Report of the Committee of Experts on Constitutional Review, the Interpretations and General Provisions Act, 1992 and the County Governments Act, 2012 should be amended to adopt the boundaries of the administrative Districts enacted in 1992 by the District and Provinces Act to be the boundaries of the 47 counties of Kenya.

The lack of clarity on boundary delimitation has led to boundary disputes between different counties including disputes between Machakos and Makueni, between Nyamira and Kisii, and between Taita-Taveta and Kwale counties.

8) Cooperation Between National and County Governments

The Constitution establishes two levels of distinct but interdependent governments. The two levels of governments are required to cooperate and consult in the course of carrying out their respective functions. They are required to perform their functions in recognition of the principle of separation of powers, mutual support and assistance. Article 189 also demands that government at each level must respect the institutional and constitutional integrity of government at either level. The Intergovernmental Relations Act, 2012 gives priority to dispute resolution through Alternative Dispute Resolution platforms such as the Council of County Governors and the National and County Government Coordinating Summit, The Constitution creates the Senate to protect the interest of counties and their governments.

There have been a number of challenges regarding cooperation and consultation. Instances of failure to cooperate and consult have been experienced in the last five years of implementation. This lack of cooperation and consultation has occurred between the national and county governments as well as between the two arms of County Governments.

9) National and County Government Coordination Summit

The Intergovernmental Relations Act, 2012 establishes the National and County Government Coordination Summit (herein referred to as the Summit) as the apex body for intergovernmental relations. It provides a forum for consultation and co-operation between the national and county governments, for monitoring the implementation of national and county development plans, coordinating and harmonizing the development of county and national governments policies and facilitating and coordinating the transfer of functions, power or competencies from and to either level of government.

The Summit was fairly active in the first year of its existence when it facilitated the settlement of political disputes between the national and the county governments. This was especially the case on matters relating to revenue sharing and transfer of functions from the national to the county governments. The Summit is required to meet at least twice annually to deliberate on matters of mutual concern to the two levels of government. By November 2015 the Summit had regrettably not met even once. Failure by the president, as chair of this body, to convene meetings of the body is a violation of the constitutional requirement that the body meets at least two times in one calendar year.

10) Council of County Governors

The Council of County Governors comprises of the Governors of the 47 counties. The Council provides a forum for consultation amongst county governments. It also serves as a forum for sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promoting best practice on matters of interest to the county governments. The Council, is also mandated to facilitate capacity building for county governments, facilitate dispute resolution between county governments and encourage peer review, monitor and evaluate each other's performance as a means of benchmarking and exchange of best practices between county governments.

The Council of County Governors is also expected to prepare and submit reports annually to Parliament, the National and County Government Coordinating Summit and County Assemblies.

There have been concerns that the Council of County Governors has in some instances taken decisions reminiscent of a centralized system of government. For instance, the Council has lobbied for equal allocation of resources such as grants from national government to county health facilities to all counties. Such decisions create disadvantage to those counties that host level five hospitals (formerly provincial hospitals) since the counties must use similar allocations to fund facilities that serve residents of many counties. The Council of County Governors should provide a mechanism for inter county dialogue but avoid recentralization of decision making and treating all counties as equal regardless of a county's development status and unique character.

The Council of County Governors should cultivate good working relationship with the Senate, National Assembly and national government ministries so that any issues that may create misunderstanding are expeditiously and amicably resolved.

11) Intergovernmental Relations Technical Committee

Section 11 of The Intergovernmental Relations Act, 2012 establishes the Intergovernmental Relations Technical Committee, which is comprised of a chairperson and not more than eight members appointed by the National and County Government Coordinating Summit. The Committee members were appointed and took office in March 2015. The Technical Committee is responsible for the Summit's day-to-day operations, including facilitating its activities and implementing its decisions. The Technical Committee also acts as the National and County Government Coordinating Summit Secretariat. Section 12 of the Act, provides that the committee, will take over the residual functions of the Transition Authority after it's dissolution. The formation of the committee was expected to strengthen the cooperation and coordination between the two levels of government.

In a consultative meeting with CIC, Committee members reported that a weak legislative framework that did not give the Committee operational autonomy hampered the discharge of its functions. The Committee argued that its mandate would be effectively discharged if the Intergovernmental Relations Act was amended to give the Committee the status of a body corporate.

Despite the delay in the formation of the Intergovernmental Relations Technical Committee, the national and county governments were able to set up working sectoral committees that were instrumental in the shaping of relations in the uptake of functions assigned to the county governments. For instance, the health sector has an active inter-sectoral forum that contributes to the management of the dynamics that define the implementation of the system of devolved governance within the sector. Sectoral forums were largely contributed towards the stymieing of otherwise frosty relations between the national and county governments.

While the relationship between the two levels of governments have been cordial and cooperative, there have been cases of intergovernmental strife. The strained relationships between different levels of government and intra governmental disputes between county assemblies and county executive committees are cases in point. In some disputes, county assemblies adopted a lynch mob mentality as evidenced by the manner in which they moved and passed motions to impeach county governors. In the last two years the following County Governors have been subjected to impeachment process. :

1) Gov. Martin Nyaga Wambora – Embu County;
2) Gov. Kivutha Kibwana – Makueni County;
3) Gov. Chepkwony Paul Kiprono – Kericho County.
4) Gov. Mwangi wa Iria – Murang'a County

The matters are at various stages of determination either by Senate or the courts

While powers of impeachment are granted to county assemblies, they are quasi-judicial powers, which must be exercised judiciously. However, the spate of impeachment attempts on the members of county executive committee, some of which were predicated on flimsy grounds during the first two years of implementation of the system of devolved government are alarming and disconcerting. It would appear that impeachment of governors and CECs was used as a tool of intimidation of the county executive. Impeachment is a serious process seeking to question and substitute the popular will of the electorate in their choice of a leader, and ought to be exercised with caution and restraint. The basis for an impeachment process should be objective to the extent that it does not subject itself to contentious debate.

Case Study – Threshold for Removal a Governor- Governor Wambora Case

In Civil Appeal No. 21 of 2014, the Court of Appeal noted that the ***Constitution*** does not define gross-violation. The Court ruled that what amounts to gross violation must be considered on a case by case basis taking into account the peculiar facts and circumstances of each case, and that not every violation of the ***Constitution*** or other law is gross violation.

The following constitute grave violation or breach of the Constitution:

a) interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional executive power;
b) abuse of the fiscal provisions of the Constitution;
c) abuse of the Code of Conduct for public officers;
d) disregard and breach of the provisions on fundamental rights;
e) interference with local government funds and stealing from the funds, pilfering of the funds...for personal gains...;
f) instigation of military rule and military government and
g) any other subversive conduct which is directly inimical to the implementation of some other major sectors of the Constitution.

Consequently, the Court of Appeal ruled that a motion to remove a Governor from office and particulars of the charge must expressly state that the alleged violation is gross, give particulars of the alleged gross violation in the charge and be proved before the relevant constitutional organ. The rationale for this, the Court explained, is that where the violation is not gross, then the removal process under Article 181 of the Constitution is not available. In the case of impeachment of Governor Wambora, the word "gross" was omitted from the charges levelled against the Governor. The Court noted that a Governor is entitled to notice and particulars of the charges facing him and notice as to whether the allegation is merely an allegation of violation of the Constitution or other law or gross violation of the Constitution and other law.

The Court of Appeal adopted the following findings of the High Court as part of what constitutes gross violation:

"The question therefore is how to measure what constitutes gross violation. We are of the view, that the standard to be used does not require a mathematical formula, but it must take into account the intendment of article 181(1) of the Constitution. In our view therefore whatever is alleged against a Governor must;

a) Be serious, substantial and weighty.
b) There must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.
c) The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.
d) The charges as framed must state with degree of precision the article(s) or even sub-article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated."

The Court ruled that gross violation of the Constitution includes violation of the values and principles enshrined under article 10 of the Constitution and violation of Chapter six of the Constitution; or intentional and/or persistent violation of any article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for the definition is that the values and principles embodied in the Constitution provide the bedrock and foundation of Kenya's constitutional system and under article 10(1) the values bind all State organs, State officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ.

The Court of Appeal gave the following as examples of the constitutional articles whose violation amounts to gross violation include:

a) Chapter 1 on the Sovereignty of the People and Supremacy of the Constitution more specifically articles 1, 2, and 3 (2) of the Constitution.
b) Chapter 2- article 4 that establishes Kenya as a sovereign multi-party Republic & Article 6 that establishes devolution and access to services.
c) Article 10 on national values and principles of good governance.
d) Chapter 4 on the Bill of Rights.
e) Chapter 6- articles 73 to 78 on Leadership and Integrity.
f) Chapter 12 - article 201 on principles of public finance.
g) Chapter 13- article 232 on values and principles of public service.
h) Chapter 14 - article 238 on principles of national security.
i) Article 259 (11) on advice and recommendation.
j) Any conduct that comes within the definition of the offence of treason in the Penal Code (Cap 63 of the Laws of Kenya).

Given that the power of impeachment has been abused by MCAs, the best option is for this power to be withdrawn from them and instead given to the people to exercise direct democracy through a recall election if they so choose to. The process of the removal of Governors by impeachment has now been tried and tested. Regrettably, it has in some instances been, subjected to abuse, with governors complaining of being held at ransom by their county assemblies for fear of being subjected to frivolous reasons for impeachment. In some instances, some county assemblies, for example, in Embu, proceeded to pass a motion for removal of the governor, despite, and in complete defiance of, an order by the High Court, which had stopped the process, until the determination of the case filed in court by the governor.

12) The Commission for the Implementation of the Constitution

Section 15 of the Sixth Schedule to the Constitution mandates the Commission for the Implementation of the Constitution (CIC) to monitor the implementation of the system of devolved government. The Commission carried out two assessments on the implementation of transferred functions by county governments and published reports of its findings. [57]

13) The Transition Authority

The Transition to Devolved Government Act 2012, establishes the Transition Authority to facilitate the transition to devolved government. The TDGA expected that the Transition Authority would facilitate the transition to devolved government in two phases. The performance of TA in regards to these functions has been discussed above.

2.12.5 Challenges and Recommendations

Challenges

In the process of monitoring the implementation of devolution, CIC observed a number of challenges that cut across all counties. Many of these challenges are occasioned by resource allocation and power struggles between national and county governments and between the two arms of county governments. As a commission, we considered these as teething problems of devolution but which require urgent solution. The challenges are discussed below:

1) Institutional Conflicts

Conflicts between various public institutions have undermined successful implementation of devolution. Examples of such battles include:

a) Senate and the National Assembly regarding County Bills, as indicated in articles 110–113. There is need to determine with certainty which Bills affect county governments and must be processed by the two Houses of Parliament in line with the Constitution. Legislation should be enacted to elaborate the operation of article 110 of the Constitution.

b) The Senate and County Governors over the power to summon. While the Senate has power under article 125 of the Constitution to summon any person to provide evidence on any matter being considered by it, conflicts between the Senate and Governors was manifested when governors disregarded summonses to appear before the Senate in relation to utilization of resources, audit of county accounts and County Development Boards. The requirement to appear before the Senate is a constitutional requirement and governors should honour the summons and state their positions before the Senate.

c) Standoff between County Governments and the National Government regarding transfer of certain functions such as county roads, forestry, electricity, gas and energy reticulation, cultural activities, public entertainment and amenities. These functions have not been transferred as provided for in the Fourth Schedule to the CoK, 2010. The issue requires speedy resolution. Secondly, intergovernmental mechanisms to facilitate working relations within the executive and between the executive and legislature both at national and county governments should be developed in line with the Intergovernmental Relations Act, 2012.

d) County Governors and County Assemblies. The conflicts between these arms of county governments have been witnessed in a number of counties, resulting in some cases to the impeachment by MCAs of governors in Embu, Murang'a and request for the suspension of Makueni County Government. As discussed above, the impeachment should be a last resort as the process disrupts service delivery. Intergovernmental relations mechanisms and other dispute resolutions mechanisms should be exhausted before resorting to impeachment.

e) County Governors and their deputies. A number of Deputy Governors have complained that they are not given duties by their respective governors. In counties such as Machakos, there have been open conflicts between the county governor and his deputy. The functions of the deputy governors are stated in section 32 of the County Governments Act, 2012. They include deputizing the governor in the execution of the governor's function. The governor may assign the deputy governor any other responsibility or portfolio as a member of the county executive committee. Indeed, in a number of counties, deputy governors double up as members of the CECs. Just like the two are elected together as per article 180(5)-(6), of the Constitution, a similar process to remove the governor (section 33 of the County Government Act), should be used in the removal of a deputy governor from office).

2) Slow implementation of transition activities

Key institutions tasked to facilitate the transition to devolved government have been slow to implement key transition activities (as discussed elsewhere in this section). County governments have therefore,

had challenges relating to the performance of their functions owing to incomplete analysis and costing of functions, incomplete identification of assets and liabilities and the non-transfer of certain functions among other challenges.

3) Disputes between county governments

Some county governments have been embroiled in disputes over common boundaries and utilization of shared resources. For example, (i) Nairobi and Murang'a counties over utilization of water from Ndakaini Dam, (ii) Taita Taveta and Kwale counties, Machakos and Makueni counties, and Kisumu and Vihiga counties. (iii) Conflicts have also arisen on the financing and utilization of former provincial hospitals. These facilities hitherto served all residents of a province and beyond and were funded by the then central government. Under the devolved system, counties are expected to finance and manage their health facilities. The effect of this is that counties which host such facilities are overburdened by costs of running the hospital, which serves residents of other counties, especially with regards to referral for the specialized services they offer.

4) Challenges in professional and technical capacity of county governments

County governments have experienced challenges of staff capacity, including;

a) Low technical capacity in key areas such as legislative drafting, procurement, accounting, etc.
b) Difficulties in attracting and retaining adequately qualified staff to run their operations.
c) Slow pace of staff in embracing the new constitutional dispensation which requires public officers to exhibit high standards of professional ethics, responsiveness, impartiality, promptness in the delivery of services; enhance public participation through involvement of the people in policy making, and promote transparency and public officer accountability for administrative acts. As a result, some counties continue to deliver services in the same manner they did before the promulgation of the Constitution of Kenya 2010.
d) Most counties have not established adequate financial management information systems, human resource management systems, payroll management systems, asset and inventory management systems, and other structures required for robust service delivery. All these have greatly affected service delivery by counties

5) Uncoordinated civic education, public participation and access to information

Members of the public are insufficiently informed on how devolution was envisaged to work and its expected socio-economic impact. This has led citizens to have very high expectations of the system. A significant majority thinks that devolution should instantly solve all the governance problems that have been bedeviling the country. Members of the public have also been fed with inaccurate information on the cost of devolution as being expensive and that it would lead to balkanization of certain demographic groups. Due to inadequate or skewed information, members of the public do not meaningfully participate in identifying, designing and budgeting for interventions, which affect them. Inadequate public participation yields priorities which are inconsistent with the aspirations of the citizenry. The effect of this is that citizens lose interest in county and national government programmes, further dampening their enthusiasm with devolution. There are myriad disjointed efforts at civic education being proposed and run by various government institutions and Non-State actors. Without proposer coordination, these initiatives pose the danger of misinforming, fatiguing or confusing citizens. They may also lead to waste of limited public resources due to duplication. At the same time, it will be difficult to quantify the gains realized by these efforts since monitoring them will be difficult.

6) Deled publication of county laws

Laws passed by county governments become effective after publication in the Kenya Gazette (Section 23 of the County Government Act)44. The publication should take place within seven days after assent. County governments have raised concerns that after passage of laws at the county level, the execution of the laws has in most cases been delayed due to delays in the government printer. The county governments through an intergovernmental mechanism could create an inter governmental printer with sufficient capacity to print laws, bills and other statutory instruments for county government without delay.

44 A Bill shall be published by including the Bill as a supplement in the county Gazette and the Kenya Gazette

7) Legislative Gaps

i) There is no procedure for impeachment of deputy governors. It is assumed under section 33(10) of the County Governments Act. The procedure should be set out in County Governments Act to mirror provisions relating to impeaching the governor.

ii) The law does not provide for discharge of executive power in the absence of a governor and deputy governor, and should be amended to make provision on how power should be discharged under such circumtances.

Recommendations

i) The Inter-Governmental Relations Technical Committee should identify all the remaining activities for transition to full devolution with a view to initiating immediate steps to finalize them.

ii) Finalize the analysis and forensic audit of assets and liabilities with a view to transferring to county governments such assets and liabilities required for the execution of county government functions.

iii) Finalize analysis and costing of functions to facilitate the identification of resources required to implement those functions.

iv) In the spirit of article 188 of the Constitution, Parliament should define county boundaries, based on a participatory process involving all concerned counties.

v) Facilitate creation of inter-county Joint Committees to manage joint/shared utilities and facilities used by two or more county governments.

vi) Establish effective alternative dispute resolution mechanisms to address conflicts and disputes arising between county governments.

vii) Review the National Capacity Building Framework (NCBF) to align it with identified capacity needs of county governments.

viii) Roll out NCBF for county governments.

ix) Finalize and roll out the change management for constitutionalism toolkit and information pack to help entrench constitutionalism in county governments for culture and attitudinal change.

x) Finalize and roll out National Policy on Public Participation, National Civic Education Framework, civic education curriculum and manuals.

xi) Support county governments to establish and operationalize County Civic Education Units.

xii) Support county governments to enact county public participation laws.

xiii) Counties should develop feedback mechanisms that would give people confidence that they were listened to during public participation forums.

xiv) Affirmative action programmes should be taken into consideration to ensure that all people participate in their governance including the old, the young and the persons with disability.

xv) County governments need to develop public participation processes that are manageable within the resources allocated. Further, county governments ought to ensure they have allocated adequate resources that will ensure effective public participation process through including its cost in their budget.

2.13 PUBLIC FINANCE

2.13.1 Introduction

Prior to the promulgation of the Constitution of Kenya 2010, public finance management in Kenya faced challenges and gaps that resulted in misappropriation and misapplication of public funds, inequities in resource redistribution as well as inadequate checks and balances with respect to transparency and accountability. The public finance management (PFM) reforms envisaged in the Constitution of Kenya 2010 were aimed at making public financial management more efficient, effective, participatory and transparent resulting in improved accountability and better service delivery. Article 201 of the CoK stipulates the principles of public finance to include; openness and accountability, promotion of equitable society, equitable sharing of revenue between national and county governments, fiscal discipline as well as equitable sharing of burdens and benefits between present and future generations.

In line with the changes brought about by the Constitution, the management of public finance has witnessed an overhaul that extends to primary areas like revenue collection and allocation, budgeting, financial audit and overall management of public finances. It imbues a rule-based system by introducing independent institutions to facilitate, regulate and monitor public finance management, which essentially is a marked departure from the past. Under the former Constitution, public finance was centrally managed from the Treasury with no public participation on identification, prioritization and monitoring of public expenditures. This essentially meant that accountability to the members of the public in general was non-existence.

CIC played a fundamental role in defining and shaping the institutional structure posited by the Public Finance framework under the Constitution. This role included coordinating and facilitating the formulation of the legislative framework that supports the constitutional design for public finance management and fiscal decentralization. One of the key pieces of legislation enacted pursuant to COK 2010 was the Public Finance Management Act, 2012.

With the onset of the era ushered in by the formulation and implementation of the Public Finance Management Act (2012), it was expected that the same would inter alia occasion public finance sector re-engineering including automation of financial systems and processes, introduction of multiyear and programme based budgeting and more accountability and public involvement in the public finance process.

2.13.2 Legal framework for Public Finance Management

The process of development of the PFM framework was done through recognition that a good PFM system is key for the success or failure of the system of devolved governance. The Commission for the Implementation of the Constitution played a fundamental role in ensuring that the institutional structure that supports the public finance management system including the system of devolved governance is rested on a legislative framework that merits the core requirements of the Constitution and generally accepted international ideals and practices on public finance.

Legislation

In line with the mandate bestowed upon it under the law, CIC was involved in the formulation of the following laws meant to facilitate the implementation of the Chapter on Public finance;

1) The Public Finance Management Act 2012

The legislation operationalizes Chapter 12 of the Constitution of Kenya and provides the processes, structures and institutions that support the public finance framework including fiscal decentralization. The Act seeks to reform the management of public resources by making the process more effective, transparent, participatory, and accountable and service delivery oriented. The Act establishes PFM institutions including the National Treasury and the Debt Management Office. Unlike the pre-2010 period, the Act gives Parliament and the County Assemblies a critical and substantive role in the public finance management process. The process leading to the enactment of this law was quite protracted and thus resulting in the extension of time for its enactment by a month.

In addition, the Act effectively consolidated the many existing PFM laws into one integrated PFM law. Consequently, with the enactment of the PFM Act, the following Acts stood repealed: The Government Financial Management Act, 2004; The Fiscal Management Act, 2009; The Internal Loans Act; The External Loans and Credit Act; The National Government Loans Guarantee Act, 2011; and The Contingencies Fund, County Emergency Funds Act, 2011 and Civil Contingencies Act.

2) Commission on Revenue Allocation Act, 2011

This law was vital for the operationalization of the Commission (CRA) as per the dictates of the Constitution. The CRA plays a critical role in the division of revenue between the national and county governments and an advisory role on revenue related issues generally. CRA also plays a role in the formulation of the revenue sharing formula.

3) Salaries and Remuneration Commission Act, 2011

This is the law that operationalized the Salaries and Remuneration Commission (SRC), which is tasked with the mandate of setting and regularly reviewing the remuneration and benefits of all State officers as well as advising on the salaries of public officers in national and county governments.

2.13.3 Public Finance Management Regulations

The PFM Act, 2012 requires various regulations to effectively implement it as envisaged. The object and purpose of PFM regulations is to regulate and prescribe the structure and functioning of public finance management, the preparation and implementation of the public budgets, the accounting and reporting of all financial transactions, the conduct of fiscal relations between the national and county governments, and financial control in line with the service delivery objectives covered in the development plans and programs. This is needed in order to ensure accountability, transparency and the effective, economic and efficient collection and utilization of public resources.

In addition, the county treasuries are expected to publish practice manuals, forms, guidelines, and operating procedures, to be used by government entities to support implementation of these regulations. Schedule 5 of the PFM regulations lists the various public funds to be administered by a State or county department or any other public entity.

2.13.4 Institutional Framework for Public Finance Management

The CoK 2010 has established various institutions expected to play a pivotal role in overseeing the implementation of a more efficient and accountable PFM process at the national and county levels with the intention of ensuring that the fiscal decentralization system as contemplated under the Constitution is realized. Most of these institutions have also been established at the county level. Some of the institutions established are;

1) Commission on Revenue Allocation

The Commission on Revenue Allocation (CRA) is established under Article 215 and assigned its mandate under article 216 of the Constitution of Kenya 2010. Its overall mandate is to make recommendations

of the basis for the equitable sharing of revenues raised nationally, between the national and county governments as well as the sharing of revenue amongst the county governments.

Further, in tandem with article 203 of the Constitution, CRA recommends to Parliament for adoption a revenue sharing formula that takes into account the criteria listed under this article.

Currently counties share revenue based on five parameters, namely Population (45 per cent), Equal Share (25 per cent), Poverty (20 per cent), Land Area (eight per cent) and Fiscal Responsibility (2 per cent). A new proposed formula for sharing of revenue among counties was forwarded to the Senate by CRA for consideration and adoption. The proposed formula was not agreed on and thus compelling the CRA to reconsider its earlier proposal.

2) The Controller of Budget

The Office of the Controller of Budget (COB) is an independent office established under Article 228 of the Constitution of Kenya with its core mandate being to oversee the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds.

The Office of the Controller of Budget has been instrumental in ensuring fiscal transparency, fiscal accountability and checks and balances in the PFM processes. The Office prepares quarterly and annual budget implementation reports, which enable public scrutiny to determine whether the national and county governments are spending in accordance with the key priorities put forth in the budgets including the need for public monies to be spent in a manner that conforms to the principles of public finance under the Constitution. The reports also analyse the manner and levels of revenue collected by the

different levels of governments and thus enhancing sanity and openness in budget implementation in the country.

In the repealed Constitution, some of the functions of the Office of the Controller of Budget were performed by the Controller and Auditor General and the Treasury. With respect to the CoK 2010, two new independent constitutional offices were created by splitting the functions into the Office of the Controller of Budget and the Auditor General under Articles 228 and 229. The role of the Controller of Budget was further extended to include monitoring budget implementation and reporting to parliament every four months.

The rationale for the creation of the Office of the Controller of Budget as an independent office under the Constitution of Kenya 2010 was to address the demand by the public for separation of financial management functions, that is; controlling and reporting on budget implementation from the auditing function. The need for strong expenditure controls became even more critical with the establishment of the devolved system of governance. This development has consequently witnessed the transfer of key public finance management responsibilities from the executive to some of the oversight institutions as reorganized by the Constitution of Kenya 2010.

The Controller of Budget Bill is aimed at giving effect to articles 225, 228, and 252 of the Constitution. These articles defines the operational boundaries of the Office of the Controller of Budget as proposed by the Constitution including adding such other functions as may be necessary to enable the Office achieve its mandate. The Bill is yet to be passed by the national assembly.

3) The Auditor General

The Office of the Auditor-General of Kenya is an Independent Office established under the Constitution of Kenya 2010 to audit government bodies and report on their management of allocated funds. The Auditor-General is mandated to prepare audit reports, which shall;

a) Confirm whether or not public money has been applied lawfully and in an effective way.
b) Be submitted to parliament or the relevant county assembly
c) Be debated by parliament or the county assembly for appropriate action.

The legislation on Public Audit is aimed at providing for the powers of the Auditor General in the conduct of audit functions with respect to public entities. During the process leading to the formulation of the Bill, there were fairly discordant opinions on key aspects of the Bill from key stakeholders particularly the Office of the Auditor General and the National Treasury. Some of the unresolved issues ended up being part of the reservations on the Bill that the President raised when the Bill was sent to him for assent. The issues included the role of the Public Service Commission in the appointment of the staff of the Office of the Auditor General, the audit of the security sector and the budget process as it affected the office of the Auditor General. This Bill is still pending before parliament for enactment.

4) The Salaries and Remuneration Commission

The Salaries and Remuneration Commission is an independent Commission established under article 230 of the Constitution of Kenya 2010, with the mandate to set and regularly review the remuneration and benefits of all State Officers and to advise the national and county governments on the remuneration and benefits of all other public officers. In carrying out its mandate, the Commission has to take into account the principles of; fiscal sustainability of the public compensation Bill, attraction and retention of requisite skills for service delivery, productivity and performance, transparency, fairness and equity.
According to a study conducted for the SRC by the audit firm Deloitte, on allowances payable to public servants, some public servants earned allowances that were more than 50 to 90 per cent of their basic pay. The total public-sector wage Bill continues to increase each year as employee numbers increase and average wages rise. This trend is worrying given that a huge wage bill eats into resources meant for investment and development activities. This problem is further aggravated by the presence of "ghost workers". The CARPs programme by SRC was meant to correct this situation. Article 230(5)(a) mandates the SRC to advise the government on the management of this unsustainable wage Bill.
As part of the fulfilment of its mandate, the SRC commenced job evaluations for civil servants. The exercise is expected to come to an end in April 2016. The exercise which is part of the new Public Sector Remuneration and Benefits Policy involves an assessment of job content and requirements to ensure

that the public service is attractive enough to employ persons with the requisite skills needed for the better realization of the ideals of the public service.

5) The National Treasury

The National Treasury as established by the CoK 2010 is mandated to formulate financial and economic policies and oversee effective coordination of government financial operations. Its institutional obligations includes supervision and responsible management of the economy as well as public financial operations including providing oversight of all financial institutions such as Cooperatives and Saccos dealing with financial functions. The Treasury also manages Kenya's domestic and external debt. It has established the Debt Management Department office for purposes of aiding it in the performance of this function.

Counties have frequently complained that the National Treasury has been in breach of the Constitution as far as its mandate of ensuring that counties receive their equitable share of revenue without undue delay. Article 219 of the Constitution provides that a county's share of revenue raised by the national government shall be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under article 225.

Section 17 (6) of the Public Finance Management Act adds that: "The National Treasury shall, at the beginning of every quarter, and in any event not later than the fifteenth day from the commencement of the quarter, disburse monies to county governments." This has not been the case due to frequent delays in the remission of funds by the national government to the counties. This situation has adversely affected funds absorption and service delivery at county level.

6) County Treasuries

Section 103 of the PFM Act provides for establishment of county treasuries and assigns them the responsibility of monitoring, evaluating and overseeing the management of public finances and economic affairs of the county government. The operations and functions of county treasuries mirror those of the national treasury in many aspects. These responsibilities include (i) developing and implementing financial and economic policies of the county (ii) preparing the annual budget for the county and coordinating the preparation of estimates of revenue and expenditure of the county government; (iii)coordinating the implementation of the budget of the county government; (iv) mobilising resources for funding the budgetary requirements of the county government and putting in place mechanisms to raise revenue and resources;

7) The Central Bank of Kenya

The Central Bank of Kenya was established in 1966 through the Central Bank of Kenya Act of 1966. In the CoK 2010, the current Central Bank of Kenya (CBK) is established under article 231 of the Constitution. Under the Constitution, the Central Bank has the responsibility of formulating monetary policy, promoting price stability, issuing currency and performing other functions as may be conferred on it by an Act of Parliament. The Bank is an independent institution and not under the direction or control of any person or authority in the exercise of its powers or performance of its functions.
The Central Bank of Kenya Bill is intended to operationalize the Central Bank of Kenya as provided for under the Constitution. The Bill has undergone stakeholder's consultations at various levels and shall be introduced in parliament once institutional consultations are finalized.

8) The Public Procurement Oversight Authority

The Public Procurement Oversight Authority (PPOA) is established by the Public Procurement and Disposal Act, 2005. The PPOA is charged with the responsibility of ensuring that all procurement entities in the public sector observe the provisions of the law. The Constitution makes it very clear that the structure of public procurement ought to be reviewed with the intention of making it competitive, professional and most importantly, be an exercise imbued with value for money as an ultimate attainment. The Public Procurement and Assets Disposal Bill, 2014 seeks to provide procedures for efficient public procurement and for assets disposal by public entities. The Bill is pending before parliament for consideration and passage.

The government is the single largest buyer in any economy. In Kenya, public procurements involve supply of goods, services and works to government offices, projects and in all counties. Article 227 of the Constitution provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

According to the Public Procurement and Disposal (Preference and Reservations) Regulations, (2011, 2013), all procuring entities are mandatorily required to allocate at least 30% of their procurement budget for the purpose of procuring goods, works and services from micro and small enterprises owned by youth, women and persons with disability. Further, procuring entities are required to implement these regulations through their budgets, procurement plans, tender notices, contract awards and by submitting quarterly reports to the Public Procurement Oversight Authority clearly demonstrating adherence to this requirement.

9) Debt Management Office

The Constitution and the PFM Act, 2012 provide the requisite framework to ensure the country continues with prudent debt management. Section 62 of the Act has provision for the National Treasury to establish a Public Debt Management Office (PDMO). Strict procedures, accountability and reporting requirements on public debt management have also been laid down for both national and county governments.

In 2014, the National Treasury through the Debt Management Department prepared a formal debt management strategy, which outlined the Government Medium Term Debt Strategy (MTDS) for the period 2014/15-2016/17. The MTDS was the government's sixth formal and explicit strategy and was an important step towards enhancing transparency of the government's debt management decisions. The MTDS was presented to Parliament as part of the Budget Documents by the Cabinet Secretary for the National Treasury. To institutionalize the production of the debt strategy, the requirement to publish the MTDS has been provided for under the Public Finance Management Act, 2012.
Section 65 provides that at the request of county treasuries, the Public Debt Management Office shall assist the county government in their debt management and borrowing initiatives.

10) Parliamentary Budget Office

The Parliamentary Budget Office (PBO) was established in the year 2007 and further got a legal backing with the enactment of the Fiscal Management Act 2009 (FMA), which established the PBO as an office in the Parliamentary Service Commission. The FMA was repealed in 2012 with the enactment of the PFM Act 2012.

The PFM Act under section 10 re-established the PBO and enhanced its roles. Its primary function is to provide timely and objective information and analysis concerning the national budget and economy to parliament. Given that legislators have a critical role to play in budget preparation and execution, CIC recommends that the same office is replicated at the county level. This is because MCAs require information to assist them in making decisions relating to budget preparation and execution.

11) Intergovernmental Budget and Economic Council

The Intergovernmental Budget and Economic Council (IBEC) is established pursuant to the provisions of section 187 of the IBEC Act. The IBEC is expected to provide an opportunity for negotiations between the national and county governments on diverse issues ranging from the Division of Revenue, borrowing by county governments to cash disbursement to county governments on the basis of revenue allocated under the County Allocation of Revenue Act. It is basically a platform through which the two levels of government come together and iron out possible differences as these are bound to arise in the context of revenue sharing and other fiscal relations.

2.13.5 Management of Various Funds

1) Equalization Fund

The Constitution under article 204 provides for the establishment of the Equalization Fund. This Fund is to be used to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring equality in those services to the level generally enjoyed by the rest of the nation. The Fund is supposed to be equivalent to 0.5 per cent of the latest audited annual government revenue.

In 2012, 14 counties were picked to benefit from the affirmative programme under the Fund for three years. They include Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, Taita Taveta, Isiolo and Lamu. The 14 counties are expected to receive Kshs. 6.1 billion in the financial year starting July 2015 and Kshs 6.9 billion after a year from the initial allocation of Ksh 3.4 billion over the past two years. The Fund is expected to be administered for 20 years. Parliament may extend this period for a further fixed period of years subject to such a decision being passed by half of all the members of the national assembly and more than half of all the county delegations in the Senate.

The Fund has however been marred with wrangles pitting the national government, county governments and MPs against each other due to the fact that they all want to manage the Funds. For the success of the Fund, it behoves the national government to find ways of working with counties to ensure there are no conflicts or competing interests when it comes to financing devolved functions such as roads and health from the proceeds of the Fund. Such arrangements should also ensure that such interventions are duly incorporated into the county planning process to avoid inconsequential and wasteful development spending.

The National Treasury published regulations to provide for the management of the Fund. The regulations however, completely exclude counties from even being consulted prior to the national government undertaking its interventions. The regulations fail to provide a process of consultation between the national and county governments to facilitate identification and agreement on projects proposed to be carried out at the county level. This defeats core components of the public finance framework, including the need for consultations in development planning. These regulations should be reviewed in order to align them with the Constitutional principles on PFM.

The national assembly published the Constitutional Amendment Bill whose intention is to inter alia, transfer the Equalization Fund from the management by the national government generally and through counties to constituencies. The amendment would have the Equalization Fund channelled directly through the Constituency Development Fund. This move is worrying since the very essence of the Fund may be prejudiced if the Fund is cut into small micro-projects at constituency level.

2) Constituencies Development Fund

The Constituency Development Fund was introduced in Kenya in 2003 with the passage of the CDF Act 2003 by the 9th Parliament of Kenya. The CDF Act provides that the government sets aside at least 2.5% of its ordinary revenue for disbursement under the CDF programme. The Fund was designed to support constituency-level, grass-root development projects. It was aimed at achieving equitable distribution of development resources across regions and to control imbalances in regional development brought about by partisan politics. It targeted all constituency-level development projects, particularly those aiming to combat poverty at the grassroots.

With the promulgation of the Constitution of Kenya 2010 and the onset of devolution, the Act establishing the Fund was contested in court as being unconstitutional. The court found that CDF Act is "anti-devolution" and runs contrary to the ideals of public finance management under the Constitution and hence invalidated it. The court found that CDF duplicated county governments' functions as provided for under the Fourth Schedule to the Constitution.

The invalidation of the Act by the court was however suspended for 12 months to allow transition, completion of the projects on course and the current budget cycle to run its course.

3) Ward Development Fund

The most controversial Fund at the county level still remains the Ward Development Fund due to the legal and constitutional challenges that inform their construct and operation. The idea of a Ward Development Fund (WDF) was a creation of county assemblies who viewed it as a platform for grass root development. In pushing for the establishment of the ward funds, MCAs wanted to match MPs who have the Constituency Development Fund under their control. In seeking to control the funds, Members of County Assembly (MCAs) granted themselves powers to patronize WDF in a manner similar to what has been done by the MCAs of Nairobi County.

The Nairobi WDF Act grants every MCA the power of implementation and oversight. Every MCA has the power to form Ward Development Fund Committee and become the ex-officio member of the committee. Again every MCA can consult with the WDF Officer to appoint seven members to the committee.

Such an arrangement flies against the principle of separation of powers as per article 185 of the Constitution, which provides that while a county assembly plays an oversight role on the county executive organs, it must respect the principle of separation of powers to the extent that a member of the county assembly is prohibited from directly or indirectly being involved in the executive functions of the county government and its administration. Further, a member of the county assembly is equally prohibited from being involved in the delivery of services as if the member were an officer or employee of the county government.

The CIC gave advisories by way of legal opinions, on the unconstitutionality of the Ward Development Funds (WDF) Bills formulated by the County Assemblies. In light of the CDF ruling by the High Court, which declared the CDF Act unconstitutional, it is critical that counties that have passed and operationalized these funds review the legal framework upon which the Ward Development Funds rest.

4) County Funds

Pursuant to the law, all the counties established their county revenue funds, which have principally been used for the receipt of their equitable share of revenue and all other revenue receipts.

Additionally, section 110 of the PFM Act calls for the counties to establish County Emergency Funds which is meant to enable payments to be made in respect of a county when an urgent and unforeseen need for expenditure for which there is no specific legislative authority arises. However, only a few counties have established the Emergency Funds due to the non-mandatory nature of the law. It is of note that some of the counties that are yet to set up the Emergency Funds have resorted to ring fencing funds under the Budget for purposes of matters or events that fall within the ambit of County Emergencies.

It is also evident that counties have come up with numerous social funds with varied objectives. Some of these funds go by various titles and have as their mainstay segments of the society including the Youth, Women, persons living with disability, school and college going children amongst others. In the

course of time, there is need to fully audit and determine the impact of these funds on their intended beneficiaries.

Case Study: Development of PFM Law

The PFM Act was largely prepared by the collaborative efforts of the National Treasury, the Devolution Task Force, and the Commission on Revenue Allocation, Non State Actors and Civil Societies. These efforts were mainly availed in the form of informational skills, comparative research inter alia, that were instrumental in producing a constitutionally compliant statute.

The PFM Act was one of the most difficult piece of legislation to formulate. This was due to various factors including the non-convergence of interests but more particularly the fiscal decentralization aspect. The political environment was largely welcome to reforms in the public finance sector though a small but significant segment of the same were sceptical about the uncertainty that some of the proposed reforms would introduce.

i) One of the biggest standoffs in the formulation of the PFM Act pitted the National Treasury and the then Ministry of Local Government. The National Treasury had developed a Bill that the then Ministry of Local Government argued was clawed back on the distinctness between the national and county governments. The differences, which included both the format of the legislation as well as the contents, resulted in the CIC receiving two different and divergent draft Bills from the Treasury and the then Ministry of Local Government.

ii) This disharmony on the part of the Executive persisted for a while, despite several efforts by CIC to get the concerned government agencies to focus on the provisions of the Constitution and agree on a harmonized approach to the legislation. As a way of forestalling the crisis that the process had been plunged into, CIC engaged experts to merge the two Bills and specifically structure it in a way that met the dictates of the constitution both in substance and in form.

iii) Due to delays in the enactment of the PFM Act, CIC advised the government to develop two critical transitional Bills; the County Transition Allocation of Revenue Bill and the County Transition Public Finance Management Bill. These transitional laws ensured that, since county governments came into being in the middle of a financial year and did not therefore have a budgetary allocation, (FY 2012 -13), they would be allocated some funds in the interim period prior to the budgetary preparations and division of revenue for the financial year 2013 – 2014.

iv) One other issue that CIC issued an advisory on relating to public finance in the early transition years was the failure by the Cabinet Secretary for Finance to present estimates of revenue and expenditure to the National Assembly at least two months before the end of the financial year 2011/2012 in accordance with article 221 of the Constitution.

2.13.6 Achievements under Public Finance Management

a) Operationalization of the Public Finance Management Act

The main objective of the PFM Act was to ensure that national and county governments manage public finances in accordance with the principles spelt out in article 201 of the Constitution, and that public officer's account to the public through parliament and County Assemblies. The impact of the PFM reforms has been witnessed in the following areas;

b) Budget Preparation

The county governments came into being on the 4th of March 2013 and did their first budgets in the FY 2013-2014. These budgets were largely prepared in an environment constrained of time, capacity and to a large extent bereft of the space for effective public participation as required under the law. Due to this, a majority of the counties prepared budgets that contravened fiscal responsibility principles; many were only balanced in form but not in substance. The institutions that have a stake in the budget processes including the Commission on Revenue Allocation and the Controller of Budget, advised on the requisite correctional measures to be undertaken by the counties in terms of reviewing their budgets in order to access their allocations.

Some of the aforementioned problems reemerged in the financial year 2014-2015. These problems are largely symptomatic of the inadequate capacity and preparatory plans that were in place to manage the onset of the devolved system of governance.

Budget formulation is also guided by the requirement for counties to develop their development plans whether annual or mid term. The law is clear that no public monies can be expended outside of a planning framework and to this end, all counties have done their County Integrated Development Plans (CIDP) as well as annual plans, as a guide to the development of their annual plans and optimization of resources towards the larger development needs of the county. Both the CIDP and the Budget Estimates are prepared by the Executive and are subsequently submitted to the assembly for discussions and approval as required by the Constitution.

c) Budget Implementation

Under the new PFM framework, the Implementation of budgets at both the national and county government levels has improved and compliance with the requirements of the PFM Act continues to be enhanced. In particular, review of the budget will be strictly in accordance with the resolution adopted by Parliament and also there is expected to be limited scope for additional expenditures mid-stream. That notwithstanding, oversight bodies including the Controller of Budget and the Auditor General continue to report incidences of misplaced budget priorities, wastage and leakages at both levels of government.

It can't be gainsaid that a majority of the counties have strived to deliver services in tandem with their budgets and overall economic plans. Most of these budgets and economic plans have been formulated in an environment characterized by public participation and prioritization of the needs and expectations of the county government and its people. However, the level and effectiveness of public participation is still very low due to low civic education and the delay or failure by the county government entities to avail documents to the public in advance, as well the short notices that call on wanachi to avail themselves at public forums.

Across the 47 counties, it cannot entirely be said that the public is happy with service delivery on the part of the county governments, in the sense that disapprovals, whether rightly or wrongly, have been documented in a number of counties wherein the public has expressed disapproval as to the manner in which the deployment of public resources towards the provision of public goods and services has been undertaken. Wherever these reasons have been raised, some county governments have endeavored to set the record straight by way of providing information that confirms the contrary to the allegations and thus affirming the power of the citizenry in holding accountable their respective governments be it at the national or county level.

As for budget laws at the county level, the principal laws in this regard are the County Appropriation and Finance Laws. Beyond the first year of devolution, most of the counties have not reported challenges with the formulation and passage of their respective County Appropriation Acts. However, there have been challenges in enactment of the Finance Act that basically provides for revenue raising measures of the County Government.

The development of the Finance Bills has been fraught with challenges some of which are legal in nature. For instance, Kiambu County bore the biggest challenge in the formulation of this law. There were public protests and court filings in opposition to the Bill. There were feelings that the law was counter productive and likely to negatively impact on the economic activities within the county. It is noteworthy that when the matter went to court, the court insisted on the constitutional requirement for public participation in financial affairs of the county.

In other instances, there are counties that have gone through entire financial years without passing finance bills despite the mandatory requirements of the law. Additionally, some counties have been levying charges that are neither backed by the finance law or any other law passed by the county for that matter.

In the development of budget documents to wit; County Fiscal Strategy Paper, Budget Review and Outlook Paper, Cash Flow Projections, Annual Budget Plans, inter alia, tremendous development has been recorded in the observance of legal timelines and requirements as prescribed in the Public Finance Management Act. This was not the case in the first two financial years that are now past; then, due to all manner of reasons including capacity constraints, there was little conformity with the timelines set in the law.

Also tied to this have been several complaints raised by county governments on the adoption of the Integrated Financial Management Information System (IFMIS) as the financial platform for the implementation of the budget. Quite a number of county governments expressed their reservations on the suitability of IFMIS due to connectivity outages. Others have decried the fact that IFMIS was not sufficiently modified to take into account the onset and peculiarities of the system of devolved governance. There were also a substantial number of county governments that felt that given time, it was the best framework for budget implementation at both the county and national level. Some of the issued raised as being a challenge to the implementation of the IFMIS system included;

a) Connectivity related disruptions; most of the counties complained of IFMIS being fraught with connectivity problems (downtime) and thus affecting their operations.
b) Inadequate training or insufficient capacity; the majority of the officers at the county level charged with the responsibility of implementing IFMIS related matters lacked the capacity to do the work.
c) The cost of IFMIS training is quite high including the fact that it is mostly done in Nairobi.

In discussions with the counties, some of the proposed solutions included;

a) The need for IFMIS to operate on a more stable and reliable connectivity platform like fibre optics and modems.
b) Training and related capacity building needs ought to be a vital component of IFMIS operations.
c) The possibility of reworking IFMIS to be compatible with third party applications.
d) The need to locate system administrators at the county level for purposes of granting greater access to IFMIS.

The Commission for the Implementation of the Constitution consistently implored the National Treasury to ensure that IFMIS, being the system that has been prescribed in line with the requirements of the Public Finance Management Act, to ensure that IFMIS respects and promotes the distinctiveness of the national and county levels of government.

d) Programme Based Budgeting

Traditionally, the Kenyan budget has been organised in a "line item format" – full of budget line inputs with no indication of targets and performance indicators. The PFM Act has ushered in a new era of programme based budgeting. It was expected that by the financial year 2014 – 2015, both the national and county governments shall develop programme based budgets (PBB) which requires the budget to be organized around a set of programs, and usually subprograms, with clear policy objectives. Each program has a set of indicators and targets that implementers commit themselves to achieve in a set period of time. While PBB does not eliminate information about inputs, it focuses oversight on the connection between inputs and outputs.

In addition, proper PBB requires that the budget be based on an economic classification that clearly identifies the different categories of expenditure, such as that dedicated to personnel, goods and services, or infrastructure. Each of these can be broken down further to illuminate the connection between spending on these categories and the objectives of related programs.
The Commission for the Implementation of the Constitution recommends that PBB be encouraged and all national and county government entities be required to facilitate access to these budgets by the public for effective monitoring and evaluation of value for money in development projects.

e) Public Participation

This is a core principle under the Constitution and the PFM Act 2012. It requires that members of the public are not only consulted but are equally involved in budget preparation especially in planning and review of budgetary estimates. Majority of the counties during the period under review were able to

rope in members of the public in their budget preparation endeavors, though there has been lots of criticism of the relevance and depth of participation conducted across the entire breadth of the country.

The most affected area was in the preparation of the County Integrated Development Plan (CIDP), which is a five year county development plan that details out the planning and development priorities of the County over a five years period.

At the county level, both the county executive through the committee member in charge of finance and the county assembly through the committee of the county assembly in charge of matters relating to the budget are given the responsibility of conducting public participation in the budget process. At the county executive level, this entails dealing with the formalities relating to the set up of the County Budget and Economic Forum, reaching out to, taking and consolidating views of members of the public in county planning and budgeting.

Specifically, and for purposes of the attainment of this ideal of Public Participation, the Public Finance Management Act established County Budgets and Economic Forums, which are to be operationalized by the county governments. These forums would serve as a means for consultation on plans and budgets, and also broader matters of economy and finance. Therefore, it also gives the county governments an opportunity for the justification of their decisions, and also offering explanations of the links between plans, strategies, and the budget, as formulated.

f) Other Achievements.

i) Enhanced public participation in planning, Budget Formulation and Implementation – in this regard, the PFM Act has been able to influence and direct the manner in which the public engages with the public finance processes. One of the ways in which this has been attained is through more information being provided to the public and thus leading to a more participatory and inclusive processes in the formulation of the County Development Plans and Budgets at the County level and the Medium Term Expenditure Frameworks (MTEF) and other planning processes at the national level.

ii) Improved budget preparation. The transition to program based budgeting has improved the discernment of policy linkages with the budget and facilitates more effective oversight over budget implementation.

iii) Financial Controls and Institutionalization of PFM – the law has brought with it immense change including financial controls and institutions that oversee the proper functioning of the PFM framework especially in the area of external audit, internal controls, budget implementation and reporting, public scrutiny and oversight by parliamentary institutions, inter alia. This has enhanced the level of scrutiny. It is important however that the oversight institutions undertake their responsibilities in a manner devoid of witch-hunt or the perpetuation of political/parochial interests.

iv) Intergovernmental Fiscal Transfers (structure) – from a policy and legal perspective, the PFM has brought on board clear criteria for the allocation and sharing of revenue between the two levels of government. The fact that revenue sharing is based on a revenue sharing formula crafted by an independent commission, has immunized the process of revenue sharing from the subjectivity and political machinations and interests, that would have otherwise defined the process. This equally applies to taxation and borrowing by the subnational governments.

v) Procurement reforms – The Constitution calls for the setting up of an efficient and transparent public procurement system, which is a vital component of any sound PFM system and transcends the budget process from procurement planning to audit. It also provides for affirmative action in procurement for groups that have been marginalised. The current procurement bill constitutes a strong legal framework, institutional arrangements that ensure consistency in policy formulation and implementation. The government has adopted an affirmative action procurement policy where 30% of the value of procurement for the governments is to benefit women, youth and persons with disability. This is however not backed with a policy and to ensure that this procurement truly benefits those intended to benefit from it.

vi) The national government has established over 15 social security funds. Most of these do not operate under clear policy frameworks. They also operate without clear criteria to ensure the faithfulness to the constitutional values and principles that define the manner in which public finances ought to be managed.

2.13.7 Revenue Raising, Allocation and Transfers

a) Fiscal Transfers – Revenue Sharing and Transfers

Pursuant to article 218 of the Constitution, the Division of Revenue and County Allocation of Revenue Bills form the basis for the sharing of revenue between the national and county governments, and amongst the county governments, in tandem with the Revenue Sharing formula proposed by the CRA and approved by the Senate. Consequently, these two Bills are vital for revenue sharing within the context of Fiscal Decentralization as specifically provided for under articles 202, 203 and 218 of the Constitution of Kenya 2010.

Upon establishment of county governments, the Transition to County Allocation Revenue Act, 2012 provided for the horizontal sharing of revenue between the respective county governments. Similarly, the Transition County Appropriations Act, 2013 authorized the issuance of monies out of the relevant County Revenue Fund and its application towards the needs of the respective county governments for the year ending 30th June, 2013.

In tandem with the above concerns, CIC held numerous meetings with State agencies dealing with transition to devolved government on fiscal issues including CRA, TA, the Treasury and the then Ministry of Local Government to iron out critical transition administrative issues before the elections. The issues discussed included the question of opening and operation of county accounts, setting up of the county treasuries and the use of a financial management system for both levels of government as provided in the PFM Act 2012.

In line with this, a sum of Kshs. 9.8 billion was disbursed to county governments to cover their expenses relating to personnel emoluments and administrative costs of both executive and county assemblies. Equally, a directive was issued that the Local Authority Transfer Fund (LATF) appropriated for the financial year 2012/13 be directed to county revenue accounts and the same be applied towards meeting the cost of service delivery by county governments, pending budgetary estimates and allocations for the following financial year. Further, revenues that had been raised by the former local authorities were to be directed to county revenue accounts and be managed by the county governments.

Subsequent to the passage and assent to the County Allocation of Revenue Act 2013, a number of counties received their first allocations of shareable revenue in the month of September 2013. This was due to two reasons;

i) The County Allocation of Revenue Bill was assented to on the 26th August 2013
ii) There was a precondition that ought to have been satisfied to the extent that counties were to revise their budgets especially those that had unbalanced budgets.

There were disputes between the county governments and parliament over the audited accounts used for revenue distribution between the national and county governments. Even though the law provides that the basis for revenue sharing shall be the last audited accounts approved by parliament, the division of revenue for the financial year 2013/14 was predicated on the audited accounts for the year 2008/09.

The Constitution is quite clear that each financial year, not less than 15 percent of revenue collected nationally, shall be allocated to county governments. In this regard, there have been extended disputes between the national and county government oscillating around audited accounts that have formed the basis for revenue sharing. The disputes have left counties to agitate for amendment of the Constitution to allow more funds to the counties for improved service delivery.

In the same financial year 2013/14, the national government through the national treasury by way of supplementary budgets revised the conditional allocations initially indicated in the County Allocation of Revenue Act. By way of that revision, some counties indicatively got more funds and others had their funds reduced with respect to the donor-funded projects that lay within their boundaries. Additionally, by the close of the financial year 2013/14, the conditional allocations on donor funded projects and which were due to counties had not been disbursed.

There is need for the structure of flow of donor funds to the counties to be designed to ensure that;

i) Donor funds intended for county governments go to county governments

ii) That development partners restructure their operations to respect the constitution and devolved system of government. This is particularly in regard to agreements being signed after 9th August 2013 or after functions are transferred.
iii) That the national government involves the county government in negotiations with development partners on projects relating to county functions.
iv) That the national government respect the distinctiveness of county governments and their right to make decisions on their functions and the need to therefore consult them and where they plan to support county functions to do so respecting the county agenda in the CIDPs.

This financial year 2014/2015 was also marked by notable delays in the remission of funds from the national government to the county governments. For instance, between February and April, 2014, counties did not receive their allocations as agreed in the funds disbursement schedule negotiated under the auspices of IBEC, which is an intergovernmental institution established under the PFM Act (2012).

By way of the County Allocation of Revenue Act 2013, the requirements of the PFM Act calling for the disbursements of funds to the counties on a quarterly basis was amended and the same replaced with monthly cash disbursement to the counties. In light of this amendment and noting the reservations expressed by various counties on monthly releases, it has not been a boon but a problem for counties in terms of planning and execution of development projects. These problems have been further exacerbated by the delays of remittances of equitable revenue as expected under the law.

In the financial year 2014/15, which commenced on 1st July 2014, delays in the remission of funds to the county governments were witnessed. This delay was largely occasioned by delay by Senate to pass the County Allocation of Revenue Act (2014) within the time period stipulated under the law. This was mainly because the Senate felt that counties deserved more than was allocated to them. With respect to the Division of Revenue Act, 2014, the county governments shareable revenue stood at 226 billion, which was equitably shared amongst the 47 county governments.

Unfortunately, it had to take the intervention of various institutions including the Senate, CRA, CoB, Council of Governors, IBEC, to offset the financial crunch that had beset county governments; a crunch that was predominantly attributable to the delay by the Senate to consider and pass the County Allocation of Revenue Act, 2014.

Table 1. Analysis of the sharing of revenue between the national and county governments

Type of allocation	2013/14	2014/15	2015/16
County Equitable Share	190,000,000,000	226,660,000,000	259,774,500,000
Conditional allocations	20,000,000,000	1,869,999,999	20,998,480,000
Conditional allocations (from Loans and grants)	-	13,898,673,449	10,671,205,204
Total County Allocation	**210,000,000,000**	**242,428,673,448**	**287,044,185,210**
National Government	710,375,000,000	797,650,000,000	991,892,000,000
Total Share Revenue	**920,375,000,000**	**1,040,078,673,448**	**1,570,380,370,414**

Since the establishment of county governments, there have been persistent problems experienced by way of late transfers of the equitable share of revenue from the national to county governments. The national treasury has tried to explain the delay by indicating the fact that revenue dips and highs from a collection standpoint, at the national level are such that it cannot guarantee no disruptions in the remittances to county governments within time, and as expected by law.

b) Revenue Collections and Performance

Counties have reported improved revenue collection compared to what was prevailing pre CoK 2010. The counties are yet to maximize on and deploy effective revenue raising measures that potentially

would ensure that over time, they realize their revenue potential. Others have argued that this reality might also be as a result of leakages that the counties are yet to stem or eradicate altogether.

Article 209(3) of the Constitution assigns the county governments the power to raise their own revenue with respect to the services that they provide. Consequently county governments have the onus of putting into place programs aimed at both revenue administration and revenue mobilization strategies. Counties raise taxes and collect own revenue – property tax, entertainment tax and user charges.

So far the collected revenue by the counties in a number of instances is yet to translate into improved service delivery going by the sentiments of quite a number of Kenyans. This has undermined the legitimacy of expanded revenue base in counties as exemplified by the fact that;

a) The increased court related litigation on various user charges passed by the county governments.
b) A majority of the counties are facing a number of capacity constraints when it comes to revenue mobilization and administration.

Reports by CRA and CoB point to the fact that counties lack clarity on the parameters, tools, and benefits to maximize own source revenue generation. They have not systemized or rolled out the requisite legal and infrastructural parameters necessary for maximizing revenue generation within their borders.

Therefore, county governments must look for means to enhance their respective revenue base and collection abilities in an environment that is efficient and equitable whilst also striving for affordability for citizens and improved service delivery platforms.
The foregoing notwithstanding, revenue collection at the county level has been informed by quite a number of challenging realities including the following;

a) A number of instances of double taxation and duplicity in user charges have been reported with the consequent result that many traders and Kenyans generally have been up in arms against the same. Though the matter has not reached crisis proportions, the current transpirations have been enough to jolt the national government into action by way of concerted actions to streamline revenue collection and tax administration at the local level.
b) A number of counties are yet to strengthen and immunize their revenue collection measures from leakages. The report of the Auditor General for the financial year 2013-14 was quite revealing. Majority of the counties have not been able to digitize or automate revenue collection. Even for those that have automated their systems, they still suffer from the inefficiencies that stem from inadequate internal control systems. This has the effect of setting the stage for the revenue leakages currently being witnessed. Thus, counties must be advised that revenue management does not lie in automation alone but also the enhancement of internal controls.
c) The absence of national policies in a number of areas critical to the mainstay of the county governments also ought to be addressed. There have been calls for the formulation of policy to guide revenue/tax administration and property rating/valuation at the county level. Though property taxes form a significant revenue base for the counties, its potential is far from being attained. Largely, this is attributable to the absence of clear policy guidance relevant to the dispositions of the county government with respect to valuation of property and the rates payable thereto.
d) Double taxation arises as a result of taxation by both the national and county government. This scenario has been evident in the entertainment industry wherein Counties are mandated to levy entertainment tax but the national government is yet to relinquish control of the sector, leading to the unfortunate outcome of double taxation by both levels of government.

2.13.8 Institutional Coexistence and Dispute Resolution

Several inter-institutional disputes have been noted in the PFM sector. The most contentious was the conflict between the national assembly and the senate on the exclusion of the Senate in the consideration of the Division of Revenue Bill. The Senate eventually went to the Supreme Court seeking an advisory opinion on the matter and the Supreme affirmed the Senate's position.

There have also been institutional disputes pitting Members of the County Assemblies against the Commission on Revenue Allocation and the Controller of Budget. The dispute stems from the fact that in exercise of the powers conferred to them under section 216(2) of the Constitution, the Senate as proposed by CRA did set fiscal limits for county governments which fact did not augured well with a number of county governments especially the County Assemblies. The County Assemblies proceeded to court suing both the Commission on Revenue Allocation, and the Controller of Budget for enforcing adherence to these limits.

Also, the period under review witnessed contests between the Controller of Budget and the county governments on matters relating to the budget content. Many counties were yet to appreciate or come to terms with the role that the Controller of Budget is assigned under the Constitution. On many occasions, rifts emerged when counties failed to get approvals to move funds from their respective county revenue accounts. The most pronounced of this dispute happened in the first year of devolved governance wherein, the controller of budget refused to approve budgetary funds for counties that had unbalanced budgets. That move by the controller was met with lots of fury and it took the intervention of IBEC to resolve the dispute.

The country also witnessed disputes between the governors and senators over accountability for public funds. The material matter brought to the fore in light of this dispute is whether the governors have to personally appear before the Senate to account for the funds allocated to counties or they can have their respective officers in charge of the various dockets wherein the alleged misappropriations are deemed to have occurred. The senators have sent out personal summons to the governors to appear whilst the governors have challenged the same arguing that their CECs concerned are good enough in terms of dealing with the issues as raised. In fact, this particular issue saw the Senate give directives that funds under the 2014 – 2015 Financial Year not to be released to Bomet, Kisumu, Kiambu and Murang'a counties. The Constitutionality or otherwise of such a directive as issued by the Senate is yet to be tested. The implication of such a directive in the event that it is implemented is that it would have had have far reaching impact in the counties listed especially in the context of service delivery.

The need for institutional cooperation and tolerance especially in the exercise of mandates that are assigned under the law cannot be gainsaid. This is because if these disputes were to persist, then the framework for, and the implementation of the devolved system of government is threatened.

Article 209 stipulates that only the national government has the power to impose income tax, value-added tax, custom duties and excise tax while article 210 provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation

2.13.8 Challenges and Recommendations

1) **Ineffective Public Participation** – its full purport under the Constitution has not been met. At times, members of the public have been involved in the budget preparation process as formalities and not with the intention value addition. It also does not help that the dynamics for the conduct of public participation processes have not been institutionalized or defined in law by most entities. The results is that the intended impact of public participation has not been felt.

2) **Institutional Disputes** – the disputes between the various institutions critical to overseeing the processes relating to the implementation of the PFM has sometimes delayed important activities including disbursement of funds and implementation of programs thereby prejudicing service delivery.

3) **Fiscal Transfers** – the financing of county functions have been beset with inconsistencies in the remittances of the equitable share of revenue from the national to the county governments. Despite the clear provisions of the law as well as the disbursement schedule which is annually agreed on and gazetted, there have been marked delays, at times running into months, in cash disbursements. In light of this fact, many counties have complained that the inconsistencies underlying the remittances undermine planning and service delivery under the budget.

4) **Adequacy of funds for devolved government functions;** Due to the non-completion of the functions analysis and costing process, the true cost of devolved services remains contested. This has

particularly negatively impacted programs and projects run on a regional basis including former provincial hospitals. In the absence of adequate data, the funds allocated to critical institutions do not enable them carry out their mandates effectively.

5) **Capacity Building –** the law assigns the national government the role of capacity building with respect to the county governments. In the area of PFM, capacity building has largely been required on the part of the county governments, which as "new kids on the block" have witnessed a myriad of challenges in the implementation of the ideals stated under the law. With the onset of devolution quite a number of capacity deficiencies were witnessed; from lack of qualified personnel to the inability to appreciate the dynamics and requirements of running a government. The effort by the National Treasury in this respect is laudable though not sufficient. The process also needs to be streamlined in view of the fact that there are way too many players including private practitioners that are driving the capacity building agenda. Uncoordinated capacity building activities may ultimately cause confusion than serve as a real response to the core issues at stake.

6) **User fees and charges-** County governments have, through respective county finance bills, imposed various fees and charges on businesses. Some of these charges are not compliant with Article 209(5), which requires that "the taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across boundaries or the national mobility of goods, services, capital or labour". The disputed charges are seen as undermining trade and investment in the respective counties and in the country as a whole.

7) **Delay in disbursement of resources to county governments-**County governments have suffered recurrent delays in disbursement of resources from the National Treasury to the county revenue accounts. This has delayed implementation of planned activities and partly contributed to disruption of service delivery in counties by striking staff over salary delays.

Recommendations:

1) **The process of budgetary adoption and amendments**: The implementation of fiscal decentralization has documented the manner in which political institutions have been involved in the distribution of resources albeit with a lot of controversy and interests. This is not desirable and therefore calls for the re-evaluation of budget passing and involvement of the assemblies, especially at the county level. In this respect, there is need to relook the PFM Act and limit the power of the assembly in terms of the alterations or amendments that they can make to the budgetary estimates presented before them for approval. If this power cannot be limited, then there is need to define the manner and or boundaries within which the assemblies exercise their power of the purse.

2) **Co-operation and Consultation:** The two levels of government must learn to and actually cooperate with each other to obviate unnecessary wrangling over matters that can be easily resolved. The constitution already set the minimum parameters for consultation and cooperation under articles 6 and 189. Adherence to these parameters should help in doing away with the resource disputes and supremacy contests that the country has unnecessarily been treated to. Beyond the Constitution, the institutions created under the law as platforms for the achievement of this quest must also effectively carry out their functions. Intergovernmental institutions like the National and County Government Coordinating Summit and the other sectoral intergovernmental forums must be active in carrying out the mandate assigned to it under the law. As it is, the meetings of the Summit have been far in between. In summary, this is an area that we have not faired on well.

3) **Monitoring and evaluation:** For this to be realistically undertaken, we must ensure that the reforms in this sector can easily be monitored and evaluated by way of performance based indicators. The country must be able to ascertain the impact, relevance and sustainability of the sector and the overall impact on service delivery from the standpoint of the public.

4) **Framework for conditional grants:** There is need for policy guidance on Conditional grants for the sole purpose of furthering the ideals of Public Finance as enshrined under the Constitution. This policy

must ensure that Conditional grants do not erode the fiscal autonomy of county governments or prejudice critical principles like equity and certainty in revenue allocation.

5) **Flow of donor funds:** There is a need to design the flow of funds from development partners as grants and loans for county functions to respect the distinction between the two levels of government and not make the national government the supervisor of the counties' implementation of their functions.

6) **Change Management Strategy:** Change Management is a necessary appendage to reforms for it goes into the core of design and implementation of reforms. It must be able to foster not only institutional but attitudinal changes as well. It rids the system of the old attitudes and inclinations and inculcates a fresh outlook of events in the new system occasioned by the law and the constitution.

7) **Disbursement of Funds:** The National Treasury to put in place measures that ensure funds are disbursed to county governments in a timely manner.

2.14 THE PUBLIC SERVICE

2.14.1 Introduction

In the last 20 years, Kenya's civil service has undergone a number of changes. Some of these changes include employee rationalization leading to a reduction in the wage bill reduction, performance improvement through performance contracting, the institutionalization of results-based management through the 'Results for Kenya' programme, transforming public service delivery through building partnerships and rapid results initiative. The aim of the reforms was to enhance performance efficiency in all government ministries, departments and agencies, and reverse the negative image of the public service. The results were dismal and the image of the public service has been largely negative, as it is characterized by nepotism, corruption, unequal distribution of employment opportunities among communities, unequal access to services and inefficiency in service delivery. A transformation, in the attitude of civil servants is particularly key achieving the desired reforms.

The Constitution introduced new avenues through which the public service could be transformed. . Chapter thirteen of the Constitution provides for the values and principles of the public service to be observed by all State organs and all State corporations in service delivery. The values and principles of public service include—high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely, accurate information;; fair competition and merit as the basis of appointments and promotions; representation of Kenya's diverse communities; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service.

The Constitution also, establishes the Public Service Commission (PSC) and the Teachers Service Commission (TSC), requires uniform norms and standards for staffing of county governments, and protection of public officers in the course of the performance of their duties and obligations.

This section summarizes the status of implementation of the Chapter n the Constitution on public service, focusing on achievements, challenges and recommendations.

2.14.2 Development and implementation of Legislation

1) Legislation on Values and Principles of Public service

The introduction of the values and principles of the public service in article 232 sought to address the issues relating to appointment and promotions within the public service for purposes of enhancing service delivery for the greater benefit of the Kenyan public.

To give effect to article 232, a Bill on Values and Principles was developed in 2014. The Bill provided inter-alia for: a general code on values and principles of public service; public participation in the promotion of values and principles of, and policy making by, the public service; and; reporting on the status of the promotion of values and principles of the public service. The Bill is yet to be enacted.

However, there are other pieces of legislation with provisions on values and principles of public service, discussed below.

2) Public Service Commission Act, 2012,

The Act gives effect to article 233, and provides for the functions and powers, and the administration of the Public Service Commission (PSC) established under article 233 of the Constitution; the qualifications and procedures for the appointment of the chairperson, members and secretary of the Commission, and for connected purposes.

The PSC existed under the repealed Constitution, albeit under the direct control of the Offices of the President and the Ministry of State for Public service. The PSC is now an independent Commission whose members are competitively recruited. The PSC is responsible for public service at the national level except for; State Offices, Office of High Commissioner, Ambassador, or other diplomatic or consular representative of the Republic or an Office or position subject to Parlscom, JSC,TSC,NPSC. At the county level, PSC's is responsible for hearing and determining appeals in respect of county governments' public service.

3) Teachers Service Commission Act, 2012

4) This Act gives effect to article 237 and provides for the functions and powers, and the administration of the Teachers Service Commission established under article 237 of the Constitution; the qualifications and procedures for the appointment of the chairperson, members and secretary of the Commission, and for connected purposes. What the new Act has done is to re-orient the TSC to align it with the Constitution of Kenya 2010 and to improve the teaching service in Kenya. It achieves this by reconstituting and incorporating the Commission, modernizing and expanding its functions and clearly articulating the procedure for appointment and removal of the chairperson, members and secretary. The Act also enhances the TSC operational and financial autonomy. As a Commission, the TSC has acquired certain powers that were previously handled by the Ministry of Education, Science and Technology. The TSC is mandated to review education standards for teachers, as well as their assignment and discipline and will also register teachers

5) Leadership and Integrity Act, 2012

The Leadership and Integrity Act establishes procedures and mechanisms for effective administration of Chapter Six of the Constitution to ensure that State officers and public officers uphold and respect the values, principles and requirements of the Constitution while discharging public duty.

6) 4. Public Officer Ethics Act 2003

This Act provides for a Code of Conduct and Ethics for public officers and requires financial declarations from certain public officers. Though enacted before the Constitution the Act has been transited to the new dispensation and necessary amendments made through other Acts. However, the Act should be reviewed to align it with the Constitution. The Penal Code also has provisions against stealing by servant, embezzlement and fraud by public service officers.

2.14.3 Regulations Developed Under the Public Service

Section 31 (1) of the PSC Act provides that the Commission may make regulations for the better carrying out of its functions under the Constitution, the Act and any other national legislation. The PSC

Act regulations were developed as required in Section 31 of the Act and are in use. The Commission for the Implementation of the Constitution reviewed the regulations and made observations and recommendations to PSC including the fact that the regulations should have conformed to the stipulations of the PSC Act, 2012. Further, article 94 (6) of the Constitution makes it clear that substantive matters of the law need to be included in statute and not in regulations. The PSC has consequently prepared an amendment Bill to include regulations and provide for all the specific issues pertaining to the Commission's mandate. The proposed amendment act is currently under review.

PSC also developed regulations on County Public Services Appeals Procedures in line with article 234 (2) (i) which were reviewed by CIC. The purpose of the regulations is to regulate the hearing of appeals by the PSC that have been filed by public officers against the decisions of county public services.

2.14.4 Institutional Framework

1) The Public Service Commission

The Public Service Commission established by article 233 of the Constitution is responsible for public officers working for the National Government. To operationalize the Commission, the Public Service Commission Act, 2012 was enacted in August 2012 to make further provisions to its functions and administration. The chairperson, vice-chairperson and members of PSC took office in January 2013.

The Public Service Commission is expected to hear and determine appeals in respect of county governments' public service according to article 234(2)(i). It is noteworthy that majority of the county governments consulted with PSC, especially during the transition period, for guidance on matters relating to officers on secondment. One key challenge was that the Public Service Commission Act and the County Governments Act did not provide for matters relating to human resources during the transition period. The Acts did not provide for the different categories of officers in the counties over the transition period including the seconded staff, newly recruited county staff and staff of the defunct local authorities.

2) County Public Service Boards

The Constitution, in article 235 provides that county governments are responsible (within a framework of uniform norms and standards) for establishing and abolishing offices in their public offices, appointing persons to hold or act in those offices and confirming their appointments and exercising disciplinary control over and removing persons holding or acting in those offices. This is with the exception of any office or position that is subject to the Teachers Service Commission. The Boards were established in all the counties and are operational.

The County Governments Act, 2012 gives effect to article 235 of the Constitution. The Act, in Part VIII, establishes the County Public Service Boards to manage staff on behalf of the county governments. Specific responsibilities of the Board include; establishing and abolishing offices in the county public service, appoint persons to hold or act in the offices of the county public service, including in the Boards of cities and urban areas within the county and to confirm appointments, prepare regular reports for submission to the county assembly on the execution and functions of the Boards, promote in the county Public Service Board the values and principles referred to in article 10 and 232, among other functions. All the county governments established functional County Public Service Boards all of which are operational.

3) County Assembly Service Boards

The County Assembly Service Boards are established in section 12 of the County Governments Act, 2012. They are responsible for providing services to ensure the efficient and effective functioning of the County Assemblies, constituting offices in the county assembly service, and appointing and supervising office holders; preparing annual estimates of expenditure of the county assembly and submitting them to the county assembly for approval, and exercising budgetary control over the service; undertaking,

singly or jointly with other relevant organizations, programmes to promote the ideals of parliamentary democracy; and performing other functions necessary for the well-being of members and staff of the county assembly or prescribed in national legislation. All the counties operationalized this section of the act and established functional CASBs.

The County Assembly Service Boards are a duplication of functions. Their functions can be handled by the County Public Service Boards, and therefore CIC recommends that the County Government Act be amended to abolish the County Assembly Service Boards.

4) Capacity Assessment and Rationalization of the Public Service Programme

In May 2014, an institutional framework for a joint national and county governments capacity assessment and rationalization programme for the public service (CARPS) was put in place through a gazette notice following a national and county government coordination summit meeting held in June 2014. The purpose of the programme which is on-going, is to ensure that government functions are structured to transform the Public Service to higher levels of professionalism, efficiency and effectiveness in service delivery at National and County Governments. It sets out to do the following:

a) Assess the existing capacity of the public service at both national and county government levels
b) transform the public service for efficient and effective service delivery
c) reduce the cost of providing services
d) achieve fit for purpose organizational structures and;
e) Facilitate transition to devolved governments. The implementation of the programme is yet to begin and therefore to evaluate the extent to which the programme has met its objectives may be premature. At this point, it is critical to avoid the mistakes made in a similar programme that was undertaken in the late 1990s, including the need to minimize anxiety to public officers due to fears of retrenchment.

5) The Teachers Service Commission

The Teachers Service Commission is established through Article 237 of the Constitution, which also outlines its functions. These functions are (a) to register trained teachers;(b) to recruit and employ registered teachers; (c)to assign teachers employed by the Commission for service in any public school or institution; (d) to promote and transfer teachers; (e) to exercise disciplinary control over teachers; and (f) to terminate the employment of teachers. The Constitution also provides for the independence of TSC at article 249(2) and makes it clear that the institution is only subject to the constitution and the law and therefore not subject to the direction or control of any person or authority. Additionally, the funds of the Commission are allocated by Parliament by way of a separate vote including the requirement that the commission reports to the president and parliament.

The Act was operationalized through the Teachers Service Commission Act, 2012.

In the recruitment of teachers and staff of the Commission, the Constitution and 2012 Act requires the Commission to ensure the equalization of opportunity for persons with disabilities, equalization of opportunities for the youth. It further requires that not more than two thirds of its staff is of the same gender and that the appointments reflect ethnic and regional diversity of the people of Kenya.

In performance of its administrative functions, the Commission should be guided by the principles of fair administrative Action prescribed in article 47 of the Constitution. These principles are of fundamental importance where the Commission exercises its disciplinary powers or exercises its administrative functions in any way that might affect or prejudice the legal rights or interests of any person.

In performance of its core functions, the Commission should be further guided by
article 6 on Devolution and Access to Services which prescribes that the national and county governments should conduct their mutual relations on the basis of consultation and co-operation. Article 6(3) requires that a national organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of service. Article 48 of the Constitution also requires the State to ensure access to justice for all and requirements on equality and inclusion as provided by article 27.

2.14.5 Challenges and Recommendations

Challenges

1. Lack of Clarity in the National Policy

The national policy on education mixes policy issues with matters that fall within the realm of government administration. A national policy should provide broad guidelines that embody the aspirations of a people, irrespective of who is in power, and should therefore outlive the government of the day, and indeed, inform the policies of any incoming government. It lacks a philosophical underpinning that is in line with the aspirations of the Constitution generally and with respect to education. It goes into details of dealing with strategy and management, which is unnecessary in the context of the system of devolved government, to the extent that it mixes roles of the various State organs, along with violating the Constitution.

The policy also gives the management of schools to TSC, which is not part of TSC's roles (article 237) and also assigns it constitutional functions already assigned to county governments and national governments. It would have helped if the policy limited itself to aspects of standards on education system and structure, including infrastructure, accessibility, curriculum and assessment, quality, skills development, attitudinal change, decentralization of the national State organs, their services and function, teaching standards, standards on quality of all aspects of education, standards on curricula and examinations, accountability and governance.

2. Conflicts over Mandates

The Constitution gives the function of management of schools and institutions starting from primary to universities to the national government; and the responsibility of pre-primary education, village polytechnics, home craft centres and childcare facilities to County Governments.

TSC has been managing primary and secondary schools, claiming that this is their mandate. They have also tried to hire instructors for pre-primary schools, a move which the county governments resisted and the matter is now in court. This is because the Basic Education Act, 2012 defines pre-primary education as "education offered to a child of four or five years before joining level one in a primary school", while the TSC Act, 2012 describes a teacher as "a person who has been trained as a teacher as provided for in law and registered as a teacher."

Another conflict in terms of mandate relate to the interpretation of article 232 3(a), which mandates the Commission to review the standards of education and training of persons entering the teaching service. Whereas this article provides clarity on the role, the TSC Act, 2012 seems to have given the Commission a role in curriculum development.

Consequently, the following challenges have been experienced: (a) Who has the mandate to manage schools, (b) how do the managers of schools successfully work with TSC, (c) who is mandated to set and regulate teaching standards, (d) who is responsible for the training of teachers, (e) who is to hire pre-primary instructors, (f) Etc.

Challenges and Recommendations

Challenges

1) Delay in enactment of a law to give effect to article 232(3) on values and principles of Public Service leading to delayed application of these principles. Parliament should fast-track the enactment of this law to guide the public service.
2) Violation of chapter Six of the Constitution on leadership and integrity. Corruption and unethical conduct amongst public servants has the sum effect of undermining service delivery.
3) Difficulty in meeting the constitutional requirement on 2/3rd gender rule and representation of persons with disabilities in constituting the County Assembly Service Boards, as the membership of this Boards is predetermined by the law.
4) Lack of a performance Management System: Failure by most counties to establish performance management system. Some public service practices are yet to be institutionalized. For example, performance contracting is yet to be cascaded to the lowest levels of public service (counties)

5) Difficulty in meeting the thresholds set in staffing for special groups. Some of the County Public Service Boards have indicated that the provision of Section 65 (1) (e) which require the boards to ensure that at least thirty per cent of vacant posts at entry level are filled by candidates who are not from the dominant ethnic communitis in the county has been difficult to fulfil especially for certain specialised skills, e.g., architecture, medicine and engineering. It has also been difficult to meet the requirement on PWDs with most PWDs not applying for the vacancies.
6) There exist capacity gaps in specialized fields owing to less attractive remunerations in counties.
7) Qualifications for the board secretary; the law sets the minimum qualification for the Secretary of the County Public Service Board to be a certified public secretary of good professional standing. However secretaries to the boards indicated that their duties do not include any duties that a certified public secretary would perform. In some cases it has been difficult to get individuals with the requisite minimum qualifications by law to fill the positions of board secretary. There is need to review the minimum requirements set out in the County Government Act, 2012.
8) Limited skills and qualification of staff inherited from the defunct local authorities and the huge impact of the same on the county's wage bill.
9) Legislative Gap in Public Service Commission Act 2012. The Act does not have clear provisions on the procedure of appointment or removal of the Deputy Public Prosecutor (DPP), Principal Secretaries, High Commissioners, Ambassadors or other diplomatic or consular representatives of the Republic of Kenya

Recommendations

1) To address the conflicts of mandates between TSC and County Governments on education; review the education policy and relevant laws on education so that each State organ is assigned the functions the Constitution has assigned to them, as follows
   a) County Governments: management of pre-primary school and polytechnics
   b) National Government
      i) Management of Primary and secondary schools
      ii) Development and enforcement of education standards, including the ones for teaching, for the republic. TSC may set the usually standards relating to administrative procedures, for teachers.
   c) TSC - Registration, recruitment, assigning, promotion, transfer and discipline of teachers and, to terminate employment of teachers.

2) Develop a framework to guide the managers of schools and enable TSC play its role as provided for in article 237 (2) (a-f). For example,
   a) how a school may track the performance of a teacher,
   b) how to provide feedback to TSC for decision making,
   c) what management needs to do to assist and enable TSC monitor and evaluate the teachers,
   d) how TSC may inform management of the statuses of the teachers serving them

The framework should, among others, provide for the resolution of conflicts between teachers and managers of schools.

3) Public service institutions should develop and implement codes of conduct that have the net effect of facilitating the enforcement of chapter six of the Constitution.
4) The EACC Act should be amended to mandate the setting up of two independent directorates of the Commission. One of the departments would deal with monitoring, oversight and enforcement of matters of leadership and ethics as required under Chapter 6 (save for anti-corruption) and facilitate corruption preventive measures. The other directorate would deal with the traditional anti-corruption enforcement, which the former KACA and the current EACC generally engage most of their resources in. This separation would ensure that there is a sufficient focus on the dictates of Chapter Six which have to do with the engendering of the values of integrity in leadership and that the same are not compromised by the focus on the war against corruption, which tends to exhaust all the energies and resources of the Commission as organized to-date.

5) The Leadership and Integrity Act should be amended to require all State officers who are also public officers to declare their income, assets and liabilities. Moreover the declarations be the basis for which people are held accountable. It has not been deterrent enough due to lack of enforcement mechanisms.
6) The power of delegation should always be on roles given in the constitution for accountability purposes. PSC should put in place a process of monitoring such delegated authority.
7) Standard Performance management systems should be established and applied uniformly at all levels of service delivery. Institutionalization of the system would ensure improved public service delivery and enhance transparency and accountability.
8) County governments need to develop clear and strategic capacity building strategies for citizens. The citizens and PWDs need to be sensitized of the positions so as to submit applications
9) County governments should identify the capacity gaps and invest in capacity building. Competitive terms should be offered to attract more applicants
10) A policy decision is required on how to handle issue of unqualified staff. This move may include paying them off to allow for the recruitment of qualified staff. Meanwhile, there should be a clear staff capacity building strategy and the need for their deployment to relevant sections based on qualifications.
11) CIC recommends that legislative gaps in the Public Service Commission Act, 2012 be addressed through;
    a) Development of a Public Service Management law to anchor the Constitution of Kenya provisions on the public service
    b) Amendment of the Public Service Commission Act 2012 to address all issues specific to the Commission's mandate. An example of what the amendment would address would be the process of appointment of the Deputy Public Prosecutor, appointment and removal of the Principal Secretaries, high commissioners, ambassador or other diplomatic or consular representative of the republic of Kenya.

Conclusion

The implementation of the values and principles of the public service has been observed mainly in the establishment of the requisite legislative and institutional frameworks needed to improve the public service, and in recruiting of public officers. The current constitutional dispensation is slowly entrenching a culture of meritocracy and competitiveness in appointment to the public service as opposed to the past where most high profile appointments were based on political affiliations. Where allegations of unfair processes have been made, they have, in some instances, been subjected to legal interventions. The appointing authorities therefore strive to ensure compliance with the Constitution to avoid possible litigations.

The TSC plays a critical role in the administration of teaching services. It has a great opportunity to direct the manner in which education, the strongest tool of social transformation, can be applied for the benefit of every region in this nation. Its adherence to the Constitution and the law, its observance and respect for the national values and principles, and its unreserved commitment to its mandate will go a long way in guaranteeing quality service to its clients.

2.15 NATIONAL SECURITY

2.15.1 Introduction

The promulgation of the Constitution of Kenya 2010 constitution introduced significant changes in the policy, legislation and institutional structures relating to national security. The national government is the primary duty bearer and principal custodian of the right to freedom and security as espoused in the Constitution. The national government has the responsibility to establish the necessary security mechanisms to ensure that this right is protected, promoted and fulfilled for everybody living within her jurisdiction.

Security Agencies in Kenya were under intense pressure for reforms since the 1990s. During the said period, these institutions were often accused of participating in the repression of the movement for democracy, carrying out illegal arrests and detention without trial and cruel, inhuman and degrading treatment, among other forms of human rights violations. The earliest initiative on Security Reforms by government began in 2003 following the establishment of the Kenya National Task Force on Police reform, which led to the beginning of reforms relating to National Security.

Thereafter, there have been various steps taken to reform the security sector. On 8th May 2009, the President announced the appointment of a National Task force on Police Reforms headed by Justice Philip Ransley. The recommendations provided by the Ransley Task Force formed a blue print for police reforms, which was adopted during the making of the Constitution.

Chapter fourteen of the Constitution provides for the establishment of various State organs and systems designed to guarantee national security. The Constitutional structure of government is dependent on sound security systems that in turn guarantee the protection of human rights and fundamental freedoms. The Constitution defines what national security means, assigns the responsibility for the provision of security to various State agencies to ensure State security, territorial integrity and the protection of the people of Kenya. It also provides for the manner in which national security is to be achieved and prescribes the manner in which the national government, through the security organs, is expected to implement chapter fourteen of the Constitution.

National security is defined in article 238(1) of the Constitution as "the 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." This definition is fairly broad. It recognises the fluid nature of national security and allows for national government to define its specificities with some flexibility. However, it sheds light on certain key features of national security that provide the rationale for the institutional and legislative framework required for the implementation of chapter fourteen of the Constitution. Article 238(1) highlights the two kinds of threats; internal and external. Internal threats to security include criminal activities, general insurrection, unrest and instability while external threats include external attacks such as invasions or acts of aggression by foreign powers. The two threats are treated differently by the Constitution, which assigns different responsibilities to different security organs. These organs may either act on their own motion or with the approval of the national assembly.

One other feature of national security as defined by the Constitution is that it is premised on protection of Kenya as a sovereign Republic, its people and "national" interests. Threats to security do not respect geographical boundaries whether within the county boundaries or the external boundary with neighbouring countries. Consequently, the responsibility to provide national security is placed on the national government through the national security organs. The Fourth schedule to the Constitution gives the national government the function of national defence and the use of national defence services and police services. Article 239(2) states that the primary object of national security organs "is to promote and guarantee national security."

An assessment of the status of implementation of chapter fourteen and the performance of the key institutions that implement it requires an understanding of the key features of national security as defined in article 238 and their implications. In effect, the implementing agencies need to understand not only the meaning of security but also the means by which it is to be realized.

For the implementation of national security, the Constitution provides for the legislative and institutional framework required for the protection of the people of Kenya with regard to their safety, security and freedoms.

2.15.2 Legislation and Administrative Procedures

Legislation required to implement the Constitution with regard to national security was enacted within the two-year timelines provided in the Fifth Schedule to the Constitution. The executive prioritized these laws and, accordingly, they were enacted within one year of promulgation of the Constitution. The laws include:

1) National Police Service Act, 2011.

This is the primary legislation that gave effect to articles 238, 243, 244 and 245 on national security with regard to the national police service. The Act provides for the composition, functions and powers,, administration and command of the service. A key milestone with the enactment of this Act, was the introduction of a provision that recognized that members of the service enjoy human rights and freedoms as do other Kenyans subject, however, to the limitations allowed by virtue of article 24. This is a significant step in view of the fact that there is usually a strong focus on the recognition and protection of human rights of the citizenry against violations by the Police without a similar focus on the need to uphold the rights of our service men and women. In addition, the Act specifically requires the service to comply with (a) the principles of national security; (b) article 27 on the two-thirds gender principle; and (c) the bill of rights enshrined in chapter 4 of the Constitution.

Despite enactment of the legislation in time, there was unjustifiable delay in the publication of the Act in July 2012. This delay raised concern on the executive's commitment to the police reform that was consequent upon the law being implemented.

A number of administrative procedures have been developed and published. However, there are some that are yet to be developed. The Service Standing Orders were reviewed and aligned to the Constitution and with the National Police Service Act, 2011.

2) National Police Service Commission Act, 2011.

The National Police Service Commission (NPSC) Act, 2011 gives effect to article 246 of the Constitution by establishing the NPSC and providing for its powers and functions. This law has been amended subsequently through the National Police Service Commission (Amendment) Act, no. 3 of 2014. The Commission has done a commendable job in developing most of the requisite regulations under the Act. The NPSC acted in consultation with CIC, the Office of the Attorney-General and Kenya Law Reform Commission, in reviewing and publishing the following regulations:

a) The National Police Service Commission (Promotion) Regulations;
b) The National Police Service Commission (Discipline) Regulations;
c) The National Police Service Commission (transfer and deployment) Regulations;
d) The National Police Service Commission (Recruitment and appointment) Regulations; and
e) The National Police Service Commission (Human Resources Management) Regulations.

3) National Security Council Act, 2011

The National Security Council Act, 2011 gives effect to article 240 of the Constitution by providing for the functions of the NSC and its structures. The regulations required under this Act have not been published. The inordinate delay in their development and publication is unjustifiable, as the Act cannot be effectively implemented without the subsidiary legislation that sets out the actual administrative structures and functions.

4) National Intelligence Service Act, 2011

The National Intelligence Service Act was enacted on the 27th of August 2012 in compliance with the Fifth schedule to the Constitution. The Act gives effect to article 242 relating to the establishment of the Service and to other relevant constitutional provisions, including articles 10, 232, 238 and 239. It provides for the appointment of the Director General of the Service, the functions and administration of the Service, civilian oversight, limitation of rights and offences under the Act. The Act gives effect to

the Constitution by recognizing oversight by the National Intelligence Service Council, Parliament and the Intelligence Service Complaints Board under sections 64, 65 and 66 of the Act respectively. Civilian authority to which the Service is subordinate has also been provided for with the recognition of the role of the CS and the supervisory role of the NSC in sections 27 and 29 of the Act. Further, the Act promotes respect for human rights by expressly mandating the Service to uphold the Bill of rights. It specifically prohibits torture, inhuman and cruel treatment.

Other legislation that have been enacted or amended in the last five years that relate to the function of the NIS include the Prevention of Terrorism Act, the National Security Council Act and Security Laws (Amendment) Act, 2014. These laws have sought to strengthen the capacity of the Service to combat terrorism and other serious crimes.

The Service reported that the following regulations and policies have been developed:

a) Disciplinary rules and regulations
b) Special leadership and integrity Code for State Officers in NIS
c) Code of Conduct and Ethics for members of NIS
d) Affirmative Action Policy to give effect to article 27 of the Constitution on the requisite affirmative action measures. The implementation of the policy has led to the promotion of women into senior positions and increased recruitment of women into the Service. Despite the policy, the constitutional threshold of not more than two thirds shall be of the same gender has not been reached and because of the apparent veil of secrecy, it has been not been possible to verify whether recruitment complies with the Constitution and the law;

The following regulations are yet to be developed by the National Intelligence Service:

a) Regulations on the classification of information and records pursuant to section 80 of NIS Act.
b) Regulations on the National Intelligence Service Council pursuant to section 64 of the NIS Act.
c) Regulations on the Intelligence Service Complaint's Board pursuant to section 67(8) of the NIS Act.

5) Kenya Defence Forces Act, 2012

The Kenya Defence Forces Act was enacted in 2012 within the constitutional timeline of two years. The Act provides for the functions, organization and administration of the KDF pursuant to articles 238 and 239(6). It also gives effect to article 241 and other articles, such as article 10 and the Bill of rights.

The KDF Act requires the development of a number of regulations, including

a) Kenya Defence Forces (Active Service Punishment) Regulations, 2013.
b) Kenya Defence Forces (Court Martial Appeals) Rules, 2013.
c) Kenya Defence Forces (Internal Grievances Mechanism) Regulations, 2013.
d) Kenya Defence Forces (Courts Martial) Rules of Procedure, 2013.
e) Kenya Defence Forces (Missing Persons) Regulations, 2013.
f) Kenya Defence Forces (Pensions and Gratuities) (Officers and Service members) Regulations, 2013.
g) Kenya Defence Forces Rules of Procedure, 2013.
h) Kenya Defence Forces (Summary Disciplinary Proceedings) Regulations, 2013.
i) Kenya Defence Forces (Constabulary) Regulations, 2013.
j) Kenya Defence Forces (Commissioning of Officers) Regulations, 2013.
k) Kenya Defence Forces (Execution of Sentence of Death) Regulations, 2013.
l) Kenya Defence Forces (General) Regulations, 2013.
m) Kenya Defence Forces (Imprisonment) Regulations, 2013.
n) Kenya Defence Forces (Board of Inquiry) Regulations, 2013.

The regulations were submitted to CIC for review in 2013 to ensure compliance with the Constitution and the relevant laws. It is commendable that the KDF made the distinction between regulations relating to administrative matters and the ones touching on operational matters that may be subject to the protection of secrecy. It is because of this that KDF did not withhold all the regulations from scrutiny on the basis of national security interest.

6) Other Legislation

Other related legislation that was enacted in the two-year period includes the Independent Policing Authority Act of 2011. In addition to the above, The Criminal Procedure Code and the Penal Code have also been amended to ensure compliance with the letter and spirit of the Constitution

2.15.3 Institutional Framework

A. The National Police Service

The NPS was established under article 243 of the Constitution. The following are among the key achievements of the implementation of the Constitution:

1) The creation of one national police service

Prior to the promulgation of the Constitution, there existed two police forces, the Kenya Police Force and the Administration Police Force. The two now constitute the Service. This merger addressed two major challenges that had dogged policing for years. First, the problem of rivalry and competition between the two forces was solved, as the two services are now equal members of the National Police Service. Secondly, the perception of the police as a tool of violent force was replaced by one where policing was a form of service delivery to the citizens for which the police could be held accountable.

Each Police Service is headed by a Deputy Inspector General (DIG) who reports to the Inspector General of the Police Service (IG). A Directorate of Criminal Investigation (DCI) was also established under section 28 of the NPS Act.

2) Independent Command of the Inspector General

One of the most significant police reforms implemented under and by virtue of the Constitution was the establishment of the office of the Inspector General of the Police Service who has independent command of the Service. Until the enactment of the NPS Act and the NPSC Act in 2011, the Commissioner of Police and the Commandant, Administration Police continued to perform the functions of the appointment, discipline and removal from office in the service. The effect of the Independent Command was to shield the NPS from political interference with regard to investigations, law enforcement and matters relating to employment, assignment, promotion, suspension and removal of persons from office. The IG has security of tenure for a period of four years and can only be removed from office on the grounds specified in the Constitution.

3) Recruitment and Appointment of the DIGs and DCI

For the first time in the history of Kenya, the top offices of the Police Service were subjected to competitive recruitment. The jobs were advertised and applicants interviewed before they were shortlisted. In the case of the IG, the President picked a nominee from the shortlist and submitted the same to the national assembly for approval. With regard to the DIG's, the same recruitment process is followed by the NPSC except that the successful applicants are not subject to parliamentary approval.

In 2012, President Kibaki and Prime Minister Raila Odinga nominated Mr. David Mwole Kimaiyo for the position of Inspector General of Police and forwarded his name to parliament for debate and approval by members of parliament. After vigorous interviews by the parliamentary committee on national security, parliament voted in favour for his appointment. Mr. Kimaiyo was then appointed as Inspector General of Police on December 24th 2015.

Similarly, the National Police Service Commission interviewed and shortlisted candidates for the positions of Deputy Inspector Generals of the Kenya Police and Administration Police respectively, in the months of October and November of 2012. Subsequently, the Commission forwarded shortlisted names to the President, and Grace Kaindi and Mr. Samuel Arachi appointed on the 23rd of January 2013.

This process gives effect to article 10, which requires the principle of transparency to be applied, article 232 on competitive recruitment on the basis of merit and ensuring ethnic diversity and article 73(2) on the selection on the basis of personal integrity, competence and suitability, objectivity and impartiality in

decision-making. The decisions on appointment were not influenced by nepotism, favouritism and other improper motives or corrupt practices.

The Security Laws (Amendment) Act, 2014 amended section 12 of the National Police Service Act, 2011 that provided for the process of appointment of the Inspector General of the Police Service. The NPS Act provides for the National Police Service Commission to interview and nominate candidates for submission to the President. The amendment, which was a replica of the Constitution, now prescribes that the President shall within fourteen days, nominate a person for appointment as an Inspector General of Police and submit the name of the nominee to Parliament.

4) Regulation of the Use of Force and Use of Firearms

Article 244 provides that the NPS shall "comply with constitutional standards of human rights and fundamental freedoms." Read together with article 238(2)(b) which applies to the NPS, police officers are required to respect the human rights of all persons as they carryout their law enforcement activities. The NPS Act has provided for a comprehensive schedule on the use of force and use of firearms that sets clear limits of the use of force. Police are permitted to use force to prevent crime and maintain law and order. However this power should not be abused to violate human rights. The Sixth schedule gives effect to the United Nations (UN) Basic Principles on the Use of Force and Firearms by law enforcement officials and therefore reflects international standards and best practice. Police officers are required to use non-violent means in the first instance and to use force only as a last resort. This is a major milestone in the observance of human rights by the Police Service, which has been accused of perpetrating extra-judicial killings.

Historically, the Police over the years had served as the State's main organ of oppression and principal violators of human rights operating in a culture of low accountability. Police forces have often been charged with corruption and misuse of force. The Kenya Police and other State security actors previously monopolized the use of force before the promulgation of the 2010 Constitution.

5) Enhanced Police Accountability

Two major interventions were operationalized to enhance accountability within the Police Service following the enactment of the police laws that give effect to the Constitution. The first was the requirement for the IG to set up an Internal Affairs Unit to investigate complaints and misconduct against the police. The second was the establishment of the Independent Policing Oversight Authority (IPOA), which investigates complaints related to criminal offences committed by members of the service.[45]

6) Application of the two-thirds Gender principle

Historically, the Police Service recruited very few women as compared to male members of the Service. With the introduction of a recruitment process that required that recruited officers would not be more than two thirds of either gender, there has been an increase in the number of women into the Service.

B. The National Police Service Commission

NPSC was established under article 246 of the Constitution to recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the NPS while observing due process, exercise disciplinary control over and remove persons from office. Under the repealed Constitution, the police officers were public officers falling under the jurisdiction of the PSC. In order to avoid interfering with the line of Command, PSC delegated some of its powers to the Police Commissioner and AP Commandant.

The establishment of NPSC was intended to remove the human resource function from the Police and place it under an independent commission that would ensure that matters, such as transfers, promotions and dismissals were dealt with objectively and without bias or discrimination. The NPSC Act therefore had in addition to the functions provided under the Constitution, additional functions similar to those of PSC. Unfortunately the implementation of the additional provisions proved problematic within the context of a disciplined force. The Act was amended to exclude some of the provisions and later to facilitate the delegation of powers by NPSC to the IG to allow for the exercise of independent command.

C. The Kenya Defence Forces

45 Section 87 of NPS Act and section 6 of the IPOA Act.

The Kenya Defence Forces (KDF) is the successor to the Armed Forces that existed under the former constitution. Under the new dispensation the military is subject to the Constitution, parliament and to civilian authority. It is also subject to the supervisory control of the National Security Council. Without a doubt, given the current security threats facing the country such as terrorism, radicalization,

inter-ethnic conflicts and serious crimes which have increased over the last decade, there was need for highly professional, well resourced security organs that could protect national security and keep Kenyans safe.

The military in any society has a duty to secure citizens and national interests. It does so using force. It is the use of this power that is constrained by the constitution so that it does not conflict with protection of human rights and fundamental freedoms. The constraint placed on KDF by the Constitution is found in the very specific functions that are given in article 241 as follows;

The Defence Forces:

a) Are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;
b) Shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the national assembly whenever deployed in such circumstances; and
c) May be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the national assembly.

The defence forces of Kenya made up of the Kenya Army, Kenya Air force and Kenya Navy have a clear command structure set out in the Constitution with the President at the helm as commander in chief, the Chief of Defence Forces and the Service Commanders. The command structure is not only important for the purposes of ensuring discipline and obedience to lawful orders within the Service, but it also effectively lays out the line of command and responsibility upon which the Defence Forces can be held accountable for any violations of the law.

The structures that the Constitution provides for are the three armed forces that constitute KDF as provided for under article 241(2) and the Defence Council. The Defence Council is responsible for the overall policy, control and supervision of KDF. Chaired by the Cabinet Secretary, Ministry in charge of Defence, it has six members, including the three Service Commanders, the Chief of Defence Forces and the Principal Secretary of Defence. The Defence Council is the heart of the Defence Forces providing oversight, policy direction and supervision over both administrative and operational matters. Through this mechanism, the three Armed Forces are managed and coordinated as one Kenya Defence Force. The achievements arising from the implementation of the Constitution and the KDF Act at an institutional level include:

1) Recruitment and Appointment of Members of the Service.

In July 2011, KDF advertised for their first recruitment of General Service Officers (GSO) (cadets) and specialist officers under the new dispensation. After consultation between CIC and KDF, the guidelines for recruitment were amended to align them with the Constitution. The recruitment exercise that followed that year and subsequent years were based on recruitment guidelines that were non-discriminatory and sought to ensure that those recruited would comply with the constitutional principle of ethnic diversity of the Kenyan people in equitable proportions. Of great significance was that the recruitment was done in a transparent manner with monitors and media being allowed to observe the process. The Commission monitored the recruitment held in November 2014 and observed that there was general compliance with the Constitution from the advertisement to the actual recruitment process. The process was transparent, merit based and saw an increase in the number of women recruited.

2) Deployment in Accordance with the Act

During the five year period of implementation, Kenya has faced serious security threats particularly from the Al Shabaab Terrorist group and internal unrest due to inter ethnic disputes. During this period, KDF was deployed to Somalia under AMISOM and to assist the NPS in compliance with article 238(2) (a) and 241(3). The national assembly gave approval for the deployment on the 26th of October 2011. In a continent where militaries are used to support autocratic regimes or to overthrow democratically elected governments, the subordination of KDF to civilian authority and to the people of Kenya through

their representatives in Parliament is a major milestone in achieving constitutional democracy that the Constitution promised Kenyans.

3) Fair Administrative Action in Disciplinary Proceedings and Court Martials

The KDF Act gives effect to articles 47 and 50 on fair hearing. During the development of the KDF Act, CIC emphasized the need to ensure that disciplinary proceedings within the Force included the principle of natural justice to safeguard against impunity and arbitrary decisions by superior officers. The procedure for summary proceedings is clearly set out providing for appeal and review by the Defence Council.

The Court Martial is a subordinate court under article 169(1)(c). Its jurisdiction, functions and powers are provided for in Part IX of the KDF Act as required by the Constitution. Changes to the composition of the membership of the Court Martial and its procedures are some of the notable achievements of the new constitutional dispensation. The requirement that one of the members of the panel be an officer of similar rank or as lowest as possible such as a Lieutenant Colonel was a significant achievement in promoting the principle of equality of arms, which requires parties to be treated equally and not to suffer any disadvantage or inequality in the presentation of their case. This is vital in a proceeding that takes place within the context of a highly regimented command structure where seniority in rank is sacrosanct. Another positive change has been the granting of the option to officers to elect to have a Court Martial rather than go through summary proceedings. Courts Martial are also held as open courts, thereby upholding the principle of fair trial.

D. The National Intelligence Service

The National Intelligence Service is a security organ under article 242. The NIS is successor to the notorious "special branch" that later became the NSIS. NIS is now independent from the police and it is responsible for security intelligence and counter intelligence to enhance national security in accordance with the constitution and any other national legislation. The implications of the Intelligence Service being a State organ include the following:

a) It is subject to the constitution and parliament;
b) It is bound to apply the national values and principles in article 10, including transparency, accountability and integrity;
c) It must pursue national security by respecting the rule of law and human rights; and
d) It must be non-partisan and not pursue any political interest or cause.

An assessment of the performance of the Service must therefore be guided by the above constitutional edicts. The Constitution required that the relevant legal and institutional framework be put in place to transform the Service to an accountable and effective Intelligence Service that promotes national security within a timeline of two years.

With the enactment of the NIS Act to give effect to the Constitution, the Service underwent internal alignment to bring it into conformity with the Constitution. The Service has complied with article 6(3) of the Constitution and has ensured access to its services in all counties. Administrative measures, such as training, recruitment and review of Service directives have been undertaken based on policies that promote the constitutional values and principles. Prior to the 2013 general elections, a notice was given to all officers to disengage from politics in line with newly reviewed disciplinary rules, regulations and code of conduct. This is a key achievement because of the history of the Service as a tool of the ruling political elite to target the opposition or dissenting party members.

1) National Intelligence Service Council

Section 64 of the Act establishes a National Intelligence Service Council, whose functions are to advise the Service on matters relating to the national intelligence policies and strategies, the administration of the Service and the expenditure of the Service. The recognition of this Council in law was intended to give weight to the concept of civilian authority over the Service.

Whereas the establishment of the Council is a major milestone of achievement in the implementation of the Constitution, its effectiveness still faces some challenges. First, the composition of the Council which is made up of cabinet secretaries and the Attorney General does not inspire confidence that it needs.

This is due to the huge responsibilities the members have in their own ministries. In view of the technical and administrative matters that the Council deals with, it would have been more efficient to have the membership of the Council made up of Principal Secretaries. In addition, the members of the Council are the same as those in the NSC with the exception of the cabinetsSecretary responsible for finance. It is a duplication of roles for the same members to perform similar functions at the two levels. During the development of the law, CIC pointed out this issue, but there was strong representation from the Service that the membership should be drawn from the cabinet.

Secondly, it is not obvious that, with the establishment of the Council, there is adequate oversight on administrative matters. An example of the failure to provide adequate oversight and accountability was the cancellation of the recruitment exercise of diploma trainees and graduate trainees in 2014, due to alleged corruption and pressure from a section of the political elite who wanted to influence the recruitment. To its own credit, the Service called off the exercise as soon as it became apparent that the process was not credible. This raises the question as to the appropriateness of the current membership of the Council.

The Commission recommends that the composition of the Council be reviewed and the NIS Act be amended accordingly. In addition, the membership might benefit from expanding the composition to include a person who is not a public officer but who has a distinguished career in matters relating to public administration and security policy.

2) Intelligence Service Complaints Board

The Complaints Board was established in order to promote accountability and ensure fair administrative action within the Service. Section 66 of NIS Act provides that the Board shall receive and inquire into any complaint against a member of the Service and make recommendations regarding disciplinary action in appropriate cases.

The challenges relating to this institution include the fact that it is not well known by the public and little has been done to create awareness of its existence. It is therefore difficult to establish how effective the Board is except perhaps for receiving internal complaints from members of the Service. Secondly, the process that has been set out in the Act for complaints is applicable to the proceedings facing both the Director General and the members of the Service. In view of the fact that the Board is compelled under the Act to consult the DG and the Council (in which the DG is a member) during the proceedings on matters relating to national security, there is a risk of conflict of interest in a matter relating to a complaint against the DG. Thirdly, once the Board makes a recommendation, there is no requirement for accountability for the implementation of the recommendation.

The Commission for the Implementation of the Constitution recommends an amendment to NIS Act in order to strengthen the oversight role of the Board by requiring civic education on the functions of Board, including the complaints procedure. Secondly, a procedure should be provided for cases where a complaint is made against the DG to safeguard against conflict of interest. Lastly, the DG should be required to submit a report on the progress of implementation of the recommendations of the Board.

3) Parliamentary Oversight.

Section 65 expressly provides for oversight by parliament. The provision is contained in one sentence and does not expound on the parameters of the oversight within the context of national security. Through section 58 of the Security Laws (Amendment) Act, 2014, an attempt was made to amend this provision to specify that national assembly undertake the role of oversight. The rationale for the amendment is that it is a duplication of efforts and waste of resources to have two committees of the house address the same issue even in the instance where it has no relation to the interests of counties or their governments. The challenges facing oversight by parliament are addressed elsewhere in this report and apply with regard to oversight of NIS.

E. Independent Policing Oversight Authority

The Independent Policing Oversight Authority was established through an Act of Parliament published in November 2011 to provide for civilian oversight over the work of the police in Kenya.

Some of the functions of the Authority include:

i) Investigating any complaints related to disciplinary or criminal offenses committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations were to be made public;
ii) Receiving and investigating complaints by members of the Service;
iii) Monitoring and investigating policing operations affecting members of the public; and
iv) Monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken.

Since its inception, the Authority has received a total of 3246 complaints. Of these, 594 were received in 2012/13, and 860 in 2013/14 and the rest in 2014/2015. This clearly indicates growth in the number of complaints requiring the Authority's intervention. Of the complaints received, 2400 have been processed.

The Authority also recorded significant progress in the area of investigations. As of 30th June 2015, the Authority had investigated and completed 141 cases. Of the 911 cases received for investigations to date, 540 were awaiting commencement of investigation, 230 are under investigations with investigations of 141 cases completed as reported above.

F. Kenya National Human Rights and Equality Commission

The KNHRC is a Constitutional Commission, established under article 59 and 248 of the Constitution. One of the key functions of the KNHRC includes monitoring, investigating and reporting on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs.

The KNHRC has since the promulgation of the Constitution, closely monitored, investigated and documented human rights violations that have arisen as a consequence of insecurity. The Security Sector Reforms Programme within the KNHRC, focuses on reforms within the Security Sector and includes working on reforming legislation and practice within the sector.

The KNHRC focuses on working towards reforming the National Police Service with the aim of bringing to an end police brutality, building accountability within the Service in their work, enhancing professionalism, improving service delivery among others. The overall goal of these efforts is to build a culture of respect and promotion of human rights within the Service.

In a monitoring exercise carried out between 2010-2014 in 30 counties, the KNHRC found that there was an increase in extra judicial killings, arbitrary arrests, and forcible transfer of vulnerable populations and massive destruction of property by the police. The KNHRC also noted an increase in casualties among law enforcement officers[46].

The report by the KNHRC highlighted that a total number of 3060 Kenyans (both civilian and law enforcement officers) lost their lives due to insecurity in the period (2010 to 2014). This surpasses the psychological watershed mark of the 1133 Kenyans who died during the country's worst internal conflict following the 2007-08 post-election violence.

It was also reported that there has been an increase in the number of internally displaced persons as well as massive destruction of property due to insecurity. During the period under review, 180,300 people were displaced from their places of habitual residence. Property worth billions of shillings was destroyed following terror attacks in Nairobi, Lamu, Garissa, Wajir and Mandera, with 3965 herds of livestock either stolen or killed.

In view of the findings by KNHRC, it is clear that the impact of the law on the use of force is not as high as it was intended. Challenges still remain with regard to enforcement of the law against those who

46 Are we under siege? The state of security in Kenya: An occasional report (2010 – 2014)

violate it and against impunity that allows for individuals to periodically give orders of "shoot to kill."

G. County Policing Authorities

Article 244(e) of the Constitution provides that the National Police Service shall foster and promote relationships with the broader society. It is on this basis that section 41 of the National Police Service Act establishes the County Policing Authorities, in respect of each county. Some of the functions of the County Policing Authority include developing proposals on priorities, objectives and targets for police performance in the county, monitoring trends and patterns of crime in the county and promoting community-policing initiatives in the county.

County Policing Authorities encompass the tenets of community policing, which focuses on collaboration between the police and the community that identifies and solves security problems within a community.

Each County Policing Authority shall consist of a Governor, who shall be the chairperson, members of the Service appointed by the Inspector General of Police and members of the public appointed by the Governor through the County Public Service Board.

The Chairperson of the Council of Governors in consultation with the Cabinet Secretary, gazetted the County Policing Guidelines on the 9th of January 2015 pursuant to section 25 of the National Police Service (Amendment) Act, 2014. Section 41 prescribes that the Cabinet Secretary is mandated to issue guidelines on the conduct of business of the Authority. These guidelines are yet to be issued.

It is noteworthy that counties, in cooperation with the National Police Service are in the process of establishing the County Policing Authorities.

County policing is a strategy aimed at achieving more effective and efficient crime control, reduced fear of crime, improved quality of life, improved police services and police legitimacy, through a proactive reliance on community resources that seeks to change crime causing conditions. In order for the County Policing Authorities to succeed, there will be need for greater accountability of police, greater public participation and greater respect for civil rights and liberties

H. County Security Committees

Article 239(5) of the Constitution prescribes that national security organs are subordinate to civilian authority. Pursuant to this constitutional principle, the national government established County Security Committees in each of the 47 counties. The committees consist of representatives from each national security organ at the county level. The County Security Committees are chaired by County Commissioners, who oversee the coordination of security organs at the county level. This has led to a coordinated approach in implementing the principles of National Security as outlined in article 238 of the Constitution. County Commissioners who are part of the national government's administrative structure ensure the implementation and enforcement of national government policies, in the implementation of National Security at the counties.

2.15.4 Challenges to the Effective Implementation of Chapter Fourteen

There has been significant progress in the implementation of Chapter Fourteen of the Constitution. However, as observed by the Commission, challenges have arisen, that conflict with the letter and spirit of the Constitution. They include the following:

1) Lack of a Policy framework to guide National Security

It was inappropriate to enact legislation without a defined policy. This explains the lack of coordination between the national security organs. The executive through the ministries responsible for matters relating to defence and internal security should develop a national security policy framework. Article 239(2) makes reference to the "primary object of the national security organs and security system." A system presupposes a complex whole made up of interdependent elements. A national security policy

would play the role of setting out the structure of the complex whole of national security as defined in article 238 while recognizing the single elements and parts that contribute to the functioning of the system. It is this policy that would recognize the roles of various actors, other than the security organs, including other government departments, county governments, civil society, private sector and the public. Ideally, the policy if developed with public participation would be a roadmap on ensuring the safety of Kenya with clear strategies and outcomes that are owned by Kenyans. Ideally national security should be a matter that is dealt with in a bipartisan manner and a national security policy is a means by which this can be achieved.

2) A General lack of Public Participation in the implementation of Chapter Fourteen

Lack of public participation in the development of legislation was a major challenge in all aspects relating to the legislation concerning the national security organs. Public participation is a constitutional prescript for all State organs including national security organs. The Commission for the Implementation of the Constitution addressed this challenge by holding stakeholder forums and requesting members of the public to submit their views. Failure to provide the people of Kenya an opportunity to participate in law making violates the constitution. Persistent violation points to a pattern of impunity and disrespect for the rule of law and constitutionalism.

The Commission for the Implementation of the Constitution has done its part in addressing the challenges by facilitating public participation, bringing to the attention of parliament the violations of the Constitution and engaging with the relevant ministries and security organs to review the laws and regulations to ensure that they comply with the letter and spirit of the Constitution.

Post CIC, it is imperative that the Attorney General plays his or her role responsibly to ensure legislation does not contravene the Constitution. It is an indictment on the office of the Attorney General that in the five years of implementation, legislation had been drafted with unconstitutional provisions. This is especially the case with regard to security legislation.

Moreover, there is need for clear guidelines on public participation within the security sector to be developed. The guidelines should strike a balance between the need for secrecy on matters relating to internal operations of the security organs and the constitutional imperative of affording the people of Kenya an opportunity to be involved in the development of legislation.

i) Amendments to Legislation

There have been numerous amendments to the NPS and NPSC Act. The Amendments thus far include:

a) The National Police Service Commission (Amendment) Act, No. 3 of 2014;
b) The National Police Service (Amendment) Act, No. 11 of 2014; and
c) The Security Laws (Amendment) Act, No. 19 of 2014

The amendments are of two kinds: to give clarity and remove conflicts in the laws; and to address challenges that have arisen from the implementation of the legislation. Some proposed amendments were however unconstitutional or sought to claw back numerous constitutional gains.

Through the intervention of CIC by advisories to the Executive andpParliament, some of the unconstitutional amendments were rejected. Regrettably, frequent amendments result in uncertainty to the implementation of the law. The Constitution and the legislation required thereunder requires a transformation of the Service both culturally as well as in its institutional structure and administration. This process of change that requires time and enabling predictable legal environment is disrupted by the numerous amendments. This challenge is compounded more, when the proposed amendments are further challenged in court.

This was the case with the Security Laws (Amendment) Act, 2014. The Security Laws (Amendment) Act No. 19 of 2014 (SLAA) was enacted by the national assembly on 18th December 2014 and received presidential assent on 9th December 2014. It came into force on 22nd December 2014. The Act amends the provisions of twenty-two other Acts of Parliament concerned with matters of national security.

The Act was challenged in court on the grounds that it was a violation of the Constitution. The Court

held that, while the enactment of the Act was not of itself unconstitutional, sections 12, 16, 20, 26, 34, 48, 95 were unconstitutional and violated specific Articles and freedoms enshrined in the Constitution.

It is recommended that Parliament takes a cautious approach to amendments of the police laws and avoids piecemeal amendments entirely. As earlier mentioned in the report, piecemeal amendments through statute miscellaneous amendment law further violate the national principle of public participation.

ii) Conflict between the Line of Command of IG and Disciplinary Control of NPSC

The NPS is a disciplined Service in which the Line of Command plays a crucial role not only in the administration of the Service but also in ensuring that operations are undertaken effectively through obedience to the orders of superiors. The establishment of NPSC was intended to remove matters of human resource from the control of the Police Commissioner in order to professionalize and end impunity on matters such as transfers and promotions. Unfortunately, this objective presumed that the Service operates like other civilian public service departments which fall under PSC. In the wider public service, a public officer outside of the department one is working in can exercise disciplinary control. In a disciplined service, the command structure can only be effected if superior officers can exercise discipline over junior officers. The function of NPSC in article 246 is therefore discordant with the Independent Command of the IG. This conflict has serious implications for the administration of the Service. A number of police officers have gone to court to prevent their transfer or deployment regardless of the impact to security operations.

In the case of Republic v Inspector General of Police Ex parte Jackson Cheruiyot Maiyo [2015], Police Constable Maiyo sought court orders quashing his transfer from a diplomatic unit to a police station in Mandera by the office of the Inspector General of the Police. The Court held that the power to determine transfers within the National Police Service belongs to the National Police Service Commission and that the transfer of Police can only be carried out by the Inspector General after consultation with the National Police Service Commission. Where there is no evidence of the Commission's consent, the transfer is unconstitutional.

The above case reiterates the court's previous decision in Republic v Deputy Inspector General of National Police & 32 others where the court held that the powers of transfer of members of the Service were reserved to the Commission by the Constitution. A decision to transfer by the Inspector General must have emanated from the Commission or have been in consultation with the Commission.

iii) Lack of Coordination between the KPS and APS

The Constitution establishes one National Police Service but in an apparent contradiction retains the distinctiveness of the two Services of KPS and APS. The effect of this is that what was to be a cure for historical rivalry and turf wars between the two Services, has compounded them in the new dispensation. The differences between the two Services are minimal. The additional different functions of each individual Service are that the Kenya Police is mandated to:

a) Investigate crime; and
b) Collect criminal intelligence.

On the other hand, the Administration Police has the following additional functions:

a) provision of border patrol and border security;
b) provision of specialized stock theft prevention services;
c) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
d) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties; and
e) co-ordinating with complementing Government agencies in conflict management and peace building.

This challenge has resulted in duplication of appointments into offices like County Commander KP and County Commander AP in the same county. There has also been a lack of coordination between the two Services during operations as members of each Service report to the Line of Command within their own Service. This is inefficient and ineffective. The lack of coordination presents a serious security risk to the extent that operations are affected by it.

It is recommended that article 243(2) be amended by repealing it so that there remains one National Police Service. Because of the unique functions of the APS in supporting and protecting government personnel and installations, a special unit or directorate could be set up administratively to provide those services. Recruitment, training and administrative measures should be realigned to the concept of one national Police Service.

iii) Corruption and Recruitment

Though the recruitment process was streamlined and aligned to the precepts of the Constitution, the actual implementation has faced challenges. There have been allegations of corrupt practices to influence recruitment.

One of the darkest moments of the implementation of article 244 on the objects and functions of the NPS was the nullification of the recruitment held on 10th July 2014. The recruitment was marred with allegations of corruption and irregularities. A number of institutions, such as the Independent Policing Oversight Authority, the Kenya National Commission on Human Rights and the general public had petitioned the High Court against the recruitment process.

The High Court ruled that the entire recruitment process be cancelled. The court cited the following reasons for the cancellation of the results of the recruitment exercise:

1) Widespread irregularities regarding the manner in which the recruitment was conducted.
2) The violation of the constitutional standards set out under articles 10, 27, 73, 244, 246 and 249 of the Constitution and statutory requirements under sections 10 and 12 of the National Police Service Commission Act.
3) The recruitment violated the provisions of article 232(1) (d) and (e) of the Constitution, which require the involvement of the people in the process of policymaking and accountability for administrative actions.
4) That the National Police Service Commission had failed to develop policies, regulations and procedures for the proper conduct of the recruitment exercise.
5) That the recruitment exercise carried out on 14th July 2014 by Sub-County Recruitment Committees on the basis of delegated powers by the Commission was inconsistent with, or in contravention of articles 10, 27, 73, 232, 244, 246 and 249 of the Constitution and sections 10 and 12 of the National Police Service Commission Act and thus illegal.

The Court highlighted the obligation of State agencies to protect and uphold constitutional rights. It reiterated that police recruitment should be carried out in a manner that respects the constitutional principles of transparency, accountability and public participation.

The Police Service has consistently been ranked as among the most corrupt institutions in the country in various polls[47,48]

It is recommended that appropriate measures be taken to prevent corruption and to hold accountable those who participate in or aid in such corrupt practices. Promotion of national security is premised on the trust a nation has in its security organs to deliver on their mandates professionally and with integrity. When the credibility of a security organ is brought to question then there is a breach of trust and the country loses its sense of safety and security. The issue of corruption within the security sector must be tackled specifically and forcefully if the constitution is to be effectively implemented.

v) Vetting of Members of the Service

The police reforms that were envisioned by the Constitution and the NPS Act did not just target institutional and organizational structures. They were also aimed at the integrity of the personnel. To this end, section 7(2) of the National Police Service Act, 2011 requires officers to undergo vetting by the Commission to assess their suitability and competence.

The vetting to Police began in June 2014. Since then, the NPSC vetted officers who held the former ranks of Senior Deputy Commissioners of Police1& II (7), Deputy Commissioners of Police (23), Senior Assistant

47 Ipsos synovate polls, 2012 and 213

48 Transparency International Corruption Perception Index (CPI) 2012, 2013 and 2014

and Assistant Commissioners of Police (166) and formally appointed those who passed the vetting to the new ranks of Senior Assistant Inspector General, Assistant Inspector General and Commissioner of Police through a competitive process.

To enable public participation in the vetting process, the names of these officers were published in the print media and the public was invited to submit information in the form of complaints or compliments, which were used to assess their suitability. The vetting exercise was a defining moment in police accountability and promoting professionalism. It was discovered that officers in the Service with high-level professional training and vast experience are currently performing duties outside their fields of specialization and are hence underutilized. In addition, it has exposed gaps and systemic weaknesses, which will inform the formulation of human resource policies and regulations.

In October 2015, the NPSC released the results of the vetting process. The total number of officers vetted was 1364, of which 1272 officers were cleared, while 63 officers were removed from office on the grounds that they were unsuitable or incompetent. However, the conduct of the vetting process in the full glare of the media raised concern over the process and its objective. Vetting in an employment context is done purely to assist the employer determine suitability. Accordingly, it did not have to be undertaken in public. Public participation in employment does not require interviews to be conducted before media and to the extent that other public officers are not subjected to a similar process amounts to discrimination. The process also exposed the Service to public ridicule, which is harmful to the legitimacy of the Service as a security organ.

CIC recommends that the vetting process be reviewed to ensure respect for the right of privacy for the police officers, to guard against discrimination and to ensure that the officers are treated with respect. In the case of Immanuel Masinde Okutoyi & others v National Police Service Commission & another [2014], the court held that procedural fairness is therefore a Constitutional requirement in administrative action. This requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now trite that even in cases where there is no requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly in accordance with article 47. However, it is imperative that the allegations made against a police officer be availed to him or her in good time to enable him or her adequately respond thereto. To confront an officer with allegations whose source cannot be vouched violates the tenets of the Constitution.

vi) Extra-judicial Killings

Despite very progressive provisions on the use of force and firearms, there continues to be allegations of extra-judicial killings by police. A study carried out by the Kenya National Commission on Human Rights indicates that Kenyan security forces have carried out 25 extrajudicial killings since 2013, in a crackdown of militants. The KNCHR also reported that it had recorded 81 "enforced disappearances" since 2013.

The challenge is not merely the absence of regulation, but the implementation of the law. There could be two possible reasons for this: (a) the officers involved are not trained in the new requirements under the law; and (b) there is inadequate enforcement of the law to hold those who violate it to be held accountable.

It is recommended that there be comprehensive training on the use of force and respect for human rights in the Force and that the institutions charged with ensuring accountability, such as the internal affairs unit and IPOA, improve on their performance.

3. The National Police Service Commission

i) Composition of the Commission

The composition of NPSC is provided for under article 246 of the Constitution. It should have a chairperson and five other members, two of whom are retired police officers from the Service, from the Kenya Police and Administration Police. The Inspector General (IG) and the two Deputy Inspector Generals (DIGs) fill the other three positions. At this point in time, the composition of the Commission does not comply with the Constitution. The vice-chairperson passed away and the vacancy has not been filled at the time

of writing this report. A member of the commission remains indisposed since 2013, but still remains in office. In view of the fact that the IG and DIGs are State Officers with full –time responsibilities within the Service, their participation in Commission meetings and activities is limited to their availability. The interests that the ailing member, who is a retired police officer, was to represent are not given adequate opportunity to be heard. The Commission is therefore not running as efficiently as it should and lacks the requisite number of commissioners.

CIC recommends that the Executive fill the vacancy in the Commission expeditiously in accordance with the law.

ii) Conflict between the NPSC and the Inspector General over mandate

Due to the conflict that exists between the provisions of article 245 and 246 of the Constitution, there has been tension between the NPSC on one hand and the NPS on the other regarding the mandate of the Commission and the interrelationship between the two institutions. This tension was apparent in the first year of existence of the Commission and it took the intervention of the President to resolve the differences between the two institutions.

Attempts have been made to resolve the conflict through amendments to the NPSC Act as discussed above, but these attempts are untidy and unwieldy because they are attempting to go round a constitutional precept.

4) The Kenya Defence Forces

i) Composition of Defence Council

The current composition of the Defence Council contravenes the not more than two thirds gender principle. The President replaced the female principal secretary to the Ministry of Defence with a male PS. This had the effect of changing the membership of the KDF to one out of six members being a woman. This change is an unfortunate development after the initial compliance with the Constitution. It needs to be addressed.

ii) Proposed Amendments to KDF Act.

There are proposed amendments to the KDF Act that seek to claw back on Constitutional gains. The amendments include those that seek to conceal the budget of KDF within the ministerial budget and removal of the two-thirds gender principle. CIC has held meetings with the Ministry of Defence and KDF and submitted an advisory to the departmental committee of Defence advising against the proposed amendments.

iii) Lack of public participation

There continues to be lack of public participation with regard to the development of legislation relating to KDF. This was apparent in the development of KDF Act itself and in subsequent amendments to the Act. CIC subjected the KDF Act to public participation in the course of the review of the Bill, but the obligation to apply the principle of public participation lies with all State organs including KDF.

The Commission for the Implementation of the Constitution recommends that the constitutional principle of two-thirds gender representation be upheld in appointments to KDF. Attempts to claw back on this principle should be resisted by Parliament. There continues to be disparity in the ratio of women to men in the Defence Forces, but the disparity can only be addressed by faithful adherence to the constitution at all levels of offices in KDF. Moreover, it is recommended that only those amendments that meet the threshold of compliance with the Constitution be enacted with regard to the amendments of the KDF Act.

Lastly, The KDF should develop and implement public participation guidelines in relation to the development of laws, policies and administrative procedures as may be appropriate within the context of national security. In particular, an attempt should be made to ensure that lower ranks are involved in the development of the laws and regulations that regulate them. The Defence Forces should also create awareness about the internal grievance mechanism and Court Martial processes to enable member of the public to utilize these mechanisms in their pursuit of justice.

5) The National Intelligence Service

i) Requirement for Warrants for Investigations by the Service

A milestone in the implementation of the principle of accountability was the enactment of a requirement for the NIS to apply for warrants from the High Court to undertake certain investigations. This requirement basically means that there must be justifiable cause that can convince a court that the right to privacy and property of an individual may be violated on the grounds of national security. Accordingly, the decision to investigate a person in a certain manner, such as intercepting their communication is no longer arbitrary. It restricts the investigations to persons suspected to be a threat to national security. There must be probable cause. Further the warrant is issued for a specific period for purposes of accountability.

Commission for the Implementation of the Constitution has consistently resisted attempts to amend this provision to allow arbitrary intrusive investigations that are likely to violate human rights and fundamental freedoms. The Commission intervened through the departmental committee of the national Assembly when it considered the Statute Law (Miscellaneous Amendments) Bill, 2014 and gave an advisory rejecting the proposed amendment. A second attempt was made to amend the part through the Security Laws (amendment) Act, 2014. Section 56 of the Security Laws (Amendment) Act, 2014 repeals the entire Part V of the National Intelligence Service Act, 2014 and replaces it with a new part that focuses on special operations. The amendment removes the requirement of a warrant that was required in the previous provision.

The requirement for accountability with regard to investigations undertaken by NIS is consistent with best practice in other commonwealth jurisdictions. The warrant facilitates the promotion of national security, which may require limitation of certain rights, but ensures that such investigations are necessary and proportional and do not amount to abuse of power and impunity. The Commission for the Implementation of the Constitution strongly recommends that the national assembly resists all attempts to remove the requirement for warrants. CIC further recommends that, in order to address the exigencies of service that may arise due to the nature of the security threat, the process of issuing the warrant be made more efficient. This may include the identification of designated judges by the judiciary who are available on a twenty-four hour basis to hear such applications. These judges should be vetted to ensure that matters that amount to classified information are safeguarded.

ii) Balance between national security and accountability

The Constitution under article 35 enshrined the individual's right to access information held by the State and this was crucial if State organs were to be held accountable. It is not possible to check or oversight without being in possession of requisite information. NIS like its predecessor remains shrouded in secrecy. None of the regulations under the NIS Act are published and its budget is normally reflected within a global estimate on the basis that disclosure of expenditure would be a threat to national security. The need for secrecy in relation to threats to national security is not in doubt and is appropriate. The danger arises when the veil of secrecy is used to avoid accountability and transparency, which are constitutional imperatives, or to infringe civil liberties.

To give effect to article 35 on the right to access to information while recognizing the need for confidentiality on some matters of national security, the NIS Act under section 72 provided for the protection of classified information and records. Regrettably, the regulations have not been developed by August 27, 2015 and the effect of the non-publication is the risk that any and all information may be treated as classified at the absolute discretion of the service. The delay in developing these crucial regulations and the enactment of the access to information bill are unjustifiable.

In the absence of a clear system for classification, the Official Secrets Act, continues to apply. This Act has not been aligned with the Constitution. The Official Secrets Act has two challenges. It does not distinguish between information that can be justifiably protected as secrets and other general communication of government. Second, it gives general blanket cover over all government communication in complete violation of article 35.

In the performance of its functions, CIC was unable to independently verify the implementation of the Constitution, the NIS Act and the administrative measures because of the veil of secrecy over the

affairs of the NIS. CIC recommends that the development of regulations relating to the classification of information be prioritized and that both the cabinet secretary and the Director General are held accountable for non-publication of the same.

iii) Security Vetting.

The new constitutional dispensation introduced the requirement for the appointment of State and public officers who meet the threshold for leadership and integrity under chapter 6 of the Constitution and suitability for performing the functions of the State or public office on the basis of merit. In this regard, legal and institutional structures have been developed to assist the national assembly and any recruiting body to make informed decisions on the suitability of those nominated into those offices. The development is a milestone on the journey to achieving a professionalized public service based on meritocracy.

One of the legislative interventions that has been put in place is the provision of a confidential security report by NIS. The same Act in section 2 provides for the definition of "security vetting" to mean a systematic procedure used to examine and appraise a person to determine his or her suitability, loyalty and eligibility based on security competencies and considerations. Section 5 of the Act had been intended to provide for the function of security vetting, but the proposed clause was amended in the national assembly to provide for a confidential security report for persons seeking to hold positions that require vetting. The Service has developed vetting guidelines to regulate the process, but is yet to publish the same.

There are two challenges that arise from this function of the Service. To begin with, the definition of security vetting is problematic to the extent that it makes the appraisal by the Service a pre-condition for determining suitability and consequently making the Service a major influence on who actually gets appointed to office. The primary function of the Service is to gather, collect, analyse and transmit security and counter intelligence. There is no constitutional or legal basis for the involvement of the Service in making determination on the suitability of persons to hold office. Furthermore, the definition, does not elaborate on the "security competencies and considerations" that inform the report from the Service and this presents potential risk of abuse to the extent that there is no objective criteria informing these considerations.

In addition, the fact that the vetting guidelines are not published and the report is "confidential, " means that the person being vetted has no access to the information that may be used adversely against them. This is a clear violation of article 35(2) that gives every citizen a right to a correction or deletion of untrue or misleading information that affects the person.

In view of these challenges, CIC recommends that that NIS Act be amended to ensure that the NIS remains within its mandate to gather and share information with the relevant State agency and not to make a determination on the suitability of an applicant. Secondly, it is recommended that the vetting guidelines are published so that potential applicants are aware of their rights with regard to safeguarding their right to access of information and safeguarding the right to privacy.

iv) Oversight of the NIS

As discussed earlier, while NIS Act has provided for oversight mechanisms, there is need to strengthen these mechanisms to be effective. For example, the Complaints Board should be granted power to submit recommendations for prosecution where crimes have been committed to the DPP for prosecution. Currently, the Act only provides for the Board to make recommendations to the DG and the Council but not to any law enforcement agency. It is also recommended that the Board be given power to receive and investigate complaints relating to the vetting process. The membership of the Board would benefit from appointment of members who are independent of government to avoid "capture" caused by long exposure to the service.

With regard to oversight over the budget of the Service, there is no compelling reason why certain administrative matters can be distinguished from those that pose a security risk at an operational level to ensure that those that pose no risk are subject to public scrutiny. The scheme of service for NIS for example need not be secret and can be subjected to debate in the assembly without any risk to security.

6) Independent Policing Oversight Authority

One of the key functions of the Authority is to carry out investigations regarding disciplinary or criminal offences that may have been committed by members of the National Police Service, and make recommendations including for prosecution by the Director of Public Prosecutions (DPP). In the Authority's experience, the absence of arresting powers, where the DPP has pursuant to recommendations by the Authority, directed prosecution of the concerned officers, has greatly hampered the ability of the Authority to effectively and efficiently bring such police officers before courts of law to answer criminal charges.

In addition, the fact that currently the Authority has to seek assistance from the NPS to arrest its own members when charged with criminal offences upon recommendations by the Authority, and also request Police Officers to assist in collecting and processing evidence like in scenes of crime and taking photos militates against the independence of the Authority.

During the conduct of investigations by the Authority, many cases investigated by the Authority relate to shootings by the police, consequently crucial evidence includes firearms used in the shootings. The Authority's investigators, however not being police officers and not being vested with police powers, cannot, pursuant to sections 4, 4A and 7 of the Firearms Act, hold or carry the firearms even for purposes of analysis of exhibits. This greatly hinders the investigative role of IPOA, as the Authority is compelled to rely on the same police officers it investigates to furnish the firearms to ballistic experts for analysis. In certain instances, the firearms used in the shootings are switched and are never availed for analysis.

Section 25(2) provides that the Service should notify the Authority of death or serious injury. The Act is, however, silent on the time within which the Authority should be notified of such incidences after they occur. A specific time frame should therefore be stated in the provision to ensure the Service does not delay in reporting to the Authority such incidences as this may affect the quality of evidence and/or occasion of evidence.

One of the greatest external challenges faced by the Authority is lack of understanding and failure to appreciate the Authority's mandate and objectives by members of the NPS. This has resulted in misunderstanding of the investigations, delays in response to requests for information, contamination of evidence and provision of misleading information to the Authority.

Another challenge is lack of capacity, which would enable the Authority to finalize cases efficiently and effectively.

7) Calls for devolution of security

The Commission for the Implementation of the Constitution notes with concern, the growing calls for devolution of security. This has been evidenced by a number of counties declaring that there was need for counties to handle their own security matters. The Constitution is clear on the organs tasked with ensuring the protection against internal and external threats. The organs are the National Police Service, the Kenya Defence Forces and the National Intelligence Service, pursuant to article 239(1) of the Constitution.

Article 239(4) further provides that a person shall not establish a military, paramilitary, or similar organization that purports to promote and guarantee national security, except as provided for by this Constitution or an Act of Parliament. Attempts to devolve the security function to county governments blatantly violate article 189(1) of the Constitution that requires that either government performs its functions and exercises its powers in a manner that respects the functional and institutional integrity of the governments at either level.
It should be noted that County Policing Authorities were established for the sole purpose of ensuring cooperation between the National Police Service and the public. This therefore should be the mechanism used to enhance and promote security in the counties. Further a national security policy or strategy can set out areas of cooperation between the two levels of government while ensuring respect for the functional integrity of the national government and the security organs.

8) County Policing Authorities

There are conflicts in relation to the functions of the Authority and the mandate of the Inspector General of Police: Section 41(9) (a) provides that one of the functions of the County Policing Authorities is to develop proposals on priorities, objectives and targets for police performance in the county. This is in direct conflict with the mandate of the Inspector General of Police who exercises Independent Command of the National Police Service in accordance with article 245(2)(b).

In addition, section 10(1) of the NPS Act provides that the Inspector General's functions include policy decisions and audit of the police operations and functioning. The County Policing Authorities cannot interfere with the mandate of the Inspector General and the Command Structure of the Police Service.

Section 41(12) provides that a person elected as a Secretary to the Authorities shall be based at the Governor's office and shall not be a police officer. This is impractical. Section 40 of the NPS Act allows for the Inspector General to create designated Police Stations. This therefore means that the Police Officer in charge of the area is better placed to store records of meetings of the Authorities because of the existing designated stations.

Moreover, the role of the Police Service is significant in these County Policing Authorities in accordance with article 244(e) of the Constitution. The Police Officers in the area are the link between the communities and the Service and therefore the role of the Police Officer in charge of the area should be one that will ensure the implementation of article 244(e).

Furthermore, section 10(1) of the NPS Act prescribes that one of the functions of the Inspector General of Police is to make recommendations to the County Policing Authorities. The representative of the Service is meant to guide the County Policing Authorities in the carrying out of their functions by ensuring that they implement the recommendations made by the Inspector General.

There must be a link between the responsibility of the Police Officer in Charge and the role of the County Policing Authorities. In the development and establishment of County Policing Authorities and Community Policing, the role of the Police in the community and the role of the community in contributing to peace and security should be the building blocks of this collaboration between the Police and the community. The NPS Act should be amended accordingly to ensure effective implementation of article 244 of the Constitution.

Conclusion

Great strides have been made in ensuring that National Security is aligned to the letter and spirit of the Constitution. This has been evidenced by the development of legislation, the establishment of National Security Organs and the implementation of the necessary administrative procedures that will ensure the effective implementation of Chapter Fourteen.

Whereas the requisite laws and institutions and measures have been put in place to implement Chapter Fourteen of the Constitution, there remain crucial steps to be undertaken to facilitate full implementation. The steps include due respect for the rule of law and ensuring that legislation developed complies with the letter and spirit of the Constitution. There is need especially for the development of a National Security Policy framework that will guide the effective implementation of this Chapter.

2.16 CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

2.16.1 Introduction

The Constitutional Commissions and Independent Offices are established under article 248 of the Constitution of Kenya 2010. The establishment of these institutions was in response to the call by Kenyans to have independent public institutions to deal with issues of national interest while being insulated from undue political interference. Coming from a history where similar State agencies could easily be rendered redundant by, among other means, the withholding of funding and arbitrary dissolution of membership, it was imperative that such institutions be independent of political influence and arbitrary exercise of executive power.

Chapter 15 of the Constitution provides for, among other things, (a) The objects, authority and funding of Commissions and Independent Offices; (b) Composition, appointment and terms of office; (c) Removal from office; (d) General functions and powers of Constitutional Commissions and Independent Offices; (e) Incorporation of Commissions and Independent Offices; and (f) Reporting obligations.

2.16.2 Mandates of the Constitutional Commissions and Independent Offices

The objectives of Constitutional Commissions and Independent Offices are specified in article 249(1) of the Constitution. These include (a) protect the sovereignty of the people, (b) secure observance by all State organs of democratic values and principles; and (c) promote constitutionalism.

Article 249 provides that these Offices are subject only to the law, and are independent and not subject to direction or control by any person or authority. Parliament is further required in article 249 (3) to allocate adequate funds to enable each Commission and Independent Office to perform its functions. Further, the budget of each Commission and Independent Office shall be a separate vote.

The functions and powers conferred on the members of Constitutional Commissions and holders of independent offices are designed to uphold their functional and operational independence. They include (a) power to conduct investigations on their own initiative or on complaints made by members of the public; and (b) powers necessary for conciliation, mediation, negotiation, and the recruitment of staff. The Constitution gives the Kenya National Human Rights and Equality Commissions (KNCHR, CAJ and NGEC) powers to issue summons to witnesses to assist in their investigations.

The individual mandates of the Constitutional Commissions and Independent Offices are as discussed hereunder:

1) National Human Rights and Equality Commission

This commission was split into three commissions

a) Kenya National Human Rights Commission

The Kenya National Commission on Human Rights (KNCHR) is an Independent National Human Rights Institution (NHRI) established under article 59(1) of the Constitution of Kenya, 2010 and the Kenya National Commission on Human Rights Act, 2011.

The Commission implements two key broad mandates: first, it acts as a watchdog over the government in the area of human rights. Secondly, it plays a leadership role in advising and moving the country towards becoming a human rights State. These mandates are implemented through various strategies including research, advocacy, lobbying, education and training, outreach, investigations and redress, issuing advisories and publications, and through partnerships building and networking.

The major achievements of the Commission include: timely intervention and monitoring the State's compliance with national and international obligations; creating space for increased appreciation and enjoyment of socio economic rights focusing on the right to education and provision of health services. The Commission has advocated for institutional reforms within the Police and Prison Services in line with the Constitution. It has further carried out mainstreaming of the Human Rights Based Approach (HRBA) to programs by GOK Officers and linked HRBA to citizen participation, ensuring the State's compliance with national and international obligations, ensuring the mainstreaming of Human Rights Based Approach in the government and advocating for institutional reforms within the Prisons and Police Service, as stipulated in the Constitution.

b) National Gender and Equality Commission

The National Gender and Equality Commission is a constitutional Commission established by an Act of Parliament in August 2011, as a successor Commission to the Kenya National Human Rights and Equality Commission pursuant to article 59 of the Constitution. National Gender Equality Commission derives its mandate from articles 27, 43, and Chapter Fifteen of the Constitution; and section 8 of NGEC Act (Cap. 15) of 2011, with the objectives of promoting gender equality and freedom from discrimination. This mandate has been effected through review of legislation in collaboration with the relevant ministries, departments and agencies and putting in place measures to ensure compliance with the principles of equality and inclusion.

c) Commission on Administrative Justice

The Commission on Administrative Justice (Office of the Ombudsman) is established under article 59(4) of the Constitution and the Commission on Administrative Justice Act, 2011. The mandate of the Commission is to enforce administrative justice in the public sector by addressing maladministration through effective complaints handling and alternative dispute resolution. In addition, the Commission has a constitutional mandate to safeguard public interest by promoting constitutionalism, securing the observance of democratic values and principles, and protecting the sovereignty of the people. Since its establishment, the Commission facilitates administrative justice through complaints handling and resolution.

2) National Land Commission

Chapter five of the Constitution of Kenya 2010 comprehensively covers issues in respect to Land and Environment. Article 61(1) of the Constitution provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. In light of this, the protection and regulation of all matters touching on land within the Republic of Kenya are ostensibly within the purview of National Land Commission (NLC) which is an independent Commission established under the Constitution. The NLC is thus the custodian of justice and arbitrator in so far as matters concerning land use and ownership in Kenya are concerned. Its Primary function or role is to: (a) initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; (b) manage public land on behalf of the national and county governments; (c) recommend a national land policy to the national government; (d) advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; (e) conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; (f) initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; (g) to encourage the application of traditional dispute resolution mechanisms in land conflicts; (h) to assess tax on land and premiums on immovable property in any area designated by law; and (i) to monitor and have oversight responsibilities over land use planning throughout the country.

3) Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission (IEBC) is established under article 88 of the Constitution of Kenya 2010

It is responsible for conducting or supervising referenda and elections of any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for: (a) Continuous registration of voters; (b) Regular revision of the voters roll; (c) Delimitation of constituencies and wards; (d) Regulation of the process by which parties nominate candidates for

elections; (e) Settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results; (f) Registration of candidates for election; (g) Voter education; (h) Organising monitoring, observation and evaluation of elections; (i) Regulation of the sums of money that may be spent by or on behalf of a candidate or party in respect of any election; (j) Development of a code of conduct for candidates and parties contesting elections; and (k) Monitoring of compliance with the legislation required by article 82 (1) (b) relating to nomination of candidates by parties.

4) Parliamentary Service Commission

The Parliamentary Service Commission is established under article 127 of the Constitution and through the Constitution of Kenya Amendment Act of 1999. This act is currently under review to align it to the Constitution. The Commission is responsible for providing services and facilities to ensure the efficient and effective functioning of Parliament, constituting offices in the Parliamentary Service and appointing and supervising office holders, preparing annual settings of expenditure and undertaking singly or jointly with other relevant organizations, programmes to promote the ideals of parliamentary democracy, and any functions for the well being of the members and staff of parliament.

The Parliamentary Service Commission is chaired by the Speaker of the National Assembly with the Clerk of the Senate as the Secretary.

5) Judicial Service Commission

The Judicial Service Commission (JSC) has its constitutional role spelt out in terms of recruitment and disciplining of judicial officers. It has crucial oversight functions over the Judiciary. The Judicial Service Commission is established under article 171 of the Constitution and has been expanded to reflect representation from key stakeholders, namely, the public, the Law Society of Kenya and the Judiciary amongst other members. The functions of the Judicial Service Commission are to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. In performing its functions the JSC : (a) recommends to the President persons for appointment as judges. (b) reviews and makes recommendations on the conditions of service of judges and judicial officers, other than their remuneration and the staff of the Judiciary. (c) appoints, receives complaints against, investigates and removes from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament; (d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and (e) advise the national government on improving the efficiency of the administration of justice.

In the performance of its functions, the Commission is guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality. The JSC also watches over individual actions and competence of judges and other judicial officers.

6) Commission on Revenue Allocation

The Commission on Revenue Allocation (CRA) is an independent Commission set up under article 215 of the Constitution of Kenya 2010. Its core mandate is to recommend the basis for equitable sharing of revenue raised nationally between national and county governments, and among county governments.

The Commission prepared the formula for sharing revenue among county governments. This formula has been in use for the past three financial years and has enabled counties to provide services and implement development projects to benefit the people.

CRA has recommended the basis for sharing of revenues between national and county governments for each financial year since 2012/2013. This has enabled all levels of government to perform allocated functions. CRA has further recommended budget ceilings for counties on administrative costs to ensure budgets for service delivery and development are secured. The Commission has also promoted revenue enhancement through automation and adoption of ICT processes in order to curb revenue leakages,

enhance efficiency and timely issuance of services. Training of counties on budgetary processes has been undertaken by CRA so as to promote proper financial management and public participation in counties.

The Commission has further developed a policy to identify marginalized areas in Kenya for purposes of sharing the equalization fund. The equalization fund aims to bring the quality of basic services such as water, roads, health in identified counties to a level generally enjoyed by other counties in different parts of the nation.

7) Public Service Commission

The Public service Commission (PSC) is established by the Constitution of Kenya (2010) and by the Public Service Commission Act No. 13 of 2012 comprising of the chair, vice chair and seven other Members. It has the power to hire and fire senior personnel in the public service. The PSC has power to structure the public service. The PSC sets the terms of service of all national public officers and ensure the public service delivers quality services to the public. This noble role is undertaken by the PSC in meeting the threshold underpinning of the Constitution of Kenya in respect to adhering to the principles of public service delivery under article 232 (2).The functions and powers of the PSC are stipulated under article 234 of the Constitution of Kenya 2010. They include inter alia:- development of human resources in the public service, ensuring efficient and effective public service, exercise of disciplinary control over its personnel and determination of appeals in respect of county governments' public service.

8) Salaries and Remuneration Commission

The primary mandate of the Salaries and Remuneration Commission (SRC) is to regularly review the remuneration and benefits of all State officers. The functions of the SRC are to advise the national and county government on the remuneration and benefit of all other public officers as well as to set and regularly review the remuneration and benefits of all State officers. In performing its functions, the Commission is required to take the following principles into account: (a) The need to ensure that the total public compensation bill is fiscally sustainable; (b) The need to ensure that the public services are able to attract and retain the skills required to execute their functions; (c) The need to recognize productivity and performance, and (d) Transparency and fairness.

Before the promulgation of the Constitution of Kenya, 2010 the setting and reviewing of remuneration of State officers and public officers was done in a haphazard manner. For instance, the national assembly determined their own remuneration packages, a role they abused (even after the enactment of the Constituency Development Fund Act by the ninth Parliament) by handing themselves hefty pay packages and allowances to the detriment of the heavily burdened tax payers and the Kenyan economy at large. It is this unwanted and indiscriminate self-awarding of hefty salary increments and allowances that buttressed and informed the need for the establishment of an independent Commission to set and regularly review the salary of State officers.

9) Teachers Service Commission

The Teachers Service Commission (TSC) is established by articles 237(1) and 248(2) of the Constitution of Kenya 2010. The Commission comprises of nine (9) persons, one of whom is the chair while the remaining eight (8) commissioners. The role of TSC includes reviewing the standards of education and training of persons entering the teaching service, reviewing the demand for and the supply of teachers as well as advice the national government on matters relating to the teaching profession. Further, TSC is responsible for (a) Registering trained teachers; (b) Exercising disciplinary control over teachers; (c) Termination of the employment of teachers; (d) Recruitment and employment of registered teachers; and (e) Assignment of teachers employed by the Commission for service in any public school or institution.

10) National Police Service Commission

The National Police Service Commission (NPSC) is created under article 246 (1) as read with article 248 (2) (j) of Constitution. The main mandate is to oversee the recruitment, confirm appointments, determine promotions and transfers of all officers serving under the National Police Service. The separation of the role and functions of the NPSC from the Office of the Inspector-General has placed a check on the functions of the Inspector-General and his two deputies as well as officers serving under them, This has been achieved by eliminating irresponsible action(s) taken by police officers such as arbitrary

arrests, extra-judicial killings, cover-ups as well as intimidation within the police service. Consequently, the fundamental freedoms and liberties that are inalienable rights accruing to all human beings as enshrined in the Constitution have been secured.

11) Office of the Controller of Budget

The Office of the Controller of Budget is established under article 228 of the Constitution. Its core mandate is to oversee the implementation of the budget of the National and County Governments by authorizing withdrawals from public funds and reporting on budget implementation to Parliament every four months. Since its establishment in August 2011, the Office has made significant contribution in enhancing public finance management by ensuring that government entities comply with the requisite legislation and regulations. The Office has also published and publicized nineteen Budget Implementation Review Reports (BIRR) -eleven National reports and eight county consolidated reports. These reports track and profile how public funds are utilized by government entities, highlight challenges encountered in budget implementation and contain recommendations to improve budget execution.

In a bid to promote public access to information on budget implementation, the Office continuously conducts visits to counties and also holds public participation forums. These forums are used to sensitize the public on the mandate of the Office, the budget preparation process and also equip the public with skills to interrogate the budgets in order to ensure prudent use of public funds.

12) Office of the Auditor General

The Office of the Auditor-General (OAG) is an independent office established under article 229 of the Constitution of Kenya. The Office is charged with the primary role of oversight and ensuring accountability within the three arms of government (the Legislature, the Judiciary and the Executive) as well as the Constitutional Commissions and Independent Offices. In execution of its mandate, the Office employs the following three strategic pillars:

a) Certification of Accounts to Assure Fiscal Responsibility – Certification audit responds to the core mandate of certifying accounts at national and county levels and expressing an opinion as to whether they are prepared in accordance with the applicable financial reporting framework and/or statutory requirements. The end product of this exercise is an annual audit report on each entity that is presented to Parliament and the relevant County Assembly.

b) Continuous audit presence to enhance managerial accountability – Continuous audit ensures that the Office is proactive, preventive and deterrent to fraud and corruption, wastage and abuse of public resources. This requires the auditor to constantly be on the ground to continuously assess the risks brought about by the evolving environment so as to perform "real time" transactions testing and data analysis. This is to enable timely recommendations; respond instantly to issues of national and county governments and any public concerns that require immediate audit or investigation; optimize use of audit resources while increasing audit activity; and improve financial systems and business processes for effective risk management, control and governance.

c) Performance audit to assure effective service delivery to Kenyans – This is audit work that responds directly to the Bill of Rights and social rights of Kenyans that will be met through development and implementation of programmes such as health, clean and safe water, education, housing and social security.

13) Commission for the Implementation of the Constitution

Although not listed as one of the Chapter 15 Commissions, section 5 (4) of the Sixth Schedule to the Constitution gives it similar status to that of chapter 15 Commissions. Noteworthy, CIC is required to work with each Constitutional Commission and Independent Office to ensure that the letter and spirit of the Constitution is respected. The mandate of the Commission is to monitor, facilitate and oversee the development of legislation and administrative procedures for the implementation of the Constitution; coordinate with the Attorney General and the Kenya Law Reform Commission in preparing for tabling in Parliament legislation required for the implementation of the Constitution; report regularly to the Constitutional Implementation Oversight Committee on the progress in and impediements to the implementation of the Constitution; and monitor the effective implementation of the system of devolved government.

2.16.3 Implementation of Chapter Fifteen

All the Constitutional Commissions and Independent Offices envisaged in the Constitution have been established. Working together, they have been instrumental in facilitating Kenya to record significant progress in the implementation of the Constitution, including policy, legal and regulatory reforms as well as review and development of related institutional frameworks. The consultation and collaboration between Constitutional Commissions and Independent Offices was facilitated by the establishment of the Forum of Chairpersons and Heads of Independent Offices which convened regularly to take stock of the performance and joint initiatives of the Commissions in the discharge of their respective mandates towards the implementation of the Constitution. Key achievements of the Commissions include (a) the successful conduct of the first general elections under the constitution in 2013; (b) facilitating smooth transition to the system of devolved government; and (c) working together with national and county governments to facilitate institutional reforms and the establishment of appropriate systems for effective service delivery in accordance with the principles of devolution specified in article 6 of the Constitution. The Commissions and Independent Offices have also come together on various occasions to seek judicial intervention in matters of national interest and in defense of the constitution.

CIC has taken lead in providing the much needed checks and balances on the national and county executives. The intervention has been through (a) public advisories; (b) judicial proceedings to challenge executive authority and administrative action in contravention of the Constitution or in disregard of the rule of law; and (c) by consultation with executive authorities at both levels of government.

Examples of where these interventions have worked include the pressure on the Executive to establish the National Police Service Commission, the National Land Commission, the Teachers Service Commission and the Kenya National Commission on Human Rights. These Offices were established after inordinate delay. Successful judicial intervention by CIC was demonstrated in the landmark case on the unconstitutional control by members of the National Assembly of The Constituency Development Fund. The CIC also ensured that the appointment of the first Chief Justice under the new Constitution was in accordance with the letter and spirit of the Constitution. The decision to seek judicial intervention was prompted by the unconstitutional appointment of the Chief Justice and the Attorney General by the then President Kibaki. Other examples of cases in which the Commission sought judicial intervention include a) failure on the part of the national government to implement the two-thirds gender rule in relation to elective and appointive offices; and (b) the controversy over the date of the last election

In terms of independence, the Constitution has stipulated ways in which the independence of the Constitutional Commissions and Independent Offices is safeguarded. Article 249(2) provides that the Commissions and Offices are subject only to the constitution and the law, not subject to the direction or control by any person or authority, have a direct budget line through the funds allocated by Parliament, as opposed to any Executive Office, have their budget as a separate vote for each. Article 254 further requires each Commissions and each holder of an Indipendent Office to report directly to the president and parliament.

It is important to highlight this independence here, especially the budgetary allocations because in the past, when institutions sought to exercise any independence, budgetary cuts, pre-mature dissolutions and disbandment were some of the methods through which this was undermined.

2.16.4 Achievements of the Constitutional Commissions and Independent Offices

The key achievements of CCs&IOs include: (i) the conduct of the first General Elections for President, Governors, Senators, Members of National Assembly and Members of County Assemblies; (ii) peaceful transition following the completion of the General Elections; (iii) implementation of the system of devolved government; (iv) Sectoral reforms in areas such as the Justice and Security sectors; (v) filling up of positions in line with the Constitution; (vi) enactment of key legislation required to implement the Constitution; (vii) enhanced disclosure to members of the general public of key government programmes and activities at the national and county level; and (viii) strengthened control and tracking of allocation and utilization of public resources at national and county level.

Further, it is evident that implementation is increasingly being guided by Constitutional principles including- recognition of the sovereignty of the people; the rule of law; national values and principles of governance; the requirements on leadership and integrity as well as the values and principles.
Other specific achievements include:

a) Enhancement of Public Participation

Article 10 of the Constitution provides public participation as one of the National values binding all State organs, State officers and public officers.

The Constitutional Commissions and Independent Offices have continued to inculcate citizen focus through the review of policy, legal and institutional frameworks to engender citizen focused service delivery, including requirement for public participation. In addition, these institutions have enhanced stakeholder engagement at the national and county level to mobilize citizens and other Non-State actors to monitor and facilitate the implementation of the Constitution. They have periodically issued public advisories to promote compliance with constitutional provisions on public participation. The institutions continue to facilitate access to information in accordance with article 35 of the Constitution by publishing and publicizing their reports and general information relating to the implementation of the Constitution.

b) Compliance with Articles 10, 201 and 249

In ensuring compliance with the relevant articles of the Constitution, Constitutional Commissions and Independent Offices have executed respective mandates in accordance with the Constitution and the rule of law, protected the sovereignty of the people by recognizing their right to participate and through access to information. Additionally, they have provided mutual policing between each other, pointing out when each has overstepped their mandate. The institutions have enhanced access to information through publication of reports, development of accessible websites and issuance of advisories on matters of national importance and public interest.

2.16.5 Challenges and Recommendations

In carrying out their respective mandates, Constitutional Commissions and Independent Offices have faced various challenges, namely:

1. Composition, Appointment and Terms of Service

Most Commissions remained without full composition due to delays in appointing Commissioners. Accordingly, Commissions such as the Kenya National Commission on Human Rights, the Judicial Service Commission, the Teachers Service Commission and the National Gender and Equality Commission had the performance of their respective constitutional functions impeded and, in some instances, grounded.

The Ethics and Anti Corruption Commission has operated without Commissioners, for over six months, following their resignation in circumstances that suggest political interference in the performance of its functions. Accordingly, the Commission is not properly constituted in view of the fact that it only exists as a Secretariat, and with limited efforts being made to fill the vacancies. This is in contradiction of article 250 (12) which provides that the appointment of the Secretary to a Commission shall be done by the Commission, the latter being the chairperson and members appointed in accordance with Article 250. CIC's opinion has been that the EACC, cannot function without members of the Commission neither can the secretariate carry out the functions of Commissioners.

Notwithstanding the Constitutional prescription of the number of Commissioners between three and nine, the composition of the two key commission, the KNHCR and EACC is in our view, tantamount to weakening their capacity to deliver effectively, on their respective mandates. The same applies to the National Police Service commission, which is improperly constituted following the death of one of its members and the prolonged illness of another member, who has not been able to actively participate in the affairs of the Commission.

Article 250 (4) provides that appointments to Commissions and Independent Offices shall, in addition to taking into account the national values referred to in article 10, be guided by the principle that the composition of the Commissions and Independent Offices, taken as whole, shall reflect the regional and ethnic diversity of Kenya. Despite the provision that this applies to the total number of appointments, it has been interpreted to mean that this must apply to each individual Commission. This presents a challenge to the Commissions during appointments, as qualified applicants from some regions are disqualified on these considerations. It has also led to a tendency of raising the appointments to the highest number of nine in most Commisssions, even though some Commissions can be served by fewer numbers.

Case Study One: Disabling of the EACC Operations

The Ethics and Anti Corruption Commission (EACC) had been investigating numerous graft cases involving public officers who were named in a list that it submitted to the President who in turn handed it over to the National Assembly. EACC had also taken to court seven suspects over the Anglo Leasing scandal, which involved billions of shillings lost in procurement scandals 11 years ago.

Soon thereafter, a petition was submitted to the National Assembly by Mr Geoffrey Oriaro, who had argued that the chairman Mumo Matemu and his deputy Ms.Keino were incapable of leading the war against corruption. MPs voted in favor of removing them and gave the recommendation to the President. Ms. Keino claimed that the EACC Commissioners were being forced to leave office unceremoniously to cover up for the sensitive Anglo Leasing case and investigations they were finalizing on the infamous Karen land grabbing estimated at Sh8 billion.

By forming a tribunal to investigate the two, as well as the conduct of the other Commissioners, the President appeared to give a seal of approval to the EACC secretariat headed by Mr Halakhe Waqo. The President had said that the suspension of Mr Matemu and Ms Keino would not affect the ongoing investigations and prosecutions of corruption cases. However, the Commission for Implementation of the Constitution had cautioned on the possibility of judicial intervention after the two were suspended, arguing that lack of Commissioners meant that EACC was not duly constituted

The Chairperson Mr.Matemu, vice Chairperson Ms.Keino and Prof. Josephine Onsongo resigned before facing a tribunal that had been formed by President Uhuru Kenyatta to investigate their conduct.

The Public Service Commission (PSC) did advertise for the vacant posts of the chair of the Ethics and Anti-Corruption Commission (EACC) and four other members of the commission. Interviews were held and names of successful candidates forwarded to the president by PSC. The president has since submitted names of five nominees to parliament for approval. The commission will now have five commissioners who will serve on part-time basis.

It is also worth noting that even before the current challenges of lack of Commissioners, the Commission operated for a long period without a Chairperson, thereby hindering the efficient discharge of its mandate.

2. Inadequate Funding

This led to the inability of the Offices to fully carry out their mandate and contributed to delays or outright failure to decentralize services as required by article 6 of the Constitution. In addition, Constitutional Commissions & Independent Offices were not able to leverage on each other's resources and competencies for example in sharing offices, transport etc.

Conflict on Mandates

There has been lack of clear demarcation of roles between some of the CC&IOs and their respective parent Ministries, leading to recurrent conflicts as was witnessed between the Teachers Service Commission and the Ministry of Education, and the National Land Commission and the Ministry of Lands, Housing and Urban Planning.

Threats and Intimidation by other arms of Government

This was evident when the Constitutional Commissions and Independent Offices sought to carry out their mandate in challenging the manner in which the National Assembly sought to enact legislation

designed to (a) enhance their salaries, allowances and terms of service and (b) to facilitate their control over the Constituency Development Fund (CDF).

Other examples include: threats and intimidation of the Salaries and Remuneration Commission over the salaries and benefits of Members of Parliament; and threats to the Judiciary over its judgments declaring the CDF unconstitutional and the reinstatement of the Embu County Governor, who had been impeached by the Senate.

These examples raise questions as to whether, in reality, Parliament is committed to respecting, upholding and defending the Constitution as mandated by article 3(1) of the constitution.

3. Creation of Parallel offices to carry out mandates similar to those of Constitutional Commissions and Independent Offices

There were instances where through statutes and administrative procedures, offices were created to carry out functions similar to those of Constitutional Commissions & Independent Offices. Examples include the establishment of County Education Boards by the Ministry of Education, Science and Technology and the wrongful establishment of similar offices by the TSC which resulted in functional and operational conflicts.

4. Unclear mandates

The role of the Public Service Commission (PSC) in the recruitment of State officers is unclear. The Constitution in article 234 exempts PSC from discharging its mandate with regard to State officers. However presently the PSC is recruiting EACC Commissioners.

The proposed amendment to the PSC to give it a role in the recruitment of members of Commissions is also unconstitutional

Recommendations

Composition, Appointment and terms of office: The Constitution provides that each Commission shall consist of at least three but not more than nine members. Going forward, decisions of the membership of each Commission should take consideration of the mandate, and hence appoint appropriate numbers, not necessarily the highest. The fact that the requirement to reflect the face of Kenya is based on appointments to the entire Commissions as a collective as opposed to each Commission makes this possible. Part time membership to the Commissions should also be encouraged. However, no Commission should have a combination of full and part time members.

Adequate Funding: Parliament should ensure the allocation of adequate funds to enable the effective functioning of the Commissions and Independent Offices. This requirement should not be used as a tool to arm twist the offices to bend to the whims of the Executive and the legislature. This is especially critical as the term of the Commission for the Implemetation of the Constitution comes to an end, as the other offices will have to play an active role in monitoring and over-sighting the implementation of the constitution.

Respect of Mandates: The three arms of government, as well as the respective commissions and offices should respect each other's mandate for the effective implementation of the Constitution.

Conclusion

The role that Constitutional Commissions and Independent Offices have played in the implementation of the Constitution cannot be gainsaid. As we approach the end of the first five years of implementation of the Constituion of Kenya, there is need for these offices to remain vigilant to ensure that there are no claw backs on the gains realized in the implementation process. This will only be achieved if the Office holders remain focused on their respective mandate, work together on issues of national concern and leverage on each other's' strengths and competencies to achieve their goals.

Ultimately, the benefits the Constitution that Kenyans clamored for so many years can only be realized if constitutionalism is entrenched. This can only be achieved if Constitutional Commissions and Independent Offices discharge their mandates effectively.

CHAPTER THREE

3.1 ENGENDERING AND SUSTAINING CONSTITUTIONALISM

3.1.1. Introduction

A constitution is the supreme law of the land and binds all persons and all State organs at both levels of government. A constitution of a country is the domesticated will of the people and forms the touchstone of the rule of law. How a constitution is interpreted, applied and enforced determines the effectiveness of upholding the rule of law and the enjoyment of all the rights and freedoms guaranteed by the Constitution.

Arising from this, constitutionalism refers to a practice in which both citizens leaders and the government abide by the provisions of the constitution and respect the rule of law. It is the doctrine that governments must act within the constraints of a constitution. Constitutionalism then requires all institutions to conduct their respective mandates in accordance with the relevant provisions of the constitution and the law. One of the components of constitutionalism and the rule of law is the respect for institutions including obedience to Court orders. Constitutionalism also requires that the law be applied uniformly to all citizens irrespective of their status and backgrounds. For the citizen, the concept of constitutionalism requires that citizens undertake their duty to obey protect and defend their constitution

This chapter discusses the expectations on entrenchment of Constitutionalism, challenges and recommendations going forward.

3.1.2. Major Tenets of Constitutionalism in Kenya

The Constitution of Kenya 2010 forms the basis for entrenching constitutionalism in Kenya. It has been hailed as one of the most progressive in the world and sought to empower the citizen, guarantee them fundamental rights and freedoms and change the governance structure of the country. It articulates a fundamental shift in the conduct of State affairs, a focus on delivering targeted results for Kenyans while observing the principles of good governance. The transformation envisioned is one where an empowered populace is equitably receiving services that are delivered efficiently, effectively, economically and ethically. This is denoted in the central tenets of the Constitution which provide for:

a) Sovereignty of the People

The principle of popular sovereignty in Kenya is expressed in article 1(1) of the Constitution, which provides that "[a]ll All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution". Clause (2) states that "[t]he people may exercise their sovereign power either directly or through their democratically elected representatives". According to clause (3), the people's sovereign power is delegated to three main State organs, namely (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the county governments; and (c) the judiciary and independent tribunals. For this reason, the three State organs exercise their constitutional functions and powers at the national and county levels (i) in accordance with the Constitution, (ii) on behalf of the people; and (iii) for the benefit of the people of Kenya.

b) Separation of powers

The Constitution establishes the three arms of government, namely the Executive, Judiciary and the Legislature whose powers and mandates are separate, but with checks and balances to ensure that no arm abuses its constitutionally given powers. Additionally the Constitution establishes Constitutional Commissions and Independent Offices to provide oversight over these institutions, thus providing further checks and balances. Article 174 (i) also provides devolution as one mechanism through which checks

and balances and the separation of powers are enhanced. For constitutionalism to be sustained, respect for this separation of powers must to be sustained.

c) Supremacy of the Constitution and emphasis on the rule of law;

The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Accordingly, no person may claim or exercise State authority except as authorized under the Constitution. Likewise, (a) any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency; and (b) any act or omission in contravention of the Constitution is invalid. Cardinal to the doctrine of constitutionalism is the recognition of this principle by all individuals, organs and institutions that they are subservient to the Constitution.

d) National and Public Service Values and Principles;

The national values and principles specified in article 10(2) include; (a) national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and (c) good governance, integrity, transparency and accountability, all of which provide valuable indicators as to the efficacy of implementation of the Constitution.

Special emphasis is placed on the national values and principles of governance, which bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Additional values and principles that State organs must apply in exercising their mandates are found in other parts of the Constitution including the values and principles of the public service in article 232, the public finance principles in article 201 and the values that underpin the devolved system of government in article 189. These values and principles, are the founding pillars of the Constitution and must at all times be the basis of its implementation. Constitutionalism therefore denotes the incorporation of these values and principles in the conduct of citizens and those in leadership in the conduct of public and private affairs.

e) A Bill of Rights;

The Constitution of Kenya has been hailed as one of the most progressive in the world. The major reason is the comprehensive Bill of Rights provided in Chapter Four of the Constitution. These rights including the second generation social and economic rights are discussed comprehensively in Section 2.5 of Chapter Two of this report, dealing with the Bill of Rights. The protection, promotion and enforcement of these rights is a key component of the development of respect for constitutionalism.

f) A Devolved System of Government

The Constitution provides for a system of devolved government whose objects are among others, to promote democratic and accountable exercise of power, foster national unity by recognizing diversity, promote public participation, recognize the right of communities to manage their own affairs and to further their development, protect and promote the rights of minorities and marginalized communities and to ensure the equitable sharing of national and local resources throughout Kenya.

This has led to a greater involvement of the people of Kenya in decision making and in equitable distribution of resources. For these gains to be sustained however, the public and the institutions charged with the responsibilities to the public have to remain vigilant. Cases of corruption, abuse of office and imprudent use of resources risk turning Kenyan's against the citizen's, against devolution and pose a threat to constitutionalism.

3.1.3. Cases of Failure to Adhere to Constitutionalism

In the last five years, we have witnessed major challenges to constitutionalism. These include;

1) Increasing cases of breach of the Constitution

This has been manifested in various ways such as failure to respect and obey court orders, Examples include Parliament's disobedience of the court order on the petition against members of the JSC. Closely

related were cases where personal interests were put above national interest. This happened for example in case where members of national assembly or county governments passed legislation which either contravened the constitution or merely sought to advance their interests.

2) Abuse of constitutionally granted Powers

There have been increased incidences of the Legislature abusing powers granted to it by the Constitution. In the budget for the 2015/2016 financial year, the National Assembly reduced the budgetary allocations of the Salaries and Remuneration Commission and the Judicial Service Commission respectively because of positions the Commissions had taken that the National assembly disagreed with. The same has been witnessed in County governments, where County Executives particularly those dealing with finance were intimidated by the Members of the County Assemblies on budget issues in which the Assemblies had an interest.

3) Breach of Chapter 6 by State Officers

There have been cases of physical fights witnessed in the public view in the National Assembly and in some County Assemblies including Makueni County, Nairobi City County[49], Kisumu County, in these instances the MCAs acted in ways completely in violation of Chapter Six of the Constitution.

a) In Makueni, the county government was petitioned by residents of the County for suspension under articles 1(1), 2(2), 3(1), 10, 183, 185, 192(1)(B) And Chapter Six of the Constitution of Kenya[50] for "operating at extremes and at loggerheads".

b) In Kisumu County Assembly, chaos erupted after some MCAs disrupted proceedings when one of their own (Josi) insisted on taking up the role of acting speaker following the impeachment of former speaker (Anne Atieno Adul). The MCAs got into a verbal altercation leading to physical fights at the full glare of cameras[51].

CIC view on Makueni County

On March 10th, 2015, President Uhuru Kenyatta appointed a Commission of inquiry to consider and advise him on a petition filed by the residents of Makueni County pursuant to article 192 of the Constitution and section 123 of the County Governments Act, 2012. The petition filed by Residents, sought the dissolution of Makueni County.

The Commission of inquiry sought CIC's advice on critical questions in order to arrest in its deliberations. The questions included the roles of County Executives and County Assemblies as defined by the Constitution and other relevant laws and the management of conflict between the county assembly and county executive in the context of a functional government.

The Commission of Inquiry determined that the dissolution of Makueni County fulfilled the threshold and recommended to the President, the suspension of the County. However, the President declined to suspend Makueni, and argued that the failures in Makueni did not meet the threshold required to dissolve the county government.

The issues arising from the quest to suspend Makueni County, raise both legal and political questions relating to County Governments. One of the major aims of establishing the devolved system of government is the need to promote social and economic development and the provision of proximate easily accessible services to Kenyans pursuant to article 174(f). This is achieved by the respect of the constitutional, functional and institutional integrity of each arm of government as per article 189. The Constitution also requires the arms of any level of government to cooperate and compliment one another in the conduct of the functions of that level of government.

In the absence of a willingness and ability to cooperate, thus leading to a dysfunctional County Government, this would be deemed to be acting against the common needs and interests of the residents of the County, in as far as service delivery is concerned.

3.1.4. Recommendations on Sustaining Constitutionalism

The promotion of constitutionalism is critical to the development of a democratic, peaceful and prosperous nation and must be the primary focus of all citizens and leaders. We must move from our history, which was replete with instances of disregard of the rule of law leading to a culture of impunity. This was particularly the practice among political leaders. Disregard for the rule of law was also encouraged by the practice in which the judiciary was rendered ineffective as a defender of constitutionalism. The

49 http://allafrica.com/stories/201410160378.html
50 http://kenyalaw.org/kenyalawblog/suspension-of-the-government-of-makueni/
51 http://www.kenyans.co.ke/news/drama-kisumu-mcas-fight-injuring-deputy-speaker

executive was particularly guilty of muzzling the judiciary and other organs of the State. Even though the Constitution of Kenya, 2010 forms the basis for entrenching constitutionalism in Kenya, attempts by the executive and the legislature to unduly exert their dominance over other arms of government and other State organs and to disregard the rule of law are not likely to end simply because of a new constitutional dispensation. Citizens must therefore remain vigilant to ensure that the gains of a new constitutional dispensation are not eroded through abuse of such powers.

The growth of a culture of constitutionalism will entail:

a) Individual and Community Responsibilities

All Kenyans in their individual and community capacities must commit to protect defend and obey the Constitution in their public and private sphere. They must respect and abide by the national values and principles and play their part in ensuring that the Constitution is implemented in its entirety. Critical to this process is the engendering of a shared/common understanding of the letter and spirit of the Constitution, what adherence to each value and principle demands and understanding and upholding the spirit of the Constitution. In this manner a culture of constitutionalism will be promoted.

b) Change Management

Change management will include putting in place in all public and private institutions systems, processes, procedures and structures that will ensure continued institutional compliance with the letter and spirit of the Constitution. It will also involve undertaking constitutional change management in public and even private institutions. This will help public officers and private persons to appreciate the requirements of the new constitutional dispensation and start to model constitutional values and principles.

c) Role of the Media and Professional Organizations

The Media plays a critical role in informing the public on key issues relating to governance and society generally. In this sphere, the media must promote critical aspects of the constitution including national values and principles. Where breach of the constitution occurs media must be tireless in opposing such violations and sustaining a non-partisan objective campaign for a constitutionaly compliant Kenya

d) Role of Academia

The entrenchment of the Constitution should begin at an early age. The Academia can play a role in entrenching constitutionalism through academic discourse, writing academic papers, development of curricula etc.

e) Role of Civil Society

The Civil society has a role to play in safeguarding constitutionalism. Capacity building and sensitization for both public and institutions at national and county governments levels is one of the roles civil society can play. They should also play an oversight role through media advisories and litigation to ensure that the Constitution is not breached. Going forward, civil society should engage in the implementation of the Constitution in a strategic and coordinated manner.

f) Role of Constitutional Commissions and Independent Offices

With CIC's term coming to an end, there is pressing need for Constitutional Commissions & Independent Offices to rally together to shoulder the shared responsibility to continually monitor, oversee and facilitate the implementation of the Constitution. In particular, they must jointly ensure the protection of the peoples' sovereignty, secure the observance of all state organs of democratic values and principles and promote constitutionalism, pursuant to article 249.

Even though Constitutional Commissions and Independent Offices have their separate statutory mandates, we need not emphasize the need to work together to address matters that impact their joint mandate under article 249 for the benefit of the people of Kenya.

Appropriate measures need to be taken to clarify the mandate and administrative powers for all Commissions for whom jurisdictional conflicts exist e.g. the National Land Commission and its differences

with the Ministry of Lands, Housing and Urban Planning and the article 59 Commissions. There is also need for an upward revision by Parliament, of budgetary allocations to facilitate effective discharge of the functions of Constitutional Commissions and Independent Offices.

CHAPTER FOUR

4.1 AMENDMENT OF THE CONSTITUTION

4.1.1. Avenues to Amend the Constitution

The Constitution being the supreme law of the Republic calls for its wholesome interpretation so as to promote its purpose, values and principles and to advance the rule of law and fundamental freedoms in the Bill of Rights. At the same time, the Constitution, being a living document, permits for its amendment to suit the needs and demands of a changing society. Chapter Sixteen of the Constitution is dedicated to thresholds and avenues through which can be amended.

1) Amendments that require a referendum

The constitution provides that there are certain provisions of it whose amendments require a referendum for such amendments to be effective (article 255). This is because these provisions are so key to the general design and architecture of the Constitution that an amendment affects its overall design and architecture. Such amendments must involve the people in a referendum.

2) Amendment by Parliamentary Initiative

The Constitution gives Parliament the power to amend it through a laid down procedure (article 256). The process requires the input and vote of both Houses of Parliament before it can be adopted. The proposed amendment must be supported by at least two thirds of all the members of the respective House of Parliament. An amendment Bill to the Constitution must be published for at least ninety days after the first reading of the Bill.

3) Amendment by Popular Initiative

The Constitution also provides for its amendment through popular initiative supported by at least one million registered voters in the Country (article 257). A popular initiative may be in the form of a general suggestion or a draft Bill. Promoters of the initiative must deliver the proposed Bill and supporting one million signatures to the IEBC, which shall verify that those supporting the initiative are duly, registered voters. The draft Bill shall then be submitted to all the county assemblies for consideration. If it is supported by at least a majority of the county assemblies, the draft Bill will be tabled before Parliament. Parliament will vote on the draft Bill and if it passes by at least a majority vote then it will be forwarded to the President for assent. If the Bill relates to any of the matters referred to article 255(1), it must be submitted to the people in a referendum prior to assent.

4.1.2. Proposals by Parliament to Amend the Constitution

Since promulgation of the Constitution in 2010, Parliament has initiated a number of legislative proposals and Bills to amend the Constitution. Examples of articles proposed for amendments include:

a) Articles 82(b) 88(k) 89(1), 97(c), 98(b), 98(c), 98(d) and 101; to reduce the number of MPs, review constituency boundaries in terms of population distribution and create a legal system to help attain the gender principle. Also proposed is an amendment to remove the provision for nominated MPs and to have parliamentary and presidential elections held on different days.

b) Articles 136 and 180 to change the date of the general elections;

c) Article 81(b) to make the realisation of the two-thirds gender principle in Parliament a progressive endeavour, without clear timeframes or mechanisms for its implementation;

d) Article 103(1)(b) to excuse MPs seeking permission from the Speaker for absence from a sitting, and from the requirement that their office falls vacant on missing eight sittings of Parliament in a session of Parliament;

e) Deletion of article 204 to remove the disbursement of the Equalization Fund from the purview of the national government and instead transfer it to a constituency based process, and in

effect, under the control of a Member of the National Assembly.

f) Article 260 to delete MPs, MCAs, judges and magistrates from the list of persons deemed to be State Officers.
g) Article 203(2) of the Constitution (by Council of County Governors) to raise the minimum amount of revenue allocated to counties from 15% to 40%.
h) Chapter 8 and 12 of the Constitution roles as senators especially in relation to their ability to make law concerning revenue allocation to county governments.
i) Articles 110, 111(2), 112(1)(a) by Senators and Governors that Bills that touch on counties should not to be handled by the National Assembly

The Constitution gives every person the right to initiate amendments to it. Upon careful analysis, CIC observed that most amendments proposed by Parliament for amendment to the Constitution only served to protect Members of Parliament from observing their duties within the required constitutional scope or for pecuniary and other parochial interests. Most amendments were proposed due to the fact the existing provisions in the Constitution were not beneficial to MPs. The amendments proposed by the MPs were to the general detriment of the people of Kenya.

While the Constitution indeed recognises that it can be amended, the right should be exercised with caution, prudence and responsibility and any amendments should be compelling. Ideally, the main reason for any amendment should be that of advancing the public good by ensuring legal, political and economic stability. An amendment to the Constitution should meet certain minimum standards, key among them being the protection of the Constitution and the sovereign will of the people of Kenya, as opposed to serving the personal interests of the people to whom the people's power is delegated. Hence, the Commission advises that there is need to reflect on the following while making proposals to amend the Constitution:

a) Who benefits from the proposed amendments?
b) Have the current provisions of the Constitution been given enough time to be tried and tested and consequently established as not working or irresolvable by other means, thereby necessitating amendments to it?

In line with the requirements of article 3 of the Constitution, and in order to reap its benefits, the people of Kenya must remain vigilant to ensure that they protect the Constitution, and that any amendments proposed to it should be for the greater good of the country.

4.1.3. Possible Amendment to the Constitution proposed by CIC

In this section, the Commission presents cases for amendment of given provisions of the Constitution, which if included or amended would enhance its implementation

Article	Provision in the Constitution of Kenya, 2010	Challenge in Implementation	CIC Amendment Proposals
97(1), 98(1), First Schedule to the Constitution	Article 97(1): Membership of the National Assembly (1) The National Assembly consists of— (a) two hundred and ninety members, each 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 Speaker, who is an ex officio member.	Challenge in meeting the not more than two-thirds gender principle in the National Assembly as required by Articles 27(8) and 81(b) of the Constitution. Similarly, the minimum gender balance threshold in the Senate has only been met through nominations. This has unreasonably increased the number of MPs without the increase necessarily benefiting the people of Kenya. Considering that we have the county assemblies and the sharing of functions between the two levels of government, the large number of members of the National Assembly is not justifiable, nor is it prudent use of resources.	Reduce the number of constituencies for the National Assembly. Maximum number of constituencies = 150. If all MPs elected were of same gender, then maximum to be nominated from other gender would be 75, hence maximum number of MPs would be 225.
Article 113(1)	Mediation committees If a Bill is referred to a mediation committee under article 112, the Speakers of both Houses shall appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass.	In relation to article 110 of the Constitution, article 113 has witnessed conflicts especially between the National Assembly and the Senate over what truly constitutes a Bill concerning county governments and the process of resolving disputes that may arise on the content of Bills. The process as set out in the Constitution does not lend itself to resolution as it has similar number of members for both Houses.	Insert a new provision that involves the appointment of an extra member to the mediation committee from outside either house.
Article 121	Quorum The quorum of Parliament shall be– a. fifty members, in the case of the National Assembly; or b. fifteen members, in the case of the Senate.	The given quorum threshold may be too low to allow the National Assembly and the Senate to meaningfully discuss, debate and vote on matters of national importance.	Increase the quorum to a third of the House.

Article	Provision in the Constitution of Kenya, 2010	Challenge in Implementation	CIC Amendment Proposals
Article 127(2)	Parliamentary Service Commission The Commission consists of— a) the Speaker of the National Assembly, as chairperson; b) a vice-chairperson elected by the Commission from the members appointed under paragraph (c);(c) seven members appointed by Parliament from among its members of whom— i) four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and ii) three shall be nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and c. one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.	Having sitting MPs as Members of the Parliamentary Service Commission and the Speaker as Chair may lead to a conflict of interest in the administration of the mandate of the Commission. It is also important that the administrative arm of the Parliament is separated from its legislative arm.	Remove sitting MPs from being members of the Parliamentary Service Commission Secondly, the Speaker should not be the chairperson of the committee.

Article	Provision in the Constitution of Kenya, 2010	Challenge in Implementation	CIC Amendment Proposals
Article 221	Budget Estimates and Annual Appropriation Bill (1) At least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly. (2) The estimates referred to in clause (1) shall— (a) Include estimates for expenditure from the Equalization Fund; and (b) be in the form, and according to the procedure, prescribed by an Act of Parliament. (3) The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under articles 127 and 173 respectively. (4) Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly. (5) In discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly. (6) When the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill. (7) The Appropriation Bill mentioned in clause (6) shall not include expenditures that are charged on the Consolidated Fund by this Constitution or an Act of Parliament.	The process excludes the Executive from the budget process after review of the estimates by the Assembly. It does not include a consultative process between the National Assembly and the Executive on the changes proposed by the National Assembly. Whereas this has been occurring in practice it is important to secure it in the law	Add a provision to require the National Assembly Committee on Budget to send back their proposed changes on the budget estimates to the Cabinet Secretary responsible for finance for incorporation and rationalization before eventual consideration and passage of the same by the Assembly.

Article	Provision in the Constitution of Kenya, 2010	Challenge in Implementation	CIC Amendment Proposals
Article 26 (3)	A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.	Every person has the right to life and the death sentence is an unnecessary contradiction of this right and contrary to best international experience. There exists other modes of punishment other than the death penalty	Amend this article to abolish death sentence
Articles 255, 256, 257	The Articles provide procedures to amend the Constitution._	It is expensive and disruptive to conduct referenda every time amendment proposals requiring referenda are approved.	All referendum questions should be voted on during the general elections.
Article 89(8)	If necessary, the Commission (i.e., IEBC) shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards	The Elections Act created 2450 wards, hence same number of ward representatives. By article 90 of the Constitution, 772 members were nominated, totaling to 2,222 MCAs. This is an expensive institution to run.	Amend article 89(8) to provide that the number of Wards shall be 750.
Article 67	National Land Commission	As a Chapter 15 Commission the mandate of the NLC to exercise effective oversight over the National Governments departments dealing with Land should be enhanced as opposed to the Commission exercising executive functions.	Amend article 67 to ensure the Commission does not exercise executive functions but plays oversight role. The role of the Commission to be extended to private land. Its powers to sanction National government for failure to exercise its role effectively over land should also be enhanced
Articles 245 and 246	Command of the National Police, and National Police Service Commission	Interference of the Command Structure of the Police Service which can compromise security to the nation	Amended to clarify the distinct roles of Inspector General and National Police Service on matters of human resource without interfering with the Command structure of the Service

Article	Provision in the Constitution of Kenya, 2010	Challenge in Implementation	CIC Amendment Proposals
Articles 161(2)(a) 163(1)(a) 171(2)(a)	The Chief Justice with a triple role. He is the Chief Justice and Head of the Judiciary; He is a Supreme Court Judge and the President of the Supreme Court He is the Chair of the JSC.	These roles compromise the effectiveness of the Chief Justice in any one of them, thus prejudicing the effectiveness of the judiciary generally. The dual role of being CJ and Chair of JSC can also lead to conflict of interest where the CJ is both an employee of, and accountable personally and on behalf of the Judiciary to the JSC, but also chairs this same body he is accountable to.	Amend respective articles to separate the holders of these offices appropriately to remove conflicts of performance
Article 180 (5) & (6) Article 182 (2)	Section 5 requires each candidate for election as county governor to nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor. Section 6, IEBC shall not conduct a separate election for the deputy governor but declares the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.	In article 182(2), if a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor. The Constitution is silent how to get a Deputy Governor if the serving Deputy becomes Governor.	Amend article 182(2) to provide for a Deputy Governor in the event the serving Deputy Governor becomes Governor.

CHAPTER FIVE

5.1 CHALLENGES AND IMPEDIMENTS TO THE IMPLEMENTATION OF THE CONSTITUTION AND RECOMMENDATIONS

Section 5 (6) (c)(ii) of the Sixth Schedule to the Constitution requires CIC to report regularly to CIOC "and the peoples of Kenya", on any impediments to the implementation of the Constitution. Consequently, and in accordance with section 6 of the CIC Act, 2010, CIC has reported on quarterly and annual basis the progress, challenges and impediments to the implementation of the Constitution. While great strides have been recorded in the implementation as discussed in previous chapters, the process has also experienced a range of challenges, some of which have been addressed along the way while others have persisted. This section is devoted to the challenges and recommendations that were experienced in the course of implementation, some of which still persist across most sectors.

1) Slow development of underpinning policies and administrative procedures

In April 2011 the Commission, in consultation with the cabinet and the leadership of the Public Service issued a Circular (No. OP.CAB.17/84/1A of 20th April 2011) to Government Ministries, Parastatals, Regulatory Boards and all Constitutional Commissions and other public institutions that have the primary responsibility for generating policies, legislation and administrative procedures. The circular required that agencies establish the status of, and then review existing and/or develop, where necessary, policies, upon which subsequent legislation would be anchored, among other requirements.

Due to the tight deadlines for enactment of legislations in the Fifth Schedule to the Constitution, the National Executive embarked on the development of Bills without putting in place overarching policies. This has led to many pieces of legislation, which are not aligned with the national development priorities, occasioning several amendments. There have also been delays in the development of administrative procedures to actualize enacted laws, thus undermining their effective implementation. For example, lack of review of the land policy to align it with the Constitution as required by Article 60(2) and delayed development of regulations in land laws contributed to the lack of clarity in the roles of the various State organs in land matters, including NLC and the Ministry of Ministry of Land, Housing and Urban Development, CLMBs and the Sub-County Land boards. This has affected the delivery of the much-anticipated land reforms in Kenya.

Recommendations

- i) There is need to review all policies that existed before the promulgation of the Constitution, so as to align them with the provisions of the Constitution.
- ii) Where there are no national policies and standards, CIC recommends they be developed urgently. Comprehensive policies will guide service delivery and enactment of legislation relevant to those sectors and implementation of devolution
- iii) Following enactment of laws, relevant ministries, departments and agencies at national and county government should, where required, develop administrative procedures, including regulations to give effect to laws passed pursuant to the Fifth Schedule to the Constitution.

2) Failure to meet the constitutional deadlines for enactment of laws

The failure to meet the constitutional deadlines, for the enactment of some of the laws required by the Fifth Schedule has been occasioned by failures of both the national executive and Parliament. The failures have taken different angles as;

- i) Deliberate move by the National Executive to technically defeat the deadlines set in the Constitution for enactment of laws has been an impediment to the implementation of the Constitution. A number of Ministries tended to officially submit the Bills, which they subsequently either (i) formally withdrew or (ii) replaced with new ones after review by CIC,

without informing the Commission of the changes as experienced with the Land Bills. Though the Ministry of Land, Housing and Urban Development Ministry submitted three Bills related to land within the stipulated timeframe, the Ministry continued to review and submitted varied versions of the Bills. In one instance, the Ministry changed the bill post Roundtable with a bill with totally new provisions. This made it impossible to enact the land legislations within the stipulated timeframe.

ii) Parliament extended the timelines for enacting the legislation required by the Fifth Schedule three times. Some of the causes were delays by the executive while the other reasons are attributable to Parliament. The last extension was of the August 27th 2015 deadline, which was extended by one year.

iii) Two Bills (Public Procurement and Public Audit Bills), whose constitutional deadline was August 27th 2014 was extended by nine months, to May 27th 2015. These Bills have not been enacted.

Recommendation

i) Although the continued reviewing of content may enrich a Bill, once a Bill is processed through the process stipulated in article 261 of the Constitution, any subsequent changes to the Bill should be made through relevant Parliamentary Committees to minimize unnecessary delays and confusion in preparation of Bills.

ii) Deadlines for enactment of laws should only be extended "in exceptional circumstances" as required by the Constitution. The nine Bills whose deadline was extended from August 27th 2015 to August 27th 2016, did not, in CIC's view, call for a one-year's extension. CIC had reviewed all the Bills and returned them to the AG for subsequent tabling in Parliament. What is required is political will to fast-track and enact these Bill, some of which are critical for the efficient administration of government

iii) Any Chapter 15 commissions and independent offices, county governments, or any Kenyan may want to go to court to have Article 261 (5-9) effected in instances where parliament fails to undertake its duties as per the stipulations of the law.

3) Tabling of bills before parliament without passing through CIC

Article 261 of the Constitution requires that all Bills be processed through CIC. This requirement was ignored in many cases. For example, five Bills related to agriculture were developed and tabled before Parliament in violation of articles 261(4) and section 14 of the Sixth Schedule to the Constitution. They include Agriculture, Livestock, Fisheries and Food Authority Bill, 2012, Kenya Agriculture and Livestock Research Bill, 2012, Pyrethrum Bill, 2012, Crops Bill, 2012, and The Kenya Plant Health Inspectorate Service Bill, 2011 that were enacted in January 2013. A second example of bills that were not availed to CIC for review are those related to education and the unconstitutional provisions in them have been a major source of conflicts between the various players, while others have led to some implementers ignoring or violating the law.

A review of the enacted Acts revealed fundamental constitutional issues which could have been resolved had the Bills been processed as required. Also, some Bills were not subjected to public participation as required by the Constitution. A number of Private Members Bills were also published and subsequently debated in Parliament without review by CIC yet some of them had a direct bearing on the implementation of the Constitution. A number of Private Members Bills were also published and subsequently debated in Parliament without review by CIC yet they had a direct bearing on the implementation of the Constitution.

Recommendations

i) The executive and parliament need to respect the Constitution and process Bills through the process laid down under the Constitution. Going forward, Parliament will need to adhere to the laid down process for the enactment of laws relating to the implementation of the Constitution.

ii) Laws that have been enacted but have unconstitutional provisions need to be reviewed. The AG, the Kenya Law Reform Commission need to review the Bills passed hurriedly to pick out unconstitutional provisions and ask Parliament to amend them.

4) Inadequate Public Participation

The Constitution of Kenya 2010 requires the participation of the public in governance issues. Under Article 10(2), public participation is one of the national values and principles of governance, and the need for its application is reaffirmed through various articles, e.g., Article 69(1)(d), which requires the Sate to encourage public participation in the management, protection and conservation of the environment, articles 118 and 196 which demand legislative assemblies to facilitate the participation of the public in parliamentary and county assembly businesses, and Article 232 that requires the "involvement of the people in the process of policy making" as one of the principles and values of public service.

Parliament and county assemblies are required to;

i) conduct their businesses in an open manner, and its sittings and those of its committees shall be open to the public; and
ii) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
iii) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

Part VIII of the County Governments Act, 2010 provides the mechanisms for public participation at both levels of government, i.e., principles of citizen participation in counties, citizens right to petition and challenge, duty to respond to citizens' petitions or challenges, matters subject to local referenda, establishment of modalities and platforms for citizen participation, etc.

Although ministries, agencies and county governments have strived to hold public forums encouraging public participation from the stakeholders and public at large, observations and responses from members of the public contend that these institutions have not facilitated effective public participation. In most instances, members of the public do not turn up for town hall or other meetings meant to get their input. For example, the budget consultation processes at national and county levels has been marred by low turnout and ill-prepared submissions, some of which are largely irrelevant to the issues at hand. During these processes, the national and county governments have been seen and said to undertake tokenistic citizen consultations. This is exhibited by the short notices of meetings and a lack of provision of adequate information, which can support citizens to prepare well researched inputs, prior to the meetings. On the other hand, the thresholds for meaningful public participation do not exist owing to the lack of a comprehensive national policy and law on public participation. County governments have also not put in place proper mechanisms to facilitate public participation as required in sections 91 and 115 of the County Governments Act, 2012.

Recommendations

i) The national government should develop a comprehensive National Policy on Public Participation. This policy will provide the minimum standards required for public participation as envisaged in article 10 of the Constitution and step-wise detail approach for public participation. It is also proposed that Parliament enacts an omnibus law on the same.
ii) Similarly, county governments need to enact laws on how to effect meaningful public participation at county level.

5) Limited Civic Awareness of the Constitution

A well informed public is a cardinal component of effective public participation and for communities to effectively manage their own affairs as envisaged by Article 174. Such a community is likely to oversee the State organs to whom the people have delegated sovereign power. Sections 99 to 101 of the County Governments Act, 2012 spell out the purpose and objectives of civic education, the design and implementation of civic education programmes, and the institutional framework for civic education. Civic education is aimed at having an informed citizenry that actively participates in governance affairs of the society on the basis of enhanced knowledge, understanding and ownership of the Constitution.

To support civic education programmes in the counties, the national government is required by the law to design a framework of civic education, to determine the contents of the curriculum for civic education in consultation with County governments, the public and stakeholders. Finally, county governments are

required to develop county legislation to provide the requisite institutional framework for purposes of facilitating and implementing civic education programmes.

Despite these requirements, there has not been a structured way of carrying out civic education, largely due to the absence of legislative frameworks that are meant to guide the process. This has led to Civic education being confused with public participation. As a result, the majority of Kenyans are yet to internalize basic provisions of the Constitution and hence unable to identify violations of the Constitution by public servants and to defend the Constitution.

Recommendations

i) The National Government needs to work with county governments play their roles on civic education, including developing a civic education framework and programme and allocating resources for their implementation.
ii) The civil society is also called upon to play their role in educating citizens on the provisions of the Constitution, largely because an informed public is a useful ally in watching over the faithful implementation of the Constitution

6) High expectation of the public on devolution

Lack of civic education and comprehensive guide on access to information discussed in 4) and 5) above has been ill-informed members of the public on how devolution was envisaged to work or what its socio-economic impact would be. This has led to high level of citizen expectations of the system, to extent that some think devolution should instantly solve all the governance problems that have been bedeviling the country. Members of the public have also been fed with inaccurate information on the cost of devolution as being expensive. It has also been claimed that it will lead to further balkanization of certain demographic groups. Due to inadequate or skewed information, members of the public do not meaningfully participate in identifying, designing and budgeting for interventions, which affect them. Inadequate public participation yields priorities, which are inconsistent with the aspirations of the citizenry. The effect of this is that citizens lose interest in county and national government programmes, further dampening their enthusiasm with devolution. There are myriad disjointed efforts at civic education being proposed and run by various government institutions and non-state actors. Without proper coordination, these initiatives pose the danger of misinforming, fatiguing or confusing citizens. They may also lead to waste of limited public resources due to duplication. At the same time, it will be difficult to quantify the gains realized by these efforts since monitoring them will be difficult.

Recommendations

i) Finalize and roll out National Policy on Public Participation, National Civic Education Framework, civic education curriculum and manuals.
ii) Support county governments to establish and operationalize County Civic Education Units.
iii) Support county governments to enact county public participation laws.

7) Delay in establishment of the Key Institutions to implement the Constitution

The Constitution established a number of key institutions to implement specific constitutional provisions. There were delays in the appointment by the President of Judges, members of the Teachers Service Commission and members of the National Land Commission, which may have affected service delivery in the various areas of responsibility. The IEBC, the Kenya National Commission on Human Rights and the National Police Service Commission also suffered delays as to their establishment. The current absence from office of members of the Ethics and Anti-Corruption Commission (EACC) is diluting the credibility of the Commission and casting doubts as to the legitimacy of actions and key decisions made by the institution without commissioners. This casts doubts as to the seriousness of the executive and parliament in the fight against corruption.

Recommendation

i) All laws providing for the appointment of members of commissions and independent offices should be reviewed so that those without guidelines on when the exercise for appointment should start and end or are weak in that regard, are improved. Penalties for not observing these timelines and for not playing one's role in the appointment should be put in place.

ii) The executive and parliament should move swiftly to appoint, through constitutional process, members of EACC

8) Conflicts between Ministries, Commissions and other Institutions

There have been several conflicts between ministries, commissions and other institutions. These conflicts have undermined effective service delivery to citizens. A notable example has been the conflict between Ministry of Land, Housing & Urban Development and the National Land Commission. These conflicts have been attributed in part to misunderstanding of the roles and responsibilities and lack of regulations and policies to guide implementation. Lack of cooperation between the Ministry and the Commission has resulted in failure or delay in the development of administrative procedures to actualize legislation on land management and administration, delay in review of national land policy, confused reporting structures for staff, delay in processing land related transactions, e.g., signing of title deeds, and erosion of the credibility of both NLC and the ministry. The conflict severely impeded the progress of implementation of land reforms, the most recent result being a move by the NLC and Coast MPs to reject the proposed community land Bill and land amendment Bill that were before parliament. The MPs termed the Bills as unconstitutional.

There has also been conflict over the mandate of Constitutional Commissions mandate such as the overlap of the mandates of the Kenya National Commission on Human Rights (KNCHR), the National Commission on Administrative Justice (NCAJ) and the National Gender and Equality Commission (NGEC). The roles of the Independent Electoral and Boundaries Commission and of the Registrar of Political Parties over the registration and coordination of political parties have also resulted in conflict.

Conflicts between various organs has undermined successful implementation of devolution. Examples of such conflicts include:

i) Between the Senate and the National Assembly on whether the Senate has mandate to participate in the processing of some Bills deemed to be affecting county governments. There is need to determine with certainty which Bills affect county governments and must be processed through both the Senate and the National Assembly in line with articles 110 – 113 of the Constitution.

ii) Between Council of County Governors and Senate where governors disregarded summonses to appear before the Senate in relation to utilization of resources, audit of county accounts and county development boards. The Senate has power under article 125 of the Constitution to summon any person to provide evidence on any matter being considered by it.

iii) Between Members of County Assemblies (MCAs) and governors on impeachment of governors and control of resources. County Assemblies have been on a rampage to impeach governors, derailing county programmes and service delivery.

iv) Between Council of County Governors, MCAs, Controller of Budget and Senate on budget ceilings for county assemblies. The budget ceilings were later resolved with guidance from the Controller of Budget.

v) The standoff between county governments and the national government regarding transfer of certain functions such as county roads, forestry, electricity, gas and energy reticulation, cultural activities, public entertainment and amenities require speedy resolution. These functions have not been transferred as provided for in the Fourth Schedule of the CoK, 2010.

vi) The national government ministries clawing back on county government functions either directly or through legislation, by creating Government-Owned Entities (GOEs) to undertake such functions.

vii) Boundary disputes between county governments and conflict of the use of shared resources by county governments.

viii) Confusion over reporting and disciplinary control of national government staff seconded to county governments.

ix) Such supremacy wars have delayed the enactment of key legislation and the passing of budgets, leading to delays in disbursement of funds to county governments, and subsequently adversely affecting service delivery to the Kenyan people.

Recommendations

i) The Constitution, in articles 6 and 189 envisaged some of these conflicts, and through the Intergovernmental Relations Act, 2012, and section 54 of the County Government Act, 2012, Parliament established a framework for consultation and co-operation between the national and county governments and amongst county governments for resolution of disputes. Institutions should make use of these mechanisms.

ii) Various State organs, e.g., the Council of County Governors, Senate, National Assembly and national government ministries, should cultivate good working relationship with the Senate, National Assembly and national government ministries so that any issues that may create misunderstanding are expeditiously and amicably resolved.

iii) Clarify mandates of institutions with a view to eliminating any overlaps and emphasizing complementarities.

iv) County governments should form joint committees as provided for in the Intergovernmental Relation Act and agree on the modalities of financing and management of shared resources, e.g., water resources and health facilities serving more than one county.

v) Transfer the seconded staff so that they become county governments employees and so eliminate dual reporting to and disciplinary control by national and county governments.

9) Disregard for the Rule of Law and Court Decisions

There have been many instances of disregard for the rule of law by State officers including the Executive and Members of Parliament, undermined successful implementation of the Constitution. The most common example is the failure by State officers to obey court orders, which has had the effect of undermining judicial authority. This may be attributed, in part, to resistance to change by public officers and lack of appreciation that the new dispensation heralds a shift in service delivery underpinned by national values and principles of governance.

Recommendation

i) Respect for the rule of law is not only necessary but a foundational factor for order and peace. The Constitution is clear that it (Constitution) is the Supreme law (Article 2) and all people, whether owners of sovereign power or State officers, whatever the position, are meant to obey the law, equally (Articles 3, 10, and 27 (1)).

ii) The police and DPP should handle all people of Kenya equally and thus arrest and prosecute whoever is disobeying the law, whatever their station.

10) Violation of Chapter Six of the Constitution

There is an increase in the violations of Articles 3 and 10, Bill of Rights, Chapter Six and Leadership and Integrity Act, 2012. This has been exhibited by the increase in physical fights and abuse of office by public officers, especially State officers. Going with this is the increasing failure by the relevant authorities to take action, particularly against the State officers. Politicians are issuing war threats and brewing ethnic hatred, which is a precursor for violence as we head to the national elections. More worrying is the fact that a good number of the officers involved know the law but conveniently ignore it.

Secondly, the corruption cases/allegations in the executive and legislature in both national and county governments being reported are all violations of Chapter Six of the Constitution and the Leadership and Integrity Act, 2012.

Recommendations

i) Relevant authorities mandated to enforce Chapter Six of the Constitution, including the Ethics and Anti-Corruption Commission, National Cohesion and Integration Commission and the institutions under which these State officers work should take the necessary action to ensure compliance with the Constitution and the Leadership and Integrity Act, 2012. The Constitution, including fair administrative action and Article 10, should guide EACC's interventions so that all are treated equally before the law and through due process.

ii) The public should continue to demand for full compliance with Chapter Six by their leaders. The civil society including the media must expose the rot and help in putting pressure for observance of the law.

iii) Public servants should know they hold public resources on trust for Kenyan citizens.

iv) Institutions need to seriously design and implement constitutional change management within their rank and file as a way of entrenching constitutional values and principles, and equally engendering appreciation among state and other public officers that the Constitution requires transformation in thinking and behaviours

11) Delays by national government of prerequisite activities to the successful implementation of some county functions

a) Delay in disbursement of resources to county governments

County governments have suffered recurrent delays in disbursement of resources from the National Treasury to the county revenue accounts. This has delayed implementation of planned activities and hence delivery of public services. It would be important for The National Treasury to put in place measures that ensure funds are disbursed to county governments in a timely manner.

b) Delays in the development of national policies and standards

These are critical for they are required to guide the country. For example lack of a comprehensive policy to guide what the word progressive means under Article 21 (2) has led to unclear determinations of priority levels with respect to the rights listed under article 43 and thereby subjecting the two levels of government to possible suits in court.

c) Delays in gazettement of county laws by the Government printer

Article 199 requires that county laws shall only come into force once gazetted in the Kenya Gazette. Gazettement has faced delays and a number of counties have been facing challenges of having to choose between waiting for considerable time before their laws are gazette and the need to deliver functions.

d) Malfunctioning of IFIMIS in ASAL counties

Most of the counties in the ASAL areas do not have good Internet services. For example, Mandera county's IFIMIS has not been able to function to date. Staff from IFIMIS at the national level, are said to have spent three days in Mandera trying to sort out the problem but left with no success. Consequently, an IFIMIS platform that does not work means many activities get stalled as payment cannot be made and procurement not done

Recommendation

i) The National Treasury must abide by the disbursement timelines set in law so that service delivery at the county level is neither delayed nor disrupted.

ii) Streamline the Integrated Financial Management Information Systems (IFMIS) to efficiently support disbursement, procurement and payment at national and county governments. The NG needs to ensure that IFIMIS is fully operational in all the 47 counties and without any disruptions.

iii) The laws guiding the disbursement of funds should be examined so as to identify bottlenecks in them, if any, including aligning them to Articles 6, 207 and 219.

iv) Probably the Government Printer should become an intergovernmental body or its operations enhanced by way of having a fully-fledged department dedicated to the needs of county governments.

12) Slow implementation of transition activities

The Transition Authority, institution tasked to facilitate the transition to devolved government, in disregard to the requirements of Section 15 of the Sixth Schedule of the Constitution, transferred most of the functions to all counties, in one go. This, together with the fact that functions have never been unbundled nor costed, and the resistance to change by some public officers of the national government, have been the foundational causes of the challenges with transfer of functions and the slow pace of implementation. The incomplete analysis and costing of functions, and incomplete identification of assets and liabilities are among challenges that affect implementation of devolved functions.

To date, three months away from the end of the transition period, some functions, e.g., roads and health are yet to be fully transferred. Secondly, after the first transfer of functions, a good number of

county governments appealed to the Senate to have all the functions they had applied for transferred, as allowed by the Transition to Devolved Government Act 2012. The Senate did determine that the functions be transferred but to date the transfer has not happened.

Key institutions tasked to facilitate the transition to devolved government have been slow to implement some key transition activities.

Recommendations

i) Functions that have not been transferred should be transferred so that there is sufficient time before March 4th 2016, the end date for the phased transfer (Section 15 of the 6th Schedule to the Constitution) to sort out any issues that may arise, with respect to the transfer.

ii) The Inter-Governmental Relations Technical Committee should consolidate all the remaining activities for transition to full devolution with a view to initiating immediate steps to finalize them.

iii) Finalize the analysis and forensic audit of assets and liabilities with a view to transferring to county governments such assets and liabilities required for execution of county government functions. Since most of the assets are already in the hands of either the county governments or the national government, depending on whose function it is, then what really needs to happen is to confirm and document who has what assets. For the liabilities, the analysis should make a recommendation, probably to IBEC, as to how they should be handled, lest some county governments end up with burdens of liabilities they may not be able to repay.

iv) Finalize analysis and costing of functions to facilitate the identification of resources required to implement those functions.

v) County Governments should also cost their functions and develop systems and structures, up to the lowest decentralized level, to help them deliver services.

For continuous and smooth implementation of the functions transferred to County Governments and as we look for an improved formula of dividing revenue between the two levels of government, it may help to, in the short term, ascertain that at a minimum, the amount of money that used to be allocated for the implementation of the functions that have been transferred to county governments provides the minimum threshold of monies divided to the county government level. The rationale is that if the central government used to incur the same expenses to deliver the services in 2012, then it is reasonable to take that threshold as the worst case scenario. The 15% in article 203 of the Constitution was meant to be a cushioning level.

13) Challenges of professional and technical capacity of county governments

Since counties just came into being after the March 4th 2013 general elections, counties have experienced inadequate technical capacity in some areas such as legislative drafting, accounts, procurement, etc. They have also had difficulties attracting and retaining adequately qualified staff to run their operations. Some counties for example, Mandera County, Wajir County, etc., have had special challenges with personnel because of insecurity. For example, teachers left the Mandera County following the Al-Shabab attacks forcing the county to hire more than 800 untrained teachers to ensure that learning continues. Prior to the rise in insecurity, 97% of the health workers were from outside the county and after they left, the county had to hire 93% local persons into the health sector.

Some public officers at both levels of government staff have not fully embraced the new constitutional dispensation which requires public officers to exhibit high standards of professional ethics; responsiveness, impartiality, promptness in the delivery of services; enhance public participation through involvement of the people in policy making, and promote transparency and public officer accountability for administrative acts. As a result, some counties continue to deliver services in the same manner it was before the promulgation of the Constitution of Kenya 2010.

Recommendation

i) Develop human resource plans aligned to each government level's functions

ii) Review the National Capacity Building Framework (NCBF) to align it with capacity needs and plans identified by the county governments.

iii) Finalize the change management strategies that were initiated in pursuance of the CIC circular

e) Challenges to Effective Public Financial Management

The past experiences in financial management in this country informed the provisions of Chapter 12 of the Constitution, Public Finance Management Act, 2012, and attendant regulations. Public financial management has been bedeviled by several challenges, which have threatened to derail the realization of principles of public finance as stipulated in article 201 of the Constitution. Some of these challenges are:

i) The disputes between the various institutions critical to overseeing the processes relating to the implementation of PFM has sometimes delayed important activities including disbursement of funds and implementation of programs thereby prejudicing service delivery.

ii) The financing of county functions has been beset with inconsistencies in the remittances of the equitable share of revenue from the national to the county governments. Despite the clear provisions of the law as well as the disbursement schedule which is annually agreed on and gazetted, there have been marked delays, at times running into months, in cash disbursements. In light of this fact, many counties have complained that the inconsistencies underlying the remittances undermine planning and service delivery under the budget. The delayed remittance actually halt program delivery and the purchase of goods and services needed thereto.

iii) Adequacy of funds for devolved government functions due to the non-completion of the function analysis and costing process has negatively impacted programs and projects run on a regional basis including former provincial hospitals. In the absence of adequate data, the funds allocated to critical institutions do not enable them carry out their mandates effectively.

iv) The law assigns the national government the role of capacity building with respect to the county governments. In the area of PFM, capacity building has largely been required on the part of the county governments, which as new kids on the block have witnessed a myriad of challenges in the implementation of the ideals stated under the PFM law. With the onset of devolution quite a number of capacity deficiencies were witnessed; from lack of qualified personnel to the inability to appreciate the dynamics and requirements of running a government. The effort by the national treasury in this respect is laudable though not sufficient. The process also required to be streamlined in view of the fact that there are way too many players including private practitioners that are driving the capacity building agenda in a manner that is uncoordinated and may ultimately foster confusion than a real response to the core issues at stake.

Recommendations

i) The process of budgetary adoption and amendments: The implementation of fiscal decentralization has documented the manner in which political institutions have been involved in the distribution of resources albeit with a lot of controversy and interests. This is not desirable and therefore calls for the re-evaluation of budget passing and involvement of the assemblies, especially at the county level. In this respect, there is need to relook the PFM Act and limit the power of the assembly in terms of the alterations or amendments that they can make to the budgetary estimates presented before them by the Executive for approval. If this power cannot be limited, then there is need to define the manner and or boundaries within which the assemblies exercise their power of the purse.

ii) The two levels of government must learn to and actually cooperate with each other to obviate unnecessary wrangling over matters that are easily resolved. The Constitution already set the parameters for cooperation under articles 6 and 189 and adherence to these parameters should help in doing away with the resource disputes and supremacy contests that the country has unnecessarily been treated to. Beyond the Constitution, the institutions created under the law as platforms for the achievement of this quest must also effectively carry out their functions. Institutions like the National and County Government Coordinating Summit must be active in carrying out the mandate assigned to it under the law. As it is, the meetings of the summit have been far in between. In summary, this is an area that we have not faired on well.

iii) Monitoring and evaluating of reforms in the PFM sector need to be enhanced. The country must be able to ascertain the impact, relevance and sustainability of the sector and the overall impact on service delivery from the standpoint of the public.

iv) There is need for policy guidance on Conditional Grants for the sole purpose of furthering the ideals of Public Finance as enshrined under the Constitution. This policy must ensure that

Conditional Grants do not erode the fiscal autonomy of County governments or prejudice critical principles like equity and certainty in revenue allocation.

v) Change Management is a necessary appendage to reforms for it goes into the core of design and implementation of reforms. It must be able to foster not only institutional but attitudinal changes as well. It rids the system of the old attitudes and inclinations and inculcates a fresh outlook of events in the new system occasioned by the law and the constitution.

5.2 A PARTING SHOT

As this Report shows, significant strides have been made, in the journey towards the full implementation of the Constitution of Kenya 2010. The Report also demonstrates however, that there is much that still remains to be done in that journey. We have identified the successes, acknowledged the challenges, and given our proposals and recommendations from the vantage point of the institution perhaps most intimately engaged in the implementation process over the last five years.

The mandate given by the People of Kenya to the Commission was to monitor, facilitate, coordinate and oversee the implementation of their Constitution. The Constitution envisaged that the implementation was to be done by Government in its various arms and agencies, at both levels. Indeed, this continues to be the case beyond the life of CIC, notwithstanding that as at the time of writing this report, Parliament is yet to guide the country on the oversight of implementation beyond CIC.

On the oversight mandate, as we exit, while we readily submit to the judgment of history, we are confident that we have given that mandate our best shot, on behalf and in the best interests of the People of Kenya. Like all human endevours, that shot was not perfect. The challenge for our nation now in so far as the implementation journey is concerned, is how to consolidate the gains from the five year period, and tackle the challenges to ensure that the process of implementation remains on track.

This is the moment for Wanjiku to discharge her Article 3 mandate, the obligation to respect, uphold and defend her Constitution. This is the moment for Wanjiku to maintain the highest level of vigilance, and to hold accountable, all those to whom she has, in terms of Article 1 of the Constitution, delegated her sovereign power.

As for those delegatees of the people's sovereign power under Article 1 (3) of the Constitution, the expiry of this initial five year implementation period, provides the opportunity to take stock and recommit to the complete fidelity to the Constitution and its implementation, that the people expect of their delegatees.

Parliament and its members must ask themselves the hard question whether in this implementation period, they have faithfully, in terms of Article 94 (1) of the Constitution protected the Constitution, and promoted democratic governance of the Republic. Over the last five years, there have been too many instances of Parliament, and in particular the National Assembly, acting in complete disregard, indeed contempt, for the letter and spirit of the Constitution. Sadly, this has been mostly manifested in matters that touch on the personal and group interests of Parliamentarians; be it refusal to accept the clear Constitutional mandate of the Salaries and Remuneration Commission; the insistence on retention of the Constituency Development Fund (CDF) despite it clearly being inimical to, and inconsistent with, devolution; the unhelpful turf wars between the two houses of Parliament; and the overt disrespect on several occasions, of Judicial decisions and the Rule of Law. Indeed it is not an exaggeration to state that Parliament, and in particular the National Assembly, has continued to act as though it is an extra-Constitutional body with some claim to supremacy. All too often, the National Assembly and its members, have appeared completely oblivious to the provision in Article 2 (1) of the Constitution: "This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of Government".

The Constitution places far reaching implementation responsibilities on the Executive. Indeed, the legislative responsibilities of the Legislature and the interpretation and enforcement role of the Judiciary aside, the Executive is the primary and principle implementer of the Constitution. In this regard, the moment presents a timely opportunity for the Executive to evaluate its discharge of this obligation. Beyond and separate from Legislation, there are many important provisions of the Constitution whose implementation the Executive must initiate and follow through: These include:

i) Article 7(2) – the official languages of the Republic are Kiswahili and English. This provision is not stated to be progressive.
ii) The Economic and Social Rights set out in Article 43 of the Bill of Rights. Article 21(2) 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". Five years into the implementation of the Constitution, there should at the very least be available to the citizen, a road map as to how and when the Article 43 rights will be achieved.
iii) Article 69(1) (b). – "The State shall work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya" . Here again the Executive should at the very least have a road map for the realization of this Constitutional provision.
iv) Article 231(4) of the Constitution provides; *"Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolize Kenya or an aspect of Kenya but shall not bear the portrait of any individual."* The Executive must demonstrate its adherence to, or at least its programme to ensure adherence, to this particular Constitution provision.

These are examples, not by any means exhaustive, of specific constitutional provisions, that five years after promulgation, the Executive must account for their implementation.

Beyond the implementation of specific provisions of the Constitution, the expiry of this five year period provides an opportunity for all Arms of Government at both levels, as well as all State organs, and indeed all citizens, to reflect on the status of certain pillars of the architecture of the Constitution of Kenya 2010, and what needs to be done individually and collectively to enhance and fulfill the implementation of the letter and spirit of the Constitution. These include:

i) The inclusion of the National Values and Principles of governance set out in Article 10 and in particular with reference, to the application or interpretation of the Constitution; the enactment, application or interpretation of any law; and the making or implementation of public policy decisions.
ii) The respect for, and inclusion of the Bill of Rights, in the delivery of services to citizens at both levels of Government.
iii) Public participation in implementation the Constitution and in policy and decision making at both levels of government.
iv) Support for, and full commitment to the success of devolution as a key pillar for the delivery of services to Wanjiku. Article 6(2) of the Constitution provides that "the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation".
v) Notwithstanding the elaborate legal framework for inter-governmental relations, the National Government and the 47 Country Governments need to reflect on whether this framework is respected and adhered to.
vi) While the Constitution is clear on the roles and mandates it gives to the various arms of government at both levels, to what extent have these organs risen above petty turf wars and the protection of parochial interests to effectively discharge their respective Constitutional mandates?
vii) Most important of all for Government in its various arms, all the State organs, as well as citizens and citizen groups, it is an opportunity to reflect on what each must do, towards establishing and promoting, a national culture of Constitutionalism.
viii) In the preamble to the Constitution of Kenya 2010, the People recognize the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom democracy, social justice and the rule of law.

At this stage in the implementation journey, we urge Government, all state Organs and all citizens, to individually and collectively take stock as we rededicate ourselves, to such government, as we have recognized and declared our aspiration to achieve.

God bless Kenya.

Annex 1: Status of the Fifth Schedule Legislation

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
Chapter Two: The Republic				
1	Legislation in respect of culture (article 11 (3))	Five years	Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2015	Reviewed the Bill and forwarded recommendations to the Attorney General.
2			National Culture and Arts Bill, 2015	CIC awaiting submission of a revised copy for review.
3			Seeds and Plant Varieties (Amendment) Bill, 2015	Reviewed the Bill and forwarded recommendations to the Attorney General.
			The Culture Bill 2015	Reviewed the Bill and forwarded recommendations to the Attorney General.
Chapter Three: Citizenship				
4	Legislation on citizenship (article 18)	One year	The Kenya Citizenship and Immigrations Act, 2011	Enacted in August 2011
			The Kenya Citizens and Foreign Nationals Management Service Act 2011	Enacted in October 2011
Chapter Four: The Bill of Rights				
5	Freedom of the Media (article 34)	Three years	The Media Council Act, 2013	Enacted in December 2013
6	Family (article 45)	Five years	Marriage Act 2014	Enacted in May 2014
		Five years	Matrimonial Property Act, 2013	Enacted in December 2013
		Five years	Protection Against Domestic Violence Bill, 2013	Enacted in May 2015
7	Consumer protection (article 46)	Four years	Consumer Protection Act, 2012 (article 46)	Enacted but requires review to comprehensively give effect to article 46
8	Fair administrative action (article 47)	Four years	Fair Administrative Action Act, 2014	Enacted in May 2015
9	Fair hearing (article 50)	Four years	The Victims Protection Act, 2014	Enacted in December 2014
10	Rights of persons detained, held in custody or detained (article 51)	Four years	Persons Deprived of Liberty Act, 2014	Enacted in December 2014

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
11	Kenya National Human Rights and Equality Commission (article 59)	One year	Kenya National Commission on Human Rights Act, 2011	Enacted in August 2011
		One year	The National Gender and Equality Commission Act, 2011	Enacted in August 2011
		One year	The Commission on Administrative Justice Act, 2011	Enacted in August 2011
Chapter Five: Land and Environment				
12	Community land (article 63)	Five years	The Community Land Bill, 2015	Bill reviewed and forwarded to the AG Published in August 2015
13	Regulation of land use and property (article 66)	Five years	Physical planning Bill, 2015	Reviewed and forwarded to the Attorney General Published in August 2015
		Eighteen months	The National Land Commission Act, 2012 (article 67)	Enacted April 2012
14	Legislation on land (article 68)	18 months	The Land Registration Act, 2012 (article 68)	Enacted April 2012
		18 months	The Land Act, 2012 (Article 68)	Enacted April 2012
15	Agreements relating to natural resources (article 71)	Five years	Agreements Relating to Natural Resources (Classifications of Transactions) Bill 2015	Reviewed and submitted recommendations to the Attorney General
		Five years	Mining Bill, 2014 (Art. 60, 62(1)(f), 66(2), 69 & 71	Passed by the National Assembly on 29thOctober, 2014 and forwarded to Senate for consideration. Has passed the second reading.
		Five years	Forest Bill, 2015 (Article 71 (2)	Reviewed and submitted to the Attorney General
16	Legislation regarding environment (article 72)	Four years	Environmental Management and Coordination (Amendment) Bill, 2014	Bill passed by the National Assembly and Senate.
Chapter Six: Leadership and Integrity				
17	Ethics and anticorruption commission (article 79)	One year	The Ethics and Anti-Corruption Commission Act, 2011 (article 79)	Enacted in August 2011
18	Legislation on leadership (article 80)	Two years	The Leadership and Integrity Act, 2012 (article 80)	Enacted in August 2012
Chapter Seven: Representation of the People				
19	Legislation on elections (articles 82 and 87)	One year	The Elections Act, 2011	Enacted in August 2011

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
20	Independent Electoral and Boundaries Commission (article 88)	One year	The Independent Electoral and Boundaries Commission Act, 2011	Enacted in July 2011
21	Legislation on political parties (article 92)	One year	The Political Parties Act, 2011	Enacted in August 2011
Chapter Eight: Legislature				
22	Promotion of representation of marginalised groups (article 100)	Five years	Statute Law Misc. (Amendment) Bill, 2015	The Bill reviewed and forwarded to the Attorney General.
23	Vacation of office of member of Parliament (article 103)	One year	The Elections Act, 2011	Enacted in August 2011
24	Right of recall (article 104)	Two years	The Elections Act, 2011	Enacted in August 2011
25	Determination of questions of membership of Parliament (article Specification 105)	Two years	The Elections Act, 2011	Enacted in August 2011
26	Right to petition Parliament (article 119)	Two years	The Petition to Parliament (Procedure) Act, 2012	Enacted in August 2012
Chapter Nine: Executive				
27	Power of mercy (article 133)	One year	The Power of Mercy Act, 2011	Enacted in August 2011
28	Assumption of office of president (article 141)	Two years	The Assumption of the Office of the President Act, 2012	Enacted in August 2012
Chapter Ten: Judiciary				
29	System of courts (article 162)	One year	The Industrial Court Act, 2011	Enacted in August 2011
		One year	The Environment and Land Court Act, 2011	Enacted in August 2011
		One year	The Supreme Court Act, 2011 (article 163)	Enacted in June 2011
30	Removal from office (article 168) (of Judges)	One year		Provided for in the Judicial Service Act, 2011
31	Judiciary Fund (article 173)	Two years	Judiciary Fund Bill, 2015 (to amend the JSC Act, 2011)	Provided for in the Judicial Service Act, 2011 Bill reviewed and advisory forwarded to the AG

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
32	Vetting of judges and magistrates (Sixth schedule, section 23)	One year	The Vetting of Judges and Magistrate Act, 2011	Enacted in August 2011
		One year	The Judicial Service Act, 2011	Enacted in August 2011
Chapter Eleven—Devolved Government				
33	Speaker of a county assembly (article 178)	One year	County Government Act, 2012	Enacted in July 2012
34	Urban areas and cities (article 183)	One year	Urban areas and Cities: The Urban Areas and Cities Act, 2012 (article 184)	Enacted in August 2011
35	Support for county governments (article 190)	Three years	County Government Act, 2012	Enacted in July 2012
		Three years	Public Finance Management Act, 2012 (article 190)	Enacted in July 2012
		Three years	Intergovernmental Relations Act, 2012 (article 190)	Enacted in February 2012
36	Removal of a county governor (article 181)	18 months	County Government Act, 2012	Enacted in July 2012
37	Vacation of office of member of county assembly (article 194)	18 months	County Government Act, 2012 (article 194)	Enacted in July 2012
		18 months	Leadership and Integrity Act, 2012 (article 194)	Enacted in August 2012
		18 months	Elections Act, 2011 (article 194)	Enacted in August 2011
38	Public participation and county assembly powers, privileges and immunities (article 196)	Three years	County Government Act, 2012 (Article 196) County Assemblies Powers and Privileges Bill, 2014(to repeal Section 17 of the County Governments Act, 2012)	Enacted in July 2012. Bill reviewed and advisory forwarded to Parliament
39	County assembly gender balance and diversity (article 197)	Three years	County Government Act, 2012 (article 197)	Enacted in July, 2012

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
40	Chapter eleven (Article 200 and Sixth Schedule, section 15)	18 months	The Transition to Devolved Government Act, 2012	Enacted in February, 2012
		18 months	The Intergovernmental Relations Act, 2012	Enacted in February, 2012
		18 months	The County Government Act, 2012	Enacted in June, 2012
Chapter Twelve: Public Finance				
41	Revenue Funds for county governments (article 207)	18 months		Provided for in the Public Finance Management (PFM) Act, 2012
42	Contingencies Fund (article 208)	One year		Provided for in the PFM Act, 2012
43	Loan guarantees by national government (article 213)	One year		Provided for in the PFM Act, 2012
44	Establishment of the Commission on Revenue Allocation	One years	The Commission on Revenue Allocation Act, 2011 (article 215)	Enacted in August 2011
45	Financial control (article 225)	Two years	The Public Finance Management Act, 2012	Enacted July 2012
46	Accounts and audit of public entities (article 226)	Four years	Public Audit Bill, 2014	Bill reviewed and forwarded to the Attorney General. Period of enactment extended by Parliament for nine months. Joint Committee formed to review Presidential Memorandum.
47	Procurement of public goods and services (article 227)	Four years	Public Procurement and Asset Disposal Bill, 2014	Bill reviewed and forwarded to the AG. Period of enactment extended by Parliament for nine months. Joint Committee formed to Presidential review memorandum
48	Establishment of the Salaries and Remuneration Commission (article 230)	One year	The Salaries and Remuneration Commission Act, 2011	Enacted in August 2011
Chapter Thirteen: Public Service				
49	Values and principles of public service (article 232)	Four years	Public Service (Values and Principles) Act, 2014	Enacted in
			The Public Service Commission Act, 2012	Enacted August 2012

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
50	Establishment of the Teachers Service Commission (article 237)		The Teachers Service Commission Act, 2012	Enacted in August 2012
			The Teachers Service Commission (Amendment) Bill, 2015	Bill reviewed and forwarded to the Attorney General.
Chapter Fourteen: National Security				
51	National security organs (article 239)	Two years	National Intelligence Service Act, 2012 (article 239/242)	Enacted in August 2012
		Two years	National Security Council Act, 2012 (article 239)	Enacted in August, 2012
		Two years	Kenya Defence Forces Act, 2012 (article 232, 239 / 241)	Enacted in August 2012
52	Command of the National Police Service (article 245)	Two years	National Police Service Act, 2011 (article245)	Enacted in August 2011
		Two years	Independent Police Oversight Authority Act, 2011	Enacted in November 2011
General: Any other legislation required by the Constitution				
53	Other Legislation	Five years	Treaty Making and Ratification Act, 2012 (article 2 (6))	Enacted in Dec 2012
54		Five years	The Social Assistance Act, 2013 (Art. 43 (1)(e))	Enacted in January 2013
55		Five years	Basic Education Act, 2013 (Art. 53)	Enacted in January 2013
			Basic Education (Amendment) Bill, 2015	Reviewed and forwarded to the Attorney General.
56			National Government Coordination Act, 2013 (Art. 131 (1) & 132 (3)(b))	Enacted in January 2013
57			The Independent Offices (Appointment) Act, 2011 (article 156 & 24 8)	Enacted in August 2011
58			The Legal Aid Bill, 2015	Published on 26th June, 2015
59			Succession (Amendment) Bill, 2015	Bill reviewed and forwarded to the Attorney General.
60			The Child Justice Bill, 2015	Bill reviewed and advisory forwarded to Parliament
61			Children (Amendment) Bill, 2015	Under review by CIC

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
62			The County Governments Public Finance Management Transition Act, 2013 (Sect. 15 of sixth schedule)	Enacted in January, 2013
63			The Government Owned Entities Bill, 2014	Bill reviewed and forwarded to the Attorney General
64			The National Sovereign Wealth Fund Bill, 2015 The Kenya Sovereign Wealth Fund Bill, 2015	CIC received two bills and requested the executive to consolidate them into one.
65			The Employment (Amendment) Bill 2015	Bill reviewed by CIC and forwarded to the Attorney General
			Labour Relations (Amendment) Bill, 2015	Bill reviewed by CIC and forwarded to the Attorney General
			Labour Institutions (Amendment) Bill, 2015	Bill reviewed by CIC and forwarded to the Attorney General
			Work Injury Compensation Bill, 2015	Bill reviewed by CIC and forwarded to the Attorney General
			Occupational Safety and Health (Amendment) Bill, 2015	Bill reviewed by CIC and forwarded to the Attorney General
			The Kenya National Examination Council (Amendment) Bill, 2015	Bill reviewed and advisory sent to Parliament At Committee stage
			Prevention and Control of Marine Pollution Bill, 2014	Bill reviewed and forwarded to the Attorney General.
			The Evictions and Resettlement Procedures Bill, 2015	Reviewed and forwarded to the Attorney General
66			Irrigation Bill, 2015	Bill reviewed by CIC and forwarded to the Attorney General
67			Small Claims Court Bill, 2015	Bill reviewed and forwarded to the Attorney General. Published in August 2015
68			The Organization and Administration of the Court of Appeal Bill, 2015	Bill reviewed and forwarded to the Attorney General.
69			High Court Organization and Administration Bill, 2015	Bill reviewed and forwarded to the Attorney General. Published in August 2015

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
70			Magistrate Courts (Amendment) Bill, 2014	Bill reviewed and forwarded to the AG.
			Administration of the Magistrates Courts Bill, 2015	Bill reviewed and forwarded to the AG
			Energy Bill, 2015	Bill reviewed and forwarded to the Attorney General.
			Languages Bill, 2015	Under review by CIC.
			Petroleum (Exploration, development and production) Bill 2015	Bill reviewed and advisory forwarded to the Attorney General.
72			Minimum and Maximum and Holding Acreages Bill, 2015	Bill reviewed and advisory forwarded to the Attorney General.
73			Investigation and Adjudication of Historical Land Injustices Bill, 2015	Reviewed the Bill and forwarded recommendations to the Attorney General.
74			The Controller of Budget Bill, 2015	Bill reviewed and forwarded to the AG On 1st Reading in Parliament
75			Central Bank of Kenya (Amendment) Bill, 2015	Bill Reviewed by the CIC and submitted to the Attorney General
76			Two-thirds Gender Principle Rule Bill, 2015	Bill reviewed and advisory forwarded to the Attorney General. 1st reading on 30th April, 2015
77			The Parliamentary Powers and Privileges Bill, 2014	Bill reviewed and advisory forwarded to the Parliament.
78			The County Assemblies Powers and Privileges Bill, 2014	Bill reviewed and advisory forwarded to the Parliament.
79			The Pharmacy Practitioners Bill, 2014	Bill reviewed and advisory forwarded to the Parliament 1st Reading in parliament
80			The In-Vitro Fertilization Bill, 2014	Committee stage
81			The Basic Education (Amendment) Bill, 2014	First reading
82			The Persons with Disabilities Bill, 2015	Bill reviewed by CIC and forwarded to the Attorney General
83			The National Youth Employment Authority Bill, 2015	Bill reviewed and advisory forwarded to the AG Committee stage

	Chapter and Articles	Constitution Timeline	Title of Legislation Developed	Status of the Legislation
84			Reproductive Health Care Bill, 2014 (Sen. Bill No.17)	2nd Reading
85			The Sexual Offences Act (Amendment) Bill	Reviewed and comments forwarded to the sponsor of the Bill.
86			The Pensions (Amendment) Bill, 2014	Bill reviewed and advisory forwarded to Parliament
87			The Malaria Prevention Bill, 2014	Bill reviewed and advisory forwarded to the National Assembly.
88			The Higher Education Loans Board (Amendment) Bill, 2015	Bill reviewed and advisory forwarded to Parliament
89			The Engineering Technologists and Technicians Bill, 2015	1st Reading
			The Constitution of Kenya (Amendment) No 1 Bill, 2015	1st Reading
90			The Constitution of Kenya (Amendment) No 2 Bill, 2015	1st Reading
91			The Constitution of Kenya (Amendment) (No.3) Bill,2015	1st Reading
			The Registration and Identification of Persons Bill, 2014	1st Reading
92			Biomedical Engineers Bill 2015	Bill reviewed and advisory forwarded to the sponsor.
93			The Refugees Bill, 2014	1st Reading

Other Audited Legislation Outside the Schedule 5 Legislation

	Article of the Constitution	Legislation	Status
1.	18	The Refugees Bill, 2012	Not yet enacted
2.	2(6) and 21(4)	Treaty Making and Ratification Act, 2012	Commencement 14th December 2012
3.	12	National Registration and Identification Bill 2012	Not yet enacted
4.	34	The Kenya Information and Communication (Amendment) Act, 2013	Commencement 2nd January 2014
5.	43	The Reproductive Health Care Bill, 2014	Not yet enacted
6.	43	The Health Bill, 2013	1st Reading

	Article of the Constitution	Legislation	Status
1.	18	The Refugees Bill, 2012	Not yet enacted
7.	43	The Mental health Bill, 2014	1st Reading
8.	43 & 53	The Basic Education Act, 2013	Commencement on 25th January 2015
9.	43 & 53	The Basic Education (amendment) Bill, 2015	1st reading
10.	19, 48, 50	The Legal Aid Bill, 2015	1st Reading
11.	35	The Access of Information Bill, 2013	1st Reading
12.	31	The Data Protection Bill, 2012	Not yet enacted
13.	54	The Persons with Disability Bill, 2015	Undergoing review
14.	53	The Child justice Bill, 2014	Forwarded to the Attorney General
15.	53	The Children Act (amendment) Bill, 2014	Forwarded to the Attorney General
16	Contempt of Court Bill, 2013	To define and limit the powers of courts in punishing for contempt of court and for connected purposes	In Parliament
17	Magistrates Court Bill, 2013	To give effect to articles 23(2) and 169(1)(a) and (2) of the Constitution]; to confer jurisdiction, functions and powers to the magistrate's courts; to provide for the procedure of the magistrates' courts, and for connected purposes	In Parliament
18	Legal Aid Bill, 2013	To give effect to articles 19(2 48, 50 (2),(g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes	With the Attorney General
19	Persons Deprived of Liberty Bill, 2014	To give effect to article 29 (f), 51 and 53	With Attorney General.
20	Fair Administrative Action Act (Article 47)	To give effect to Article 47 (1) of the Constitution and for connected purposes.	Enacted on 24th December 2014
21	Small Claims Court Bill, 2015	To establish Small Claims Courts and to provide for the jurisdiction and procedure and for connected purposes.	Forwarded to the AG.
22	Judiciary Fund Bill, 2015	To provide for the regulation, administration, and utilization of the Judiciary Fund and for connected purposes	Forwarded to the AG.
23	High Court (Organization and administration) Bill 2015	To give effect to article 165(1) (a) and (b) of the constitution; to provide for the organization and administration of the high court of Kenya and for connective purposes.	Pending publication and tabling in parliament.
24	Court of appeal (organization and administration) Bill 2015	To give effect to article 164 (1) a & b of the constitution; to provide for the organization and administration of the court of appeal and for connected purposes.	Pending publication and tabling in parliament.

	Article of the Constitution	Legislation	Status
1.	18	The Refugees Bill, 2012	Not yet enacted
25	Industrial courts act 2011 (Subsequently remained as employment and labour relations act)	An Act of Parliament to establish the Industrial Court as a superior court of record; to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes	Date of assent: 27th August, 2011 Date of commencement: 30th August 2011.
26	Kadhis courts act	An Act of Parliament to prescribe certain matters relating to Kadhis' courts under the Constitution, to make further provision concerning Kadhis' courts, and for purposes connected therewith and incidental thereto	Although the act is in force, it requires review to line with the constitution
27	Courts Martial, Article 169(c) KDF Act, 2012 (part 9)	Part 9 of the KDF Act (relating to the organization and administration of Courts Martial) gives effect to article 169(1)(c) of the constitution, which confers to Courts Martial the status of subordinate courts. The Part also delimits the jurisdiction, functions and powers of the courts.	Enacted in 2012.

Annex 2: Bills with an August 27th 2015 Deadline Reviewed in CIC and Submitted to AG

Article of the Constitution	Title of Legislation Developed	Date Received by CIC	Date Submitted to the Attorney General
Article 11 (3)(a) Compensation or royalties for the use of their cultures and cultural heritage	The Protection of Traditional Knowledge and Traditional Cultural Expressions Bill, 2015	18th February, 2015	30th June, 2015
	The Culture Bill, 2015	1st version from AG: 30th April, 2015 2nd version from the Ministry of Sports, Arts and Culture: 6th July 2014: 2nd version from the AG: 9th July 2015	27th July, 2015
Article 11(3)(b) Recognition and protection of indigenous seeds and plant varieties, their genetic and diverse characteristics and use by the communities of Kenya.	The Seeds and Plant Varieties (Amendment), Bill, 2015; and The Seeds and Plant Varieties (Conservation, Access and Benefit Sharing of Plant Genetic Resources) Regulations	1st 21st April, 2015	18th June, 2015
Article 63 Community land	The Community Land Bill, 2015	18th November, 2013	11th July, 2014
Article 66 Regulation of land use and property	The Physical Planning Bill, 2015 (Land Use Bill)	18th November, 2013	14th July, 2015

Article of the Constitution	Title of Legislation Developed	Date Received by CIC	Date Submitted to the Attorney General
Article 67(2)(e) Investigation and adjudication of claims arising out of historical land injustices	The Investigation and Historical Land Injustices Bill, 2015	23rd April, 2015	14th July, 2015
Article 68(c) (i) Minimum and maximum land holding acreage	The Minimum and Maximum Land Holdings Acreage Bill, 2015	4th June, 2015	14th July, 2015
Article 71 Agreements relating to natural resources	The Agreements Relating to Natural Resources (Classifications of Transactions) Bill 2015	27th April, 2015	27th May, 2015
Article 81(b) Two-thirds gender principle	The Two Thirds Gender Principle Bill, 2015; The Constitution of Kenya (Amendment) Bill; and The Election Laws (Amendment) Bill, 2015	27th July, 2015	29th July, 2015
Article 100 Promotion of representation of marginalised groups	Statute Law Miscellaneous (Amendment) Bill, 2015	5th May, 2015	14th May, 2015
Article 164(1)(b) Organization and administration of the Court of Appeal	The Organization and Administration of the Court of Appeal Bill, 2015	3rd July, 2015	28th July, 2015
Article 165(1)(b) Organization and administration of the High Court	The Administration of the High Court Bill, 2015	8th May, 2015	20th May, 2015
Article 169(1) Subordinate Courts	The Magistrates Courts (Amendment) Bill, 2015	2nd July, 2015	16th July, 2015
Article 173 Regulation of the Judiciary Fund	The Judiciary Fund Bill, 2015	2nd July, 2015	16th July, 2015
Section 17 of the Sixth Schedule to the Constitution Restructuring of the provincial administration	CIC met with the Ministry of Interior on the 8th of May. The Ministry submitted a draft report on May 26, 2015 detailing the steps it had taken and it will take in restructuring of the Public Administration.	Updated report submitted to CIC on 25th August 2015	Report under review by CIC
Any other legislation required by the Constitution to be enacted by Parliament within Five Years	The Forest Bill, 2013	27th March, 2015	5th May, 2015
	The Evictions Bill, 2015	18th November, 2013	30th June, 2015
	The Energy Bill, 2015	23rd March, 2015	21st July, 2015
	The Petroleum Exploration and Production Bill, 2015	23rd March, 2015	12th May, 2015
	Legal Aid	21st November, 2014	21st January, 2015
	The Succession Bill, 2015	24th November, 2014	23rd July, 2015

Annex 3: Litigation (List of Court Cases Instituted by/or in Which CIC Was Enjoined

1) **Petition no 74 & 82 of 2012**. Imanyara & others vs AG & others. The Petitioners moved the court for the determination of the date for the next general elections.

2) **Petition no. 102 of 2011**. Federation of women lawyers & 5 others vs. Hon. AG & Judicial Service Commission. The Petitioner challenged alleged lack of appointment of at least one-third women to the Supreme Court.

3) **Petition no 107 of 2011**. Japheth Kiio vs. Orange Democratic Movement & others. The Petitioner challenged the provisions of Section 2 and 15 of Political Parties Act and Article 77 (2) of the Constitution.

4) **Petition No 145 of 2011**. CIC vs AG & others. The Commission sought the courts interpretation on the procedure for the preparation of legislation to implement the constitution.

5) **Petition No.21 Of 2012**. Patrick Njuguna & others vs AG & others. This Petition challenged the eligibility of Uhuru Kenyatta and William Ruto to run for office.

6) **Petition No. 137 of 2011.** Dr.Timothy Njoya & others vs The AG & Others. Petition sought to determine whether Members of Parliament should pay tax.

7) **Petition No 351 of 2012**. CIC vs The AG & another. The Commission sougth the Interpretation of Presidential Executive Powers.

8) **Petition No 426 in 2012.** Kipngetich Maiyo & 24 others vs the Kenya Land Commission Selection Panel & Others. In the matter of the unlawful and unjust shortlisting of persons for the position of Chairperson and members of National Land Commission.

9) **Petition No 454 of 2012.** CIC vs The Parliament of Kenya & others. The Commission challenged the constitutionality of the Leadership and Integrity Act.

10) **Petition No 515 of 2012**. Ali Wario Guyo vs The AG & others. The Petitioner moved the court to determine the actual date of the next general election.

11) **Supreme Court Advisory Opinion No 2 of 2012.** Commission for the Implementation of the Constitution. The matter of the principle of gender representation in the National assembly and the Senate.

12) **Supreme Court Advisory Opinion No 2 of 2013**. The Senate The Sente sought an advisory opinion on their legislative role on the Division of Revenue Bill, 2013

13) **Supreme Court Advisory Opinion Ref No 1 of 2014:** The principal parties in the case are the Council of Governors, The Senate and Clerk of the Senate with CIC as an Interested Party. The case was filed on 14th February 2014 at the Supreme Court. . The Council of Governors sought an Advisory Opinion on the respective responsibilities of various organs with oversight responsibilities over devolved governments It sought a constitutional interpretation of the oversight powers of the Senate vis-a vis that of the County Assemblies over the County Government on financial management of funds at the devolved government in view of articles 96(3), 226(2) of the Constitution... The said interpretation is critical in clarifying and evolving the institutional relationships under the new constitutional dispensation. The applicant withdrew the matter

14) **Supreme Court Ref No 2 of 2014 (Advisory Opinion):** The Applicant herein is the National Land Commission filed on 2nd April 2014 with CIC as an Interested Party. The National Land Commission sought an advisory opinion to clarify the functions and powers of the Ministry of Land, Housing and Urban Development on the one hand and the functions and powers of the National Land Commission as stipulated in the various laws. The advisory opinion is sought in the following issues:-

a) Land administration and management functions
b) Land taxation and revenue
c) Human resource/staff
d) Land registration and issuance of titles
e) National land information management system (NLIMS)
f) Transfer of assets
g) Private land
h) Land settlement fund

The opinion will be issued on notice after hearing was concluded.

15) **Supreme Court Advisory Opinion Ref No 3 of 2014 :** The Applicants herein are the Speakers of the 47 County Assemblies, filed on 7th August, 2014, with CIC as an Interested Party. They have sought advisory opinion in matters concerning County Government including:

a) Whether a Constitutional Commission or an Independent Office by way of circular, regulate internal affairs of a county assembly such as sittings of a county assembly.
b) Whether MCA's enjoy immunity from civil and criminal proceedings against words spoken before, or thing brought against him/her in the county assembly.
c) What constitutes valid ground for removal of Speaker of a county assembly?

The matter is not yet concluded.

16) **Supreme Court Advisory Opinion Ref No 1 of 2015:** This matter is an Application by the Speaker County Assembly of Embu. Filed in February 2015. CIC being an Interested Party. The Applicant sought the Supreme Court's Advisory Opinion on the following issues.

a) What is the procedure for administration of oath of office of a Deputy County Governor who assumes office under Article 182 (2) of the Constitution of Kenya in the event of impeachment of a County Governor in view of Article 74 of the Constitution of Kenya?
b) What is the criterion for filling the vacancy that occurs in the office of Deputy County Governor when the originally elected Deputy County Governor assumes office as Governor as a result of impeachment of an elected County Governor?
c) What is the timeline within which the Deputy Governor assuming office of Governor under Article 182 (2) of the Constitution of Kenya should so assume office?.

The matter is yet to be concluded.

17) **High Court Petition No 71 of 2013**: The Institute for Social Accountability (TISA) vs. The Hon Attorney General & Others was filed on 6th February 2013 with CIC being enjoined as an Interested Party. The Petitioners brought the petition before the High Court seeking declarations that the Constituencies Development Fund Act No. 30 of 2013 (CDF Act) violated the Constitution.

The Petitioners' case was that the CDF Act contravened the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the National and County Government and the public finance management and administration. The Petitioner however had to amend its Petition after the President assented to the CDF (Amendment) Act, 2013 on 13th September 2013.

Judgment was delivered on 20th February, 2015 holding:-

a) The Constituencies Development Funds Act, 2013 is unconstitutional and therefore invalid.
b) This order of invalidity is suspended for a period of twelve (12) months from the date of judgment.
c) The National Government may remedy the defect within that period and the Constituencies

Development Fund Act shall stand invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.

d)

18) **High Court Civil Appeal No 280 of 2013**: Bishop Donald Kisaka Mwawasi vs. The Hon Attorney General & 2 others, filed on 14th October 2013 with CIC as the 3rd Respondent. This is an appeal against the Judgment and Decree of the Hon. David Majanja on 28th January 2013 that a person who holds dual citizenship is disqualified under the Constitution to contest elective office The Appellant was dissatisfied with the same and lodged an appeal scheduled for hearing on 22nd May 2014.

    The appeal is part heard.

19) **High Court Petition No 560 of 2013:** Kenya Tea Development Agency Holdings Ltd vs. CIC & the Attorney General, filed on 26th November 2013 with CIC as the 1st Respondent. The Petitioner was challenging the eligibility of state officers and/or public officers holding directorship positions in its board and its shareholding companies. The Petitioner deemed this as a violation of Chapter 6, Article 77 (1) of the Constitution of Kenya on restriction of such officers from participating in any other gainful employment. On 17th February, 2014 counsel for the Petitioner concurred with our finding that CIC was wrongfully enjoined in the petition as it is not the designated commission in Chapter 6 for ensuring compliance and enforcement of the provisions of Chapter 6. The learned Judge made an order expunging CIC from the Petition and excusing it from participating in the proceedings.

    The matter is still proceeding

20) **High Court Petition No 593 of 2014:** Okiya Omtatah & Another vs. Council of Governors & Others, filed on 18th December, 2013 with CIC as the 1st interested party. The Petitioner was seeking the annulment of legal notices numbers 137-182, issued by the Government on 9th August 2013, purportedly transferring Level 2, Level 3, Level 4, and Level 5 national referral health facilities from the national government to county governments.

    The Petition was dismissed on 6th August, 2014. The Court held that the application of the Fourth Schedule to the Constitution as to which health facility fall within which category is the preserve of the National Government. Further, that the issues of transition are best left to the relevant state agencies such as CIC and Transition Authority.

    The Petitioners have appealed.

21) **High Court Petition No 74 of 2014:** International Legal Consultancy Group vs. The Senate and Clerk of the Senate filed on 17th February 2014 with CIC as an Interested party. The Petitioner challenged the Summons to appear before the Senate's standing committee on economic and financial affairs issued to nine Governors and county executive committee members for finance to answer to questions on county financial management. The court ordered that the Petition be transferred to the Kerugoya High Court where the Petition was eventually consolidated to form Consolidated Petition No 3 of 2014.

    Judgment was delivered on 16th April 2014 as follows;

    1) The court has the jurisdiction under Article 159 (1), 160 (1) and 259 of the Constitution to ensure that Parliament complies with the Constitutional requirements in carrying out its functions.

    2) The Senate can summon Governors County Executive Members of Finance and County accounting officers to appear before it and answer to questions on County Government finances in so far as the National revenue allocated to the respective county is concerned, but such power should not be exercised in an arbitrary and capricious manner.

    3) The Senate's power of oversight under Article 96 (3) is limited to National revenue allocated to the County Governments.

    4) The Court declined to issue a Permanent Injunction to restrain the Senate from summoning County Governors, County Executive Members and Accounting officers at the County level.

22) **High Court No 427 of 2014:** Hon. Kanini Kega vs Okoa Kenya Movement, ODM, Wiper Democratic Movement, Ford –Kenya Party The Attorney General, CIC and IEBC filed on 27th August 2014 with CIC as the 6th Respondent. The Petitioner is challenging the proposal to amend the Constitution of Kenya, 2010 by Popular Initiative. The Petitioner had also sought conservatory orders to restrain the 1st - 4th Respondents to solicit or procure signatures and IEBC from receiving any draft Bill and signatures. The Petitioner in its main Petition prays that:-

a) A declaration that the 1st – 4th Respondents have no locus standi under Article 257 to promote amendment of the Constitution of Kenya through popular initiative be issued.

b) A declaration that Article 261 and Section 5(7) of the Sixth Schedule of the Constitution prohibits any amendment of the Constitution of Kenya prior to 27th August, 2015 or at full implementation be issued.

c) Unless and until Parliament declares under Article 261 and Section 5(7) of the Sixth schedule of the Constitution of Kenya, 2010 has been fully implemented Parliament cannot validly amend the Constitution of Kenya under Article 256 and Article 257.

d) A Declaration that the right to seek and promote amendment of the Constitution of Kenya pursuant to Article 257 is exercisable by registered voters by dint of Article 1(2) and 38 of the Constitution of Kenya, 2010 be issued.

e) Formulation of a draft bill is a condition precedent for the promoters of a popular initiative to procure at least one million voters.

f) The Popular Initiative for amendment of the Constitution of Kenya, 2010 launched by the 1st - 5th Respondents on 23rd August, 2014 is null and void ab initio.

g) The 1st - 5th Respondents prior to the formulation and publication of a draft bill under Article 257 (4) of the Constitution.

h) To save on public money, referenda to amend the Constitution of Kenya, 2010 be held on the date of the next General Election.

i) The AG and CIC have contravened Art 156 (6) and Sec 5(6) of the Sixth Schedule respectively in failing to object to the various initiatives to amend the Constitution of Kenya, 2010 prior to 27th August, 2015 or at full implementation.

j) Part V (Sec 49 - 55) of the Elections Act, 2011 is unconstitutional to the extent that it does not provide that referenda to amend the Constitution of Kenya, 2010 shall be conducted by the IEBC on the date of the General Election.

The conservatory orders were denied on 19th September 2014 prompting the Petitioner to file a Notice of Appeal. The matter has not proceeded for full hearing.

23) **High Court No 513 of 2014:** CIC vs The Speaker of the National Assembly and Others, filed on 21st October, 2014 The Commission is challenging the review of the National Assembly Standing Orders to unilaterally introduce a process through which the Cabinet Secretaries are required to routinely appear before the National Assembly on every Tuesday morning to respond to members' questions.

The matter come up for hearing on 27th October, 2014 when the National Assembly informed the court that it had suspended the operation of the Committee on General Oversight to enable the National Assembly hold consultations with the Executive.
The matter is part heard.

24) **High Court No 398 of 2014:** Legal Advice Centre vs The Hon. A.G & Others, filed on 6th August,2014. CIC was the 3rd Respondent. The Petitioner The Public Private Partnerships Act, 2013 establishes a Petition Committee, which is empowered to consider all Petitions and complaints submitted by

a private party during the process of tendering and entering into a project agreement under the Act. The Petitioner urges that the members appointed, except for a Rwandese, come from the Kikuyu and Kalenjin communities.

The 5th appointee has pending disciplinary proceedings before the Advocates Disciplinary Tribunal.

The Petitioner seeks, among other things, to quash the decision by the Cabinet Secretary Treasury contained in the attached gazette notice.

Judgment was delivered on 20th March, 2015. The Learned Judge while dismissing the Petition noted that the Petitioner had little evidence to back its allegations and its pleadings were speculative in nature.

25) **High Court No 402 of 2014:** National Land Commission vs The Cabinet Secretary, Lands and The Attorney General, filed on 12th August, 2014.CIC is the 3rd Respondent. The Petitioner is seeking conservatory orders restraining the CS, Ministry of Lands from implementing Land Registration (Form) Regulations, 2014 published vide Legal Notice 104 of 2014 on 1st August 2014 pending the delivery of the Supreme Court Advisory Opinion reference No 2 of 2014. The Attorney General raised a Preliminary Objection on the jurisdiction of the High Court to determine the application and the main Petition when the same issue was being determined by the Supreme Court.

In its Ruling on the 28th of August, 2014 the court declined to grant any orders on the ground that the same issues are alive before the Supreme Court. The matter was kept in abeyance pending the determination by the Supreme Court of the question of the Supreme Court's jurisdiction to render an advisory opinion. The matter is scheduled for mention 30 days from the date of the ruling to establish the position of the matter before the Supreme Court.

26) **High Court Petition No 368 of 2015:** Japheth Muriira Muroko vs. The Attorney General & Others. CIC is the 2nd Respondent. The Petitioner challenges the action by Parliament to extend the timeline to enact certain laws and for that reason asks that the current Parliament be dissolved in accordance to Article 261 (7) and a new Parliament be allowed to enact the required legislation.

The matter is part heard

27) **High Court Petition No 403 of 2015:** CIC vs. The Speaker of the National Assembly, filed on the 23rd of September, 2015. The Commission is requesting the court to declare the provision of the National Assembly standing orders Order No. 66 is void to the extent that it is inconsistent with the right to a fair trial enshrined in Article 50 (1) as read with Article 25 of the Constitution.

The matter is yet to be concluded.

28) **High Court Petition No 158 of 2015:** Hon. Michael Manthi Kisoi vs Commission of Inquiry into the Petition to Suspend the Makueni County Government & 9 others. CIC being the 9th Respondent. The Petitioner is challenging The Petitioner alleges that:-

1) The Makueni County Government neither undertook any civic education, local referendum, publication nor set up structures for public participation on the contents of the subject Petition before the residents of Makueni County could sign it.
2) The 1st Respondent Commission was constituted without the approval of the National and County Government Coordinating Summit.
3) The 1st Respondent has invited the submission of memoranda and statements on the subject Petition without publishing the contents thereof.
4) The 1st Respondents intends to conduct its hearings in Nairobi County instead of Makueni County.

He therefore prays that the Petition, decision to constitute the commission of inquiry and its proceedings are declared void. The Petitioner further prays for the quashing of the Gazette Notice constituting the 1st Respondent Commission and a Permanent Injunction on its proceedings.

The Petition was struck out on 8th May, 2015. The Petitioner is yet to file his Record of Appeal.

29) **High Court Petition No 182 of 2015:** Centre for Rights Education and Awareness vs The Attorney General & CIC. The Petitioner alleges that the Respondents have failed, refused and or neglected to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81 (b) as read with Article 100 of the CoK, 2010

The Respondents have violated their obligation under Article 261 (4) and gone against the Supreme Court Advisory Opinion Reference No 2 of 2012 (to enact legislation to meet the constitutional principle in the above mentioned Articles by 27th August, 2015)

Judgment was delivered on 26th June, 2015 directing the Respondents to within forty (40) days prepare the relevant bills for tabling in Parliament for purposes of implementing the above mentioned clauses.

30) **High Court Petition No 628 of 2014:** Coalition for Reform and Democracy vs Republic of Kenya. The Commission was an Interested Party. The Petitioner herein challenged the constitutionality of the Security Laws (Amendment) Act, 2014 and sought the courts determination of four fundamental questions related to the process of the enactment of the above mentioned law as well as its contents.

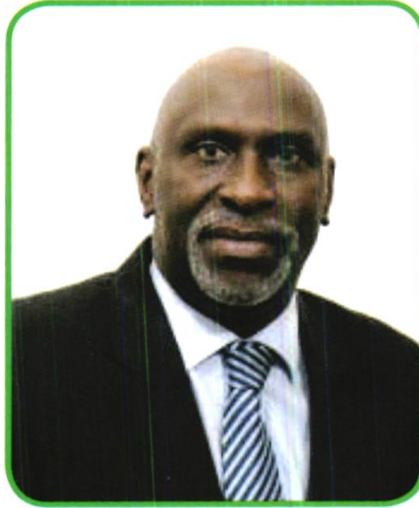
Judgment was delivered on 23rd February, 2015 ordering Sections 12, 16, 34, 20, 26,48 64 and 95 of the Security Laws (Amendment) Act unconstitutional.

31) **High Court Petition No 381 of 2014**: The Council of County Governors vs. The Senate, The National Assembly, CIC and Others. The Petitioner sought a declaration that the provisions of Section 91 (A) of the County Government (Amendment) Act, 2014 that established County Development Boards which would be constituted in the manner stated in the said Act and undertake functions outlined in Section 91A (2) of the Act were unconstitutional for violating Articles 6(2); 95, 96, 174(1), 175, 179(1), 179(4), 183(1), 185(3) and 189(1) of the Constitution. The basis of the challenge is that through the County Development Boards, Senators and members of the National and County Assemblies would be undertaking executive functions at the County level.

Judgment was delivered on 10th July, 2015 declaring The County Government (Amendment) Act, 2014 unconstitutional, null and void.

Annex 4: Structure of the Commission

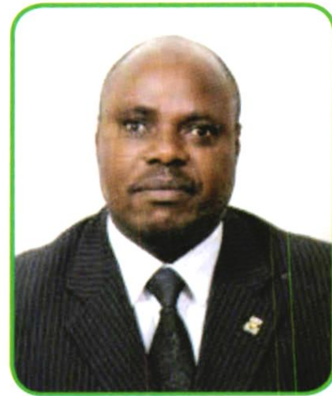
Chairperson and Commissioners of the Commission



Mr. Charles Nyachae
Chairperson of the Commission

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

Coordinates the implementation of Chapters 9 and 14 of the Constitution that deal with the executive and security respectively.



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

Coordinates the implementation of Chapter 10 on the judiciary and Chapter 15 on Constitutional Commissions and Independent Offices.

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

Coordinates the implementation of Chapter 11 of the Constitution and Section 15(2)(d) of the Sixth Schedule to the Constitution, which deal devolved government

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

Coordinates the implementation of Chapter 12 of the Constitution, which deals with public finance management

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

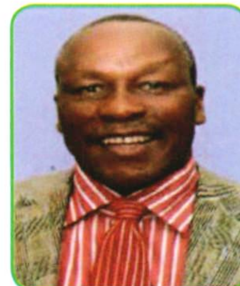
Coordinates the implementation of Chapters 3 and 4 of the Constitution, on citizenship and the Bill of Rights, respectively.

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

Coordinates the implementation of Chapter 5 of the Constitution on land and environment

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

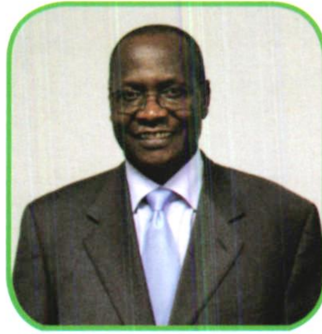
Coordinates the implementation of Chapters 7 and 8 of the Constitution on representation of the people and the legislature respectively.



Mr. Philemon Mwaisaka, EBS, SS
Convener of the Representation of the People & the Legislature Team.

Coordinates the implementation of Chapter 6 on leadership and integrity and Chapter 13 of the Constitution on public service

Senior Management Team



Joseph N. Kosure
Secretary/CEO

Esther D. Kodhek
Director of Programmes

Rose M. Macharia
Director of Management Services

Mugita Gesongo
Head of Monitoring and Evaluation

Margaret Akutekha
Head, Internal Audit

Fredrick O. Oromo
Head of Supply Chain Management

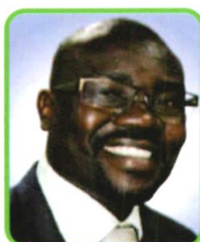
Howard Olume
Head of Human Resource

Bevin A. Bhoke
Head of Communications

James Oundo
Head of Finance

Christine Ojode
Head of Accounts

Elizabeth K. Obiero
Principal Programmes Officer, Organizational Development & Institutional Strengthening



James O. Wagala
Principal Programmes Officer, Organizational Development & Institutional Strengthening

Sophia K. Sitati
Senior Programmes Officer, Office of the Chairperson

Christine N. Kuria
Senior Programmes Officer-Citizenship and Bill of Rights Thematic Area

Caroline W. Gaita
Senior Programmes Officer, Judiciary and Constitutional Commissions Thematic Area

Edith C. Cheramboss
Senior Programmes Officer, Public Service and Leadership Thematic Area

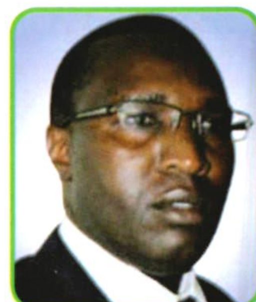
Mary G. Orwa
Senior Programmes Officer, Representation of the People and The Legislature Thematic Area

Ruth M. Muthui
Senior Programmes Officer, Judiciary and Constitutional Commissions Thematic Area

Valerie N. Okumu
Senior Programmes Officer, Devolved Government Thematic Area

Lucy M. Gaithi
Senior Programmes Officer, M&E

Kephas O. Okach
Senior Programmes Offier, M&E



Timothy K. Kariuki
Senior Programmes Officer, M&E

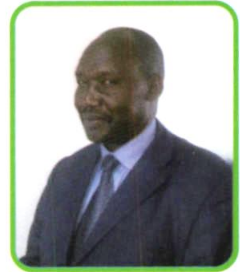
Victor Odhiambo Akuom
Senior Programmes Officer,
Public Finance Thematic Area

Jeremiah Nyakundi
Senior Programmes Officer

Natasha N. Kimani
Senior Programmes Officer, Executive
and Security Thamatic Area

Fatuma Mohamed
Senior Programmes Officer,
Land and Environment
Thematic Area

Anwar Ahmed
Programmes Officer,
Citizenship and Bill of Rights
Thematic Area



Samuel Abuta Nyakundi
HOR

Other staff

	Name	Position
1)	Monica Wambua	Human Resource Officer
2)	Lauraine Onyango	ICT officer
3)	Janet Maiyo	Account Officer
4)	Alice Kaguongo	Assistant Internal Auditor
5)	Clement Kagiri	Assistant Internal Auditor
6)	Patrick Musonye	Procurement Officer
7)	Faith Kilonzo	Administration Officer
8)	Vashti Nadayat	Hansard Officer
9)	Pauline Kamurutu	Accountant
10)	Hassan A Hussein	Accountant
11)	Mercy Karanja	Executive Assistant
12)	Nina Kabayo	Executive Assistant
13)	Catherine Kahwai	Executive Assistant
14)	Rose Boit	Executive Assistants
15)	Pamela Mugei	Executive Assistant
16)	Rebecca Akoth	Executive Assistant
17)	Edward Omer	Transport Officer
18)	Riplan Lenagwanai	Senior Driver
19)	Isaac Mugambi	Senior Driver
20)	Benson Wetinid	Senior Driver
21)	Mustaph Kainga	Senior Driver
22)	Fredrick Kyalo	Senior Driver
23)	Peter Kariuki	Senior Driver
24)	Joseph Kariuki	Senior Driver
25)	Bryson Mwakio	Senior Driver
26)	Daniel Ngetich	Senior Driver
27)	Godwin Radiro	Senior Driver
28)	Tabitha Mburu	Receptionist
29)	Kevin Letuya	Accounts Assistant
30)	Edward Omondi	Accounts Assistant
31)	James Mburu	Legal Clerk
32)	Gordon Odhiambo	Clerical Officer
33)	Prisca Aluso	Clerical Officer
34)	Dorothy Mogiri	Stores Clerk
35)	Mary Munyao	Office Assistant
36)	Joyce Kadenge	Office Assistant
37)	Pamela Aloyo	Office Assistant
38)	Betty Awour	Office Assistant
39)	Chepkwony Myra	Intern
40)	Linda Ayimba	Intern
41)	Beatrice Mutanda	Intern
42)	Nelly Gitari	Intern
43)	Catherine Ndile	Intern
44)	Samuel Njoroge	Intern

"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."

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Commission for the Implementation of the Constitution

cickenya