

BILLS UPDATE

Issue No 001 A Publication of the Kenya Human Rights Commission September 2011

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1.0 INTRODUCTION

The promulgation of the Constitution of Kenya on August 27th 2010 is said to be the most important achievement in the country's governance history since independence. It also brought to an end the country's long journey in search of a Constitution. This truly reflected the zeal, will and desire of the Kenyan populace to have a new constitution. The people of Kenya now await the full implementation of the constitution that they voted for. They have banked on the Constitution hoping that it will drive the country and their lives into better heights. The implementation of the Constitution will also ensure political, social and economic prosperity and stability in Kenya.

The fifth schedule in section five of the Constitution on, the commission for the implementation of the Constitution is mandated to monitor, coordinate, facilitate and oversee the implementation of the Constitution. This is to be enhanced by the co-ordination of the commission with other stakeholders and various state organs.

Thirteen months after the promulgation of the Constitution the CIC and other implementing agencies have successfully undertaken several activities geared towards the implementation of the Constitution. The Constitution can only be fully implemented if the implementers in the various arms of government set system right in their sectors and prepare their workforce to adopt a culture of Constitutionalism according to the CIC Quarterly Report (Jan-March) 2011.

The process however has encountered several challenges and barriers, which are likely to continue to challenge its work. These include but not limited to, failure by political leaders and executive to demonstrate stewardship to enhance the smooth implementation, political interference that is driven by personal desires and whims at the expense of national interest and the latest act by the cabinet and some members of parliament to create grey areas regarding the interpretation and implementation of the constitution. All this threaten to derail the process of implementation of the Constitution.

Despite the challenges, a number of milestones have been achieved. Several Bills have been enacted into law, especially the Bills that the fifth schedule had given a one year ultimatum. But the problem emanates from the fact that the Bills were passed in a hurry in attempts to beat the 27th August deadline. This paper explains the Bills passed, those that have been published by the Kenya gazette, Bills coming up in the next six months (those that had 18 months ultimatum, conflict of interest between the Constitution and the Articles, proposals for Constitution

implementation and the participation of Kenyans in the implementation process.

Twenty one Bills are undergoing internal review and stakeholders' consultation. Two Bills are on hold, three Bills are awaiting publication after approval by the cabinet as per CIC website.

2.0 BILLS

The fifth schedule of the constitution provides for specific time frames for legislation of various laws. The ones that had a one year ultimatum have already been enacted into law, the ones that had a eighteen months ultimatum are supposed to be legislated by 27th February 2013, while there are others that have a time frame of two, three, four and five years respectively.

2.1.1 BILLS ENACTED INTO LAW

The following Bills have been enacted into law:-

1. **COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION ACT 2011:** This legislation was established by section five of the sixth schedule. CIC was established by the Constitution to facilitate, coordinate, monitor and oversee the implementation of the Constitution.
2. **POLITICAL PARTIES ACT 2011:** This is the legislation framework for regulation of political Parties in accordance with Article 91 which gives the basic requirements of political parties and article 92 which provides for registration and funding of political parties and for other connected purposes.
3. **THE NATIONAL POLICE SERVICE ACT 2011:** The legislation is required to provide for operation of the police service in accordance with article 245 (8). The legislation is supposed to provide for the functions, organization and discipline of the National Police Service to provide for the powers and responsibilities of police officers, to ensure efficiency and transparent management of service and connected matters.
4. **KENYA NATIONAL HUMAN RIGHTS COMMISSION ACT 2011:** The legislation is meant to enhance promotion and protection of human rights as provided by article 59 of the Constitution of Kenya 2010. The commission is meant to promote respect for human rights and develop a culture of human rights in the country, to promote the protection and observe human rights in public and all private institutions, to promote gender equality and equity and coordinate and facilitate main streaming in National development.
5. **VETTING OF JUDGES AND MAGISTRATES ACT 2011:** The objectives of this legislation are to facilitate the mechanism for vetting the sitting judicial officers. Section 23 of the Sixth Schedule provides for the establishment of powers and functions of the judges and magistrates vetting board.
6. **JUDICIAL SERVICES ACT 2011:** The objective of this legislation is to put into operations Article 171 that provides for the establishment of the Judicial Service Commission, Article 172 that provides the functions of the JSC and Article 173 that provides for the establishment of judicial funds.
7. **NATIONAL GOVERNMENT GUARANTEES ACT 2011:** The legislation seeks to provide for terms and conditions under which the national Government may guarantee loans in accordance with Article 213 of the Constitution of Kenya 2010.

8. **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT 2011:** The objective of this legislation is to operationalize Article 88 that requires an establishment of the independent electoral and Boundaries Commission and Article 89 that calls for delimitation of electoral units.
9. **SUPREME COURT ACT 2011:** The legislation is to operationalize Article 163(9)
10. **COMMISSION REVENUE ALLOCATION ACT:** The Objective is to provide for Governance and operations of the commission on revenue allocation established in accordance with Article 215 of the Constitution of Kenya 2010.
11. **KENYA CITIZENS AND IMMIGRATION ACT 2011:** It provides the legal framework for regulation of immigration it makes provisions for acquisition loss and regaining of citizenship duties and rights of citizens ,issuance of travel documentary residence and exit out of Kenya and other connected purposes .
12. **COMMISSION ON ADMINISTRATIVE JUSTICE ACT:** This is to establish commission on administration of Justice Under Article 59(4) if the Constitution of Kenya 2010.
13. **POWER OF MERCY ACT 2011:** The objective Of the Legislation is to provide for tenure, procedure and criteria of the advisory committee on power of mercy in accordance with Article 133 of the Constitution of Kenya 2010.This will provide for the appointment tenure of office of the members and the powers and functions of the advisory committee on the power of Mercy and many other related Purposes.
14. **SALARIES AND REMUNERATION COMMISSION ACT 2011:** The objective of this Legislation is to make Provisions to the functions and powers of the salaries and remuneration commission ,the qualifications and the procedures for the appointment of the Chairperson & members of the commission .It will also determine salaries of the president, cabinet, MPs, governors ,senators, Judges and magistrates and cater for any other related purposes.
15. **ENVIRONMENT AND LAND COURT ACT 2011:** This Act ensures the establishment of a court of the level of the high court to hear and determine disputes relating to the environment and the use and occupation of and title to, land and to make provision for matters relating to its justification functions and powers and for connected purposes in accordance with article 162 (2) (b) of the Constitution of Kenya 2010
16. **CONTINGENCIES FUND AND COUNTY EMERGENCIES ACT 2011:** This legislation is supposed to provide for the effective operation of the contingencies fund and county emergency funds established by county government.
17. **NATIONAL GENDER AND EQUALITY COMMISSION ACT 2011** .The objective of this legislation is to provide for the membership powers and functions of the commission.
18. **URBAN AREAS AND CITIES ACT 2011** .This legislation is supposed to provide for governance and management of urban cities in accordance with article 184 of the constitution of Kenya 2010. The act is meant to provide for the classification, governance and management of urban areas and

cities, to provide for the principle of governance and participation of residents and the other related intentions.

19. **KENYA CITIZENS AND FOREIGN NATIONAL MANAGEMENT ACT 2011:**

The objective of this legislation is to establish citizens and foreign national management. This will provide for the creation and maintenance of national population register and administration of law relating to births and deaths, identification and registration of citizens, administration of the laws relating to marriage and other connected intentions.

20. **INDEPENDENT OFFICES ACT 2011:**

The objective of this registration is to provide a frame work for appointment of independent offices under chapter 15 of the Constitution of Kenya 2010

21. **EMPLOYMENT AND LABOUR RELATIONS COURT ACT 2011:**

This legislation's objective is to establish a court at the level of the high court in accordance with article 162(2) (b) of the Constitution of Kenya 2010. This legislation will enhance the employment and labour relations and other connected purposes.

22. **ETHICS AND ANTI-CORRUPTION COMMISSION ACT 2011:**

The objective of this Act is to establish ethics and anti-corruption commission under article 79 of the constitution of Kenya 2010. This will provide for the qualifications for the appointment of the chairperson and members of the commission.

23. **ELECTIONS ACT 2011:**

The legislation is supposed to revise and

consolidate election laws in Kenya. It is supposed to provide for the conduct and procedures of elections to the office of the president, the national assembly, the senate, governor and county assemblies to provide for the conduct of referenda and prevent election malpractice

2.2.2 ACTS PUBLISHED IN KENYA GAZETTE

Of the 23 legislations that were enacted in the first year of implementation of the Constitution the Government Printers has been able to publish the following Acts as confirmed from their offices:

1. The Supreme Court Act, 2011
2. Vetting of Judges and Magistrates Act, 2011
3. The Judicial Service Act 2011
4. The Independent Offices Act, 2011
5. The Independent Electoral and Boundaries Commission Act, 2011

2.2.3 OFFICES ESTABLISHED

The following offices / institutions were established to facilitate smooth operations in regard to legislation enacted in the first year of implementation of the Constitution.

1. Commission for Implementation of the Constitution. The objective of this office is to monitor, facilitate, coordinate and over see the implementation of the constitution in accordance with 6th schedule.
2. Judicial Services Commission. This institution was established to promote and facilitate the independence and accountability of the judicially and efficient and transparent administration of justice.
3. Office of the Auditor General. The objective of this office is to audit and report in respect to each financial year

according to Article 29 of the constitution of Kenya 2010.

4. Independent Electoral and Boundaries commission a selection panel was established. The commission will administer elections, de limit boundaries and over see regulations of political parties in accordance with Article 88 and Article 89 of the constitution of Kenya 2010.
5. Office of Controller of Budget. This office is meant to oversee the implementation of the budget of the national and county governments by authorizing withdrawals from public funds under article 204, 206 and 207 of the constitution of Kenya.
6. Commission on Revenue Allocation. This is supposed to advice on allocation of revenue to the devolved systems in accordance with Article 215 and Article 216 of the constitution of Kenya 2010
7. The Chief Justice. This office will provide the judiciary with its head and also provide the Supreme Court with president.
8. Vetting of judges and magistrates board. This office will provide for vetting of sitting judges and magistrates in accordance with section 23 of the sixth schedule.
9. Deputy CJ. The objective of this office is to provide the chief justice with a deputy.
10. The Supreme Court. The objective of this institution is to exercise original and final jurisdiction respecting presidential elections and final appellate court on other matters in accordance with art 165 and Supreme Court Act.
11. Judges of the high court- Art 165 of constitution of Kenya 2010

2.2.4 BILLS AWAITING APPROVAL BY CABINET

This is the 5th stage that the Bill is supposed to pass through. The AG prepares a Bill and then it is released to the Cabinet for approval as per the CIC website only one Bill is awaiting approval

by Cabinet: **THE RATIFICATION OF TREATIES BILL 2011**

2.2.5 BILLS UNDERGOING INTERNAL REVIEW (STAKEHOLDERS CONSULTATIONS)

This is the second Stage that a bill passes through during the law making process. Public participation and transparency is encouraged. Debates and contribution of the public and various stakeholders is welcome. The public participate by expressing their views through the print media, attending and participating in workshops developed by various implementers and developing the relevance policies that will enhance implementation. These are:

1. **NATIONAL SECURITY COUNCIL BILL 2011**
2. **PUBLIC FINANCE MANAGEMENT BILL 2011**
3. **THE CONTROLLER OF BUDGET BILL 2011**
4. **THE MATRIMONIAL BILL 2011**
5. **THE FAMILY PROTECTION BILL 2011**
6. **NATIONAL INTELLIGENCE SERVICE BILL 2011**
7. **IDENTIFICATION AND REGISTRATION OF KENYA CITIZENS BILL 2011**
8. **BIRTHS AND DEATHS REGISTRATION BILL 2011**
9. **THE REFUGEE BILL 2011**
10. **THE COUNTY GOVERNMENTS FINANCIAL MANAGEMENT BILL 2011**
11. **THE INTER GOVERNMENTAL RELATIONS BILL 2011**
12. **THE INTER GOVERNMENTAL FISCAL RELATIONS BILL 2011**

13. NATIONAL CORONERS SERVICE BILL 2010 AND 2011

14. THE TRANSITION TO DEVOLVED GOVERNMENT BILL 2011

15. THE DEVOLVED GOVERNMENT BILL 2011

16. DATA PROTECTION BILL 2011

17. FREEDOM OF INFORMATION BILL 2008

18. THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2011

19. THE PRIVATE SECURITY INDUSTRIAL REGULATION BILL

20. THE NATIONAL LAND COMMISSION BILL 2011

21. THE MARRIAGE BILL 2011

22. THE PRIVATE SECURITY INDUSTRIAL REGULATION BILL 2011

23. NATIONAL CORONERS SERVICE BILL 2011

24. TEACHERS SERVICE COMMISSION BILL

2.2.6 BILLS ALREADY APPROVED BY CABINET AWAITING PUBLICATION.

THE INDEPENDENT POLICING OVERSIGHT AUTHORITY BILL 2010

NATIONAL POLICE SERVICES COMMISSION BILL 2010

2.2.7 BILLS COMING UP

Bills coming up in the next six months are supposed to have been enacted by February 2013. They have eighteen months ultimatum after promulgation of the Constitution.

They are;

1. Legislation on Land (Article 68).
2. Removal of a County Governor as provided by Article 181.

3. Vacation of Office of Member of County Assembly as provided for by Article 194.

4. Legislation to put into effect chapter eleven Article 200 and Sixth Schedule, Section 5.

5. Revenue Funds for County Government as provided for by Article 207.

BILLS COMING UP IN THE NEXT SIX MONTHS

LEGISLATION ON LAND (ARTICLE 68) OF THE CONSTITUTION OF KENYA 2010: It will revise, consolidate and rationalize existing land laws. It will also enact legislation on land holding, recognition of matrimonial property and protect the deceased in matters related to land

REMOVAL OF A COUNTY GOVERNOR AS PROVIDED BY ARTICLE 181 OF THE CONSTITUTION OF KEYA 2010: It provides for the grounds under which one ceases to hold office as a county governor.

VACATION OF OFFICE OF MEMBER OF A COUNTY ASSEMBLY AS PROVIDED FOR BY ARTICLE 194: It provides for the grounds under which one ceases to hold an office in the county assembly.

LEGISLATION TO EFFECT CHAPTER 11 ARTICLE 200 AND SIXTH SCHEDULE, SECTION 15: It will ensure that the parliament provides legislation to enact chapter eleven of the constitution

REVENUE FUNDS FOR COUNTY GOVERNMENT AS PROVIDED FOR BY ARTICLE 207: It provides for the establishment of a county revenue fund. How money can be withdrawn from the fund and who can authorize the withdrawals.

2.2.8 STAKEHOLDERS WORKING ON THEM

CIC confirmed that there were no stakeholders working on the Bills since the Bills are still with the executive arm.

3.0 CONFLICT OF INTEREST BETWEEN THE CONSTITUTION & ACTS

Article 2 of the Constitution of Kenya 2010 gives the Constitution supremacy. Article 2(4) states that any law including custom law that is inconsistency with the Constitution is void to the extent of the inconsistency. It is therefore of great importance to ensure that the various Acts meant to provide for the various Articles in the Constitution are in line in order to avoid conflict of interest failure to which the interpretation and implementation of the constitution will face a lot of challenges. There is are Acts that are contradicting with the provisions of the constitution so far:

1. Article 104 of the Constitution of Kenya 2010 gives Kenyans a right to recall a member of parliament under Article 97 which gives a right to recall a member of national assembly and Article 98 which gives Kenyans the right to recalls a senator. Article 104(2) gives Parliament powers to enact legislation to provide grounds on which a member may be recalled and the procedure to be followed

The Act provides that you can recall your member of parliament only once and after two years. The Act also requires a preparation of a list of signatures from at least 10% of votes cast for the Member of Parliament being recalled in that constituency or county in the last preceding election. This list has to contain names, address, voter card numbers, national identity card or passport numbers and signatures of the registered voters who support the recall. The commission is supposed to verify the above and notify the speaker of the relevant house of recall. The commission is also supposed to conduct a recall election within the constituency or county framed in a *yes* and *no* manner which will be determined by a simple majority.

If the recall election results in the removal of the Member of Parliament, the IEBC shall conduct a by election in the affected constituency or county. A recall election is

also valid only if at least 50% of the registered voters participate. This Act is not in the spirit of the Constitution since it makes the right to recall impossible because of the many requirements it demands. Article 104 was meant to enhance accountability for Members of parliament which the Act has made almost impossible since personal interests, whims and desires of the members of politicians prevailed making it almost impossible to recall a member of parliament.

2. The Political Parties Act in section 26(1) provisions are that political parties funds will be for the purposes of promoting active participation by individual citizens in political life, promoting the representation in parliament and in county assemblies of women, persons with disabilities, youth, ethnic and other marginalized communities. Some of the funds as provided in section 24(1) (a) will be from the government meaning they are tax payer's money.

But the funds are not used to fund independent candidates who are tax payers as well, whose intention is to promote the representation of women, the disabled, youth, ethnic minorities and marginalized communities. Article 27 of the Constitution provides for equality and freedom from discrimination. Independent candidates are discriminated against since they are tax payers as well but they are not considered for funding by the government

4.0 PROPOSAL ON CONSTITUTIONAL AMENDMENTS

Chapter sixteen of the Constitution of Kenya 2010 provides for the amendments of Kenya Constitution. Article 250 provides for amending the constitution by parliamentary initiative while article 257 provides for amendment by popular initiative. So far there are two proposals for the amendment of the Constitution. The first amendment is on general principles for the electoral system and to be specific Article 81(b) which states that not more than two thirds of the members of elective public bodies shall be of the same gender. Those who are

for amending it argue that the provision of this article are technically impossible to achieve and not practical. Setting aside 80 parliamentary seats for women would also curtail the rights of men who have the universal suffrage rights.

The other proposed amendment of the Constitution of Kenya is the proposal by the cabinet on 15th September 2011 to change the elections date from the second Tuesday of August after every five years to the third Monday of December. The argument behind the amendment being that the scheduled elections on August would alter with the country's budget cycle.

This act has been viewed by many as a continuation of impunity. This matter is resting with the Supreme Court and it is expected to make a ruling over the issue. CIC, the major implementer of the Constitution has greatly criticized the decision and regarded the trend as worrying in relation to the implementation of the Constitution. It has claimed that such unnecessary amendments at this stage would undermine the implementation of the Constitution and fulfilling its intentions.

The latest amendments are by CIC. According to the Sunday Nation 25th September 2011 CIC wants the elections law amended to give members of a county assembly the powers to kick non-performing governors out. CIC argues that amending the elections Act to allow the county assembly to remove a governor will satisfy the provisions of the Constitution that gives the electorate the right to remove elected representatives. The claim is that the amendments will give effect on article 181(2) of the Constitution of Kenya 2010. The commission is for that the amendment to the elections laws should provide that a member of the county assembly can introduce a motion calling for the impeachment of the governor as long as at least one third of the members support it. CIC also proposes amendments that would give Kenya Anti-corruption and Ethics commission (KACC) powers to vet candidates seeking elective posts. CIC

invoked the provisions of the constitution of Kenya 2010 requiring the Anti-graft agency to ensure those seeking elective and public offices comply with chapter six of the Constitution.

5.0 PUBLIC PARTICIPATION IN THE IMPLEMENTATION

The CIC has a role to ensure that the public participate in the implementation process. The public participate by expressing their views through the print and electronic media, attending and participating in workshops developed by various implementers and developing the relevant policies that will enhance implementation. Debates from the public are also invited.

So far, the participation of the public in the implementation process is not encouraging according to CIC. Majority of Kenyans are not aware of the legislations that have been signed into law. CIC confirmed that majority of Kenyans are also not aware of the Bills that are undergoing internal review and stakeholders consultations so that they can participate at this crucial stage.

The print and electronic media that is meant to be a channel of participation for Kenyans is not easily accessible to Kenyans especially in the rural areas where access to electronic media is a challenge. This is specifically at the CIC website where public participation is supposed to be done through comments beside every Bill.

6.0 CALENDAR OF THE PARLIAMENT

The Parliament is on break and will resume back on Tuesday 11th of October 2011. The Parliament confirmed that so far they are not at a point of telling what Bills will be before the House, since there is a timetable that is usually released a week before the House resumes back. So the calendar of the parliament can only be accessed from 5th of October a week before the business of parliament gets back to usual.

7.0 CONCLUSION

The approval of the Constitution by Kenyans in August 2010 ushered a new era in the country's governance process. The provisions of the Constitution are so broad and Kenyans hope that it will drive the country and their lives into better heights.

Socially and economically, the Constitution is expected to create a just and cohesive society with social equity to improve the prosperity of all Kenyans through economic development programs covering all regions of Kenya while politically it is expected to pave way and open doors for governance structures that will realize a democratic system in the country that is founded on rule of law and protects the rights and freedoms of every individual in the Kenyan society.

All the above are vital to ensure that we are on our way towards realizing vision 2030 and future prosperity of Kenya according to Kenya's Vision 2030.

The greatest challenge towards the realization of the above is in implementation of the Constitution. If implementation is not realized, then the good Constitution that Kenyans voted for will remain a mere booklet that is invaluable to them. Kenyans therefore need to be very zealous and need to have a keen watch over the implementation process, failure to which the Constitution faces a threat of manipulation and hijack by self interest, personal whims and desires of our politicians at the expense of national interest.

This will result into the Constitution losing its spirit and intentions. Commitments that will lay the foundation for legal, institutional and policy framework to anchor the long term reforms stipulated by the Constitution of Kenya 2010 should be at the forefront to ensure that the process is not sabotaged or hijacked. Kenyans have an opportunity to reshape their destiny and this will happen when the process of implementation is fair and for the citizens

who should step in and fully participate in the implementation process.

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END

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