

# Beating the DEADLINES of IMPLEMENTATION

## The Counties Headache

A Civil Society Status Report  
No.1 25th July 2011



**USAID**  
FROM THE AMERICAN PEOPLE



Pact



**PACTKENYA**

Working with others for positive change



The Network for Social Accountability



# Beating the DEADLINES of IMPLEMENTATION

The Counties Headache

**A Civil Society Status Report  
No.1 25th July 2011**

**© 2011 The Institute for Social Accountability.**

All rights reserved. No part of this report may be reproduced or utilized in any form or by any means without permission from the publisher.

Design & Layout : Kimamo Kabii | Endless Inspiration

## Executive Summary

**T**his status report is prepared as collaboration between Civil Society Organisations (CSO's). The purpose of this publication is to enhance public understanding of the county reform process, improved monitoring of ongoing reforms by the public and to enhance collaboration between the Commission for the Implementation of the Constitution (CIC), CSO's and members of the public. The report seeks to inform the ongoing reform process, with a view to safeguarding the transition to Counties. TISA has prepared this publication on behalf of the CSO partnership.

This is the first issue of the countdown to counties status implementation report and we seek to enable the reader understand:

- The Concept of Devolution
- Present Status of Decentralized Governance in Kenya
- The Type of devolution provided in the Constitution of Kenya 2010
- Institutions of County government
- Functions of County Government
- The Milestones in the County Transition Process
- Status of Reforms to date.

### **PARTICIPATING CIVIL SOCIETY PARTNERS**

#### **The Institute for Social Accountability (TISA)**

The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA works through practice, learning, capacity building and direct advocacy actions. TISA has been operational since March 2008, and is a locally registered trust. We were previously known as the CDF Accountability Project. For more information visit: <http://www.tisa.or.ke/countdown-to-counties/>

### **Centre for Enhancing Democracy and Good governance (CEDGG)**

Centre for Enhancing Democracy and Good Governance (CEDGG) is a grassroots civil society organization founded in 1995 and works to empower vulnerable people groups and minority ethnic communities on their governance and development rights through training, advocacy and networking. The head office of the organization is in Nakuru Town. For more information visit: [www.cedgg.org](http://www.cedgg.org)

### **Centre for Human Rights and Civic Education (CHRCE)**

Centre for Human Rights and Civic Education (CHRCE) is a non-political, non partisan and non-profit making membership organization found in 1996 and registered as an NGO in Kenya under the 1990 NGO Coordination Act since 2005. CHRCE is dedicated to improving enjoyment of Human Rights and rooting for Democratic Governance among the people Eastern Region of Kenya. For more information visit: <http://chrcekenya.org>

### **The Kenyan Section of the International Commission of Jurists (ICJ Kenya)**

Established in 1959, The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-partisan, not for profit making, membership organisation registered in Kenya. Membership is drawn from the Bar and the Bench. ICJ-K's mission is to promote the adoption of systems that foster democratic governance, the rule of law and respect of all human rights by organizing activities and programmes that inform, agitate and advocate in an innovative manner for the recognition and protection of human dignity at all times with partner organizations worldwide. For more information visit: [www.icj-kenya.org](http://www.icj-kenya.org)

### **Transparency International-Kenya**

Transparency International-Kenya is a Non Governmental Organization dedicated

to increasing government accountability and curbing both international and national corruption. Its mission is to support citizens and governance institutions, effect transparency and accountability in public and business affairs through legal and policy frameworks, skills, knowledge and information. For more information visit: [www.tikenya.org](http://www.tikenya.org)

### **Jukwaa la Katiba**

Jukwaa La Katiba is an effort of Kenya's Civil Society under the leadership of the National Civil Society Congress (NCSC). It is the people's platform for implementation of the Constitution. Jukwaa succeeded the Katiba Sasa! Campaign, which played a decisive role in the passage of the new constitution during the 4<sup>th</sup> August 2010 Referendum. Jukwaa has national and county structures. The National Steering Committee is the national organ and is responsible for advocacy and monitoring of implementation. The County Steering Committees located in the 47 Counties are responsible for civic education and mobilisation of Kenyans in defence of the Constitution. For more visit: [www.crecokenya.org](http://www.crecokenya.org)

This publication is supported by PACT Kenya under the realisation of effective citizen engagement in decentralised governance in Kenya project.

## 1.0 About the Implementation Process

### 1.1 The Commission on Implementation of the Constitution

The **Commission for the Implementation of the Constitution (CIC)** is the main body established by the Constitution - Section 5 of the 6th Schedule of the Constitution and Commission for the Implementation of the Constitution Act 2010. The CIC's chief mandate is to ensure that the letter and spirit of the constitution is respected during the implementation phase of the constitution.

The CIC is required to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the constitution; In this it will co-ordinate with the Attorney General (AG) and the Kenya Law Reform Commission (KLRC) in preparing for tabling all legislation required to implement the constitution; The CIC will report regularly to the Constitutional Implementation Oversight Committee (CIOOC) on the progress or impediments to the process; To date the CIC has published two quarterly reports that give an account of the experiences of CIC in the realization of its facilitative, monitoring and constitution-implementation oversight role – the reports are available for download at the CIC Website: [www.cickenya.org](http://www.cickenya.org). The CIC has also published the schedule of legislations that are needed by August 27, 2011; these are available for download at the CIC website. Further, CIC is working with each constitutional commission to ensure that the letter and spirit of the Constitution is respected. In so doing CIC emerges as the most key actor outside parliament in the implementation of the constitution.

### 1.2 Participatory nature of CIC work

The commission has identified and shared with all key implementers and with the people of Kenya, specific actions that will help nurture the spirit of constitutionalism. The CIC is incorporating the participation of all Kenyans in the implementation process by subjecting each of the bills under review to stakeholder participation. In line with the constitutional requirement for public participation in all processes of governance, Kenyans have been engaged in

legislative processes through a range of public and stakeholder consultations as well as in the process of appointing key state officers such as the public procedure employed in the judicial nominations process as the country sought for persons to serve as Chief Justice, Deputy Chief Justice and the Director of Public Prosecutions. Stakeholder participation is also enhanced by putting in place an interactive website from which the stakeholders easily access bills and other related information.

CIC Commissioners are: Mr. Charles Nyachae; Dr. Elizabeth Muli; Prof. Peter Wanyande; Mr. Kamotho Waiganjo; Ms. Catherine Muyeka Mumma; Dr. Ibrahim M Ali; Mr. Philemon Mwaisaka and Dr. Florence Omosa.

### **1.3 The Legislative Process:**

The Constitution compels Parliament to enact the legislations required within the timelines set out. However, there has been a sluggish pace in preparing and discussing bills. The laws that are of utmost urgency and which are required to be enacted within one year of the effective date of the Constitution are: Legislation on Kenya National Human Rights and Equality Commission; Legislation on Citizenship; Legislation on Ethics and Anti-Corruption Commission; Legislation on Elections; Legislation on Electoral Disputes; Independent Electoral and Boundaries Commission; Legislation on Political Parties; Vacation of office of Member of Parliament; Legislation on Power of Mercy; Legislation on System of Courts; Legislation on Removal of judicial officers from office; Legislation on Vetting of Judges and Magistrates; Legislation on Election and Removal of Speaker of County Assemblies; Legislation on Urban Areas and Cities; Legislation on Contingencies Fund and Legislation on Loan Guarantees by National Government.

The Coalition Government has initiated the implementation process as bills are being prepared and five have been passed into laws they are: The Independent Electoral & Boundaries Commission Act, 2011; The Independent Offices (Appointment) Act, 2011; The Supreme Court Act, 2011; The Judicial Service Act, 2011 and The Vetting of Judges and Magistrate Act, 2011.

## 2.0 The Concept of Devolution

### 2.1 Understanding devolved governance

Decentralization is the process of dispersing power between levels of government. Decentralization involves sharing of power and can be horizontal or vertical (Mwenda, 2010). There are four major forms or types of decentralisation - deconcentration; delegation; devolution and privatization with each aimed at enhancing the participation of citizens in planning and strengthening through various means the voice of citizens in influencing service delivery providers. Devolution however demands that part of political and economic decision making is transferred to the people through locally established units.

A devolved structure would thus imply decentralisation of functions of government and decision making to the devolved governance units. This however does not prevent the existence of a national government with the sole purpose of overseeing the national agenda and hence the devolved government units will adopt those policies that are in line with the national policies.

**Table 1: Dimensions and Types /Forms of Decentralization**

Dimensions	Types/Forms			
	De-concentration	Delegation	Devolution	Privatization
Administrative				
Fiscal				
Political				
Economic/Market				

Source: Ministry of Northern Kenya and Arid Lands Development (2010)

## 2.2 Present local governance structure

### 2.2.1 Transition To Devolved Governments

County governments are not starting on a clean, new slate. There presently exist three units of service delivery at the local level. They are:

- (a) **Districts:** The districts broadly guided by the District Focus for Rural Development (DFRD) through which the government ministries through their respective district line ministries have offered services. There are presently 290 in number. The government has been allocating resources channelled through the line ministries and administered by delegated officials at the district, division and location level. This has been under the close supervision and coordination of the Provincial Administration (PA) under the office of the president.
- (b) **Local Authorities (LAs):** The LAs are statutory and derive their legal mandate from Chapter 265 of the Laws of Kenya. LA's provide some services such as garbage collection, provision of burial places of persons and disposal of animals among others. Whereas Local Authorities were originally envisioned as devolved units of service delivery, the strong central state has gradually diminished their authority. They are widely viewed as corrupt and inept. They nonetheless employ a huge workforce who expects to be included in the county government structure.
- (c) **Constituencies:** With the creation of the Constituencies Development Fund (CDF) (under the CDF Act of 2003 which was amended in 2007) which transfers at least 2.5 per cent of the national revenue to the 210 constituencies for capital developments, the constituency has also become a unit of service delivery, through which the government provides support for capital developments in various sectors such as education, health, water, agriculture, trade and industry. The management of CDF has failed the separation of powers test as the members of parliament play both an oversight, implementation

and audit role. Other funds that have been channelled through the constituency include the Economic Stimulus Package, and the Roads Maintenance Levy Fund (RMLF) among others.

- (d) ***State Corporations (SCs)/Parastatals and Regional Development Authorities (RDAs)***: A fourth though not very directly has been SCs, parastatals and RDAs which enjoy statutory delegated authority to manage the provision of certain goods and services.
- (e) There presently exist numerous decentralized funds which are administered under the various units of decentralization.

## Decentralized funds in Kenya

<b>Fund</b>	<b>Year Created</b>
Secondary Education fund	1993/94
Road Maintenance Levy Fund and the Constituency Roads Fund	1993
Rural Electrification Program	1997
Constituency Aids Control Fund	1999
Local authority Transfer Fund	1999
HIV/AIDS	1999
Constituency Development Fund	2003
Free Primary Education	2003
Water Services Trust Fund	2004
Poverty Eradication Revolving Loan Fund	1999
Community Development Trust Fund	1996
Youth Enterprise Development Fund	2006
Women's Enterprise Development Fund	2007
Free Secondary Education (FSE)	2008
Kazi Kwa Vijana	2008
Economic Stimulus Program	2009

Despite the numerous avenues for financing development at the grassroots level, Kenya's present decentralized framework has been ineffective for a number of reasons including: confused and ad hoc policies; political manipulation and the refusal by central government to cede power to lower levels; unclear lines of authority and accountability; low capacities of implementation units coupled with professional ineptitude and failure to delegate administrative discipline.

Other challenges have included weak oversight; poor planning and non-existence monitoring and evaluation frameworks; distributing resources too thinly; poor citizen engagement and poor information management and flows as a function of an 'Official Secrets' mentality.

## 3.0 What Constitution of Kenya 2010 Provides for Counties:

The Constitution of Kenya 2010 creates an ambitious County Government structure based on principles of democracy, revenue reliability, gender equity, accountability and citizen participation.

### 3.1 The type of devolution provided in the Constitution of Kenya 2010

The Constitution of Kenya provides a two-tier system of government (National and County respectively). From the outset, *Article 1 (4)* of the Kenyan Constitution recognizes the fact that the sovereign power of the people is exercised at both the National and the County levels. The constitution further creates 47 counties as outlined in the First Schedule with delineated functions and responsibilities (Fourth Schedule).

It is imperative to note 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. *Article 174* of the constitution, highlights key objectives of devolved government, among them, promoting social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensure equitable sharing of national and local resources throughout Kenya; facilitate the decentralization of State organs, their functions and services, from the capital of Kenya.

### 3.2 Institutions of County Government

#### 3.2.1 County Assemblies

A county assembly consists of: Members elected by the registered voters of the wards in a general election; the number of special seats necessary to ensure that no more than two-thirds of the membership of the assembly is of the same

gender; members of marginalised groups, including persons with disabilities and the youth, as prescribed by an Act of Parliament and the Speaker, who is an ex officio member. The members in 2 and 3 are to be nominated by political parties in proportion to the seats received in the election in a particular county.

### 3.2.2 County Executive Committees

The executive authority of the county is vested in the county executive committee.

The committee consists of: the county governor and the deputy county governor; and members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly. The number of members of the committee should be a third of the number of members of the county assembly, if the assembly has no more than 30 members; or 10, if the assembly has more than 30 members.

The county governor and the deputy county governor are the chief executive and deputy chief executive of the county respectively. Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers. If a vacancy arises in the office of the county governor, the members of the county executive committee cease to hold office but the executive committee of the county, as last constituted remains competent to perform administrative functions until a new executive committee is constituted in case of election.

### 3.3 Functions of County Governments<sup>1</sup>

County governments have been established to carry out *exclusive, concurrent* and *residual*<sup>2</sup> functions. As such their operations are not mutually exclusive from those of the national government. The two levels are expected to work in cooperation and consultation with each other. Table 2 overleaf shows the powers and functions, assigned by the Constitution to the county level of government.

Currently the national government plays an implementation role whereas the new order expects the national government to play a facilitators role in most of the sectors. Key sectors where the national government is expected to cede considerable implementation powers and functions include: Agriculture, Health, Planning and Development, Pollution Control, Public Works, Roads, Transport, Public Entertainment, Soil and Water Conservation, Forestry, Trade development and Regulation, Tourism, Animal Welfare and Cultural Activities.

---

1 Countdown to counties, Standards for County Preparedness. The Institute for Social Accountability. May 2011.

2 Exclusive functions are those fully assigned to the county government, shared or concurrent functions are those that are performed by both levels of governments while residual functions are those carried out by either government because its not clear who should carry them out. Most residual functions are taken up by the national government.

**Functions of County Governments****1. Agriculture, including—**

- (a) Crop and animal husbandry;
- (b) Livestock sale yards;
- (c) County abattoirs;
- (d) Plant and animal disease control; and
- (e) Fisheries.

**2. County health services, including, in particular—**

- (a) County health facilities and pharmacies;
- (b) Ambulance services;
- (c) Promotion of primary health care;
- (d) Licensing and control of undertakings that sell food to the public;
- (e) Veterinary services (excluding regulation of the Profession);
- (f) Cemeteries, funeral parlours and crematoria; and
- (g) Refuse removal, refuse dumps and solid waste disposal.

**3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising.****4. Cultural activities, public entertainment and public amenities, including—**

- (a) Betting, casinos and other forms of gambling;
- (b) Racing;
- (c) Liquor licensing;
- (d) Cinemas;
- (e) Video shows and hiring;
- (f) Libraries;
- (g) Museums;
- (h) Sports and cultural activities and facilities; and
- (i) County parks, beaches and recreation facilities.

**5. County transport, including—**

- (a) County roads;
- (b) Street lighting;
- (c) Traffic and parking;
- (d) Public road transport; and
- (e) Ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.

**6. Animal control and welfare, including—**

- (a) Licensing of dogs; and
- (b) Facilities for the accommodation, care and burial of animals.

**7. Trade development and regulation, including—**

- (a) Markets;
- (b) Trade licences (excluding regulation of professions);
- (c) Fair trading practices;
- (d) Local tourism; and
- (e) Cooperative societies.

**8. County planning and development, including—**

- (a) Statistics;
- (b) Land survey and mapping;
- (c) Boundaries and fencing;
- (d) Housing; and
- (e) Electricity and gas reticulation and energy regulation.

**9. Pre-primary education, village polytechnics, homecraft centres and childcare facilities.****10. Implementation of specific national government policies on natural resources and environmental conservation, including—**

- (a) Soil and water conservation; and
- (b) Forestry.

**11. County public works and services, including—**

- (a) Storm water management systems in built-up areas; and
- (b) Water and sanitation services.

**12. Fire fighting services and disaster management.****13. Control of drugs and pornography.****14. Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.**

Source: Fourth Schedule of the Constitution of Kenya (Republic of Kenya (RoK, 2010)

## 4.0 Count Down to Counties

### 4.1 Key Milestones in the County Transition Process

<b>Milestone</b>	<b>Duration</b>
Publishing of TFDG Report to determine County Structure and inform subsequent legislation	August 2011
Legislation to be passed	Between August 2011 and 2013 (see schedule below)
Demarcation of ward and County boundaries	Wards by August 2011, Sub Counties to be determined in devolution bill (likely date December 2011)
Determination of Functions of County Governments	Not provided but must precede transfer of staff. Likely date between August 2011 and December 2011
Transfer of Staff	Not provided. All staff should be vetted prior to redeployment
Commencement of County Operations	<ul style="list-style-type: none"> <li>• Governor and assembly members are elected through national elections and take charge of the county governments August 2012</li> <li>• Counties begin to operate</li> <li>• Governor prepares strategic county plan within one year by August 2013</li> <li>• All electoral candidates should be vetted by EACC</li> <li>• Citizen engagement framework begins to operate.</li> </ul>
August 2013	Counties publish first year strategic plans and budgets under the county legal framework
August 2014	Counties fully operational and relevant laws passed



## 4.2 County Legislation and Status

Milestone	Constitutional Provision	Relevance of Legislation	Status & Name of Legislation
August 2010	Constitution of Kenya 2010	To guide the development of new laws, new policies & administrative procedures required for the country.	Promulgated on August 27 <sup>th</sup> 2010
All Legislations Required within One Year ( By August 2011)			
August 2011 (One year)	Some Legislations on Devolved Government (Art. 178; 183 & 184)	Interim Report of the Task Force on Devolved Government (TFDG). To help in the implementation of the devolution process.	Report of the Task Force to be published by August 2011
	Speaker of a County Assembly Art. 178	To provide a framework for transitional arrangements & processes for the establishment & operationalization of county governments.	The Elections Act. Undergoing internal review & stakeholder consultations.
	The Urban Areas And Cities Bill, 2011 (Art. 183)	To provide for the identification, classification, governance & management of urban areas & Cities.	The Urban Areas and Cities Act. Undergoing internal review & stakeholder consultations.
	The Independent Offices (Appointment) Act, 2011 Established under Articles 228 & 248	Provides the procedure for identification & recommendation for appointment of the Auditor General & the Controller of Budget.	The Independent Offices (Appointment) Act. Enacted on July 5, 2011
	All Legislation On Elections (Art 82,87,88,92)		
	Independent Electoral & Boundaries Commission Act 2011	The Act provides for the operations, powers, responsibilities & functions of the Commission to supervise elections and referenda at County and National Government levels.	Independent Electoral & Boundaries Commission Act. Enacted on July 5, 2011
	Political Parties Bill, 2011	To provide for the registration, regulation & funding of political parties	Political Parties Act. Awaiting approval by Cabinet
	Elections Bill, 2011	To revise & consolidate election laws in Kenya, to provide for the conduct & procedure of elections of the President, the National Assembly, the Senate, Governor & county assemblies and to provide for the conduct of referenda, to prevent election malpractices and for connected purposes	Elections Act. Undergoing internal review & stakeholder consultations Electoral Disputes Act. Undergoing internal review & stakeholder consultations.

Milestone	Constitutional Provision	Relevance of Legislation	Status & Name of Legislation
<b>All Legislations Required within One Year ( By August 2011)</b>			
August 2011 (One year)	All Legislation On Judiciary (Art 162, 168, Sch.6)		
	The Supreme Court Act, 2011	Provides for the operation of the Supreme Court as a court of final judicial authority to, among other things: assert the supremacy of the Constitution & the sovereignty of the people of Kenya.	The Supreme Court Act. Commenced June 23
	The Judicial Service Act, 2011	Provides for judicial services and administration of the Judiciary.	The Judicial Service Act. Commenced March 22
	The Vetting Of Judges & Magistrate Act, 2011 Vetting of Judges and Magistrates (Amendment) Act 2011	Provides for the vetting of judges & magistrates as well as the establishment, powers & functions of the Judges & Magistrates Vetting Board.	Vetting of Judges & Magistrate Act, 2011. Enacted in May
	The Labour Court of Kenya Bill, 2011	To establish the Labour Court of Kenya, provide for its functions, powers and duties	The Labour Court of Kenya Act. Undergoing internal review & stakeholder consultation
	Ethics & Anticorruption commission (Art. 79) Ethics and Anti-Corruption Commission Bill, 2011	To provide for the functions & powers of the Commission & provide for the qualifications & procedures for appointment of the chairperson & members.	Ethics and Anti-Corruption Commission Act. Undergoing internal review & stakeholder consultations
<b>All Legislations Expected by February 2012 (18 months)</b>			
February 2012 (18 months)	Removal of County Governor (Art. 181)	To give effect to the provisions of the Constitution regarding devolution of government.	The Devolved Governments Act. Undergoing internal review & stakeholder consultations
	Vacation of office of member of county assembly (Art. 194)	To give effect to the provisions of the Constitution regarding devolution of government.	The Devolved Governments Act. Undergoing internal review & stakeholder consultations
	Legislation to effect Chapter 11 (Art. 200 and sixth schedule) Devolution Law	The Devolved Governments Act. Undergoing internal review & stakeholder consultations	The Devolved Governments Act. Undergoing internal review & stakeholder consultations
	Revenue for County Governments (Art. 181)	To secure sound & sustainable management of financial affairs of county governments, cities and urban areas, and other county public entities.	The County Governments Financial Management Act. Undergoing internal review & stakeholder consultations
	Legislation on Land (Art. 67, 68) The National Land Commission Bill.	To provide for the functions, powers, qualifications of, & appointment procedure for members of the National Land Commission.	The National Land Commission Act

**Other Key Legislations****August 2012 (Two Years)**

August 2012	Support for County Government (Art. 190) Public Financial Management Bill.	To promote transparency and accountability in the management of public finances at the National Government & County Government.	Public Financial Management Act. Undergoing internal review & stakeholder consultations.
	County assembly gender balance and diversity (Art. 197)	The Devolved Governments Act. Undergoing internal review & stakeholder consultations	The Devolved Governments Act. Undergoing internal review & stakeholder consultations
	Public Participation and county assembly powers, privileges and immunities (Art. 196)	The Devolved Governments Act. Undergoing internal review & stakeholder consultations	The Devolved Governments Act. Undergoing internal review & stakeholder consultations.

**August 2014 (Four Years)**

August 2014	Accounts and Audit procurement (Art. 226, 227) Public Financial Management Bill	To promote transparency and accountability in the management of public finances at the National Government & County Government	Public Financial Management Act. Undergoing internal review & stakeholder consultations
	Values and Principles of public service (Art. 232) Public Service Commission Bill, 2011	Provides for the establishment of the Public Service Commission under the Constitution of Kenya and for connected purposes.	Public Service Commission Act

Legislation not provided for in the Constitution of Kenya 2010 but necessary for proper functioning of counties

Legislation not provided for in CK 2010 but necessary for proper functioning of counties	<ul style="list-style-type: none"> <li>i. Functional assignment policy (prior to devolution bill)</li> <li>ii. County development planning and facilitation bill August 2012</li> <li>iii. Access to information and repeal of odious laws December 2011</li> </ul>
--	---

## 5.0 County Transition Status Report July 2011

### 5.1 Review of the Process:

This path began on August 27, 2010 by marking of Section 7(1) of the Sixth Schedule of the Constitution which brought the entire Constitution into force with immediate effect, save for the exceptions set out in Section 2 of that Schedule. The 6<sup>th</sup> Schedule also created institutions to guide and drive the process of implementation: the Constitutional Implementation Oversight Committee (the “Committee”) the Commission for the Implementation of the Constitution (the “Commission”) and the Commission on Revenue Allocation (CRA).

The Constitution Implementation Oversight Committee was established on 9 October 2010. The chairpersons and members to the CIC and the CRA were appointed on 30 December 2010. These appointments were behind schedule by over a month. This has also impacted on the drafting of relevant laws and establishing of other institutions.

### The Task Force on Devolved Government (TFDG)

The Task Force on Devolved Government (TFDG) was established on the 22<sup>nd</sup> of October 2010 through Gazette Notice 12876 dated 25<sup>th</sup> October 2010. Additional members of the Task Force and Steering Committee were gazetted on 3<sup>rd</sup> December 2010.

The purpose of the task force was to help think through the implementation of the devolution process and advise the government on policy and legal frameworks of devolving power, resources and responsibilities to the people of Kenya for effective local development. The Task Force was officially launched on 8th November 2010 by the Deputy Prime Minister and Minister for Local Government, Mr. Musalia Mudavadi.

The Terms of Reference of the Task Force are among other things, “with reference



to specific provisions of constitution, collect and collate public views on how implementation of the devolved government should be structured”.

The Chairperson of the Task Force on the Devolved Government is Dr. Mutakha Kangu Mutakha Kangu and the Vice Chairperson is Lucy Muthoni Kambuni. The joint secretaries include Pauline N. Muriithia; Antony Oteng Ombwayo and Angeline Hongo. The members are Edward A. Oyugi; Emmanuel Lubembe; Eric M. Aligula; Fatuma Ali Saman; Gichira Kibara; Hamisi Mboga; Harriet Naitore; Jelani Habib; Joash Dache; John Nguri; Joseph W. Irungu; Julius Malombe Kasembeli W. Nasiuma; Kennedy Nyaundi; Kenneth W. Akide; Kibisu Kabatesi; Marion Muriithi Nehemiah Ngeno; Onesimus Kipchumba Murkomen; Patrick Karanja; Patrick O. Onyango; Pauline Nyamweya; Polycarp J.O. Ochilo; Samuel G. Karicho; Sylvester M. Osodo and Winnie V. Mitullah.

## **5.2 Successes of the process so far**

It is now 11 months since the Constitution was promulgated on August 27, 2010. With slightly less than two months left to the August 26, 2011 constitutional deadline for some of the crucial laws. Already five laws have been enacted. They are the Independent Electoral & Boundaries Commission Act, 2011; The Independent Offices (Appointment) Act, 2011; The Supreme Court Act, 2011; The Judicial Service Act, 2011 and The Vetting of Judges and Magistrate Act, 2011 have been signed into law.

## **5.3 Appointment of members to key institutions**

The Government has already appointed members to key institutions for the implementation of the Constitution including Task Force on Devolved Government (TFDG) established on October 22, 2010. The TFDG released its interim report on April 20, 2011. The purpose of the interim report was to enable stakeholders validate it and provide further input on the proposed

implementation mechanisms, policies and pieces of legislation on the devolved system of government in Kenya, as envisaged in the Constitution of Kenya 2010 promulgated on August 27, 2010. On July 10, 2011, the TFDG presented 6 bills to the Deputy Prime Minister and Ministry of Local Government. They are: The County Governments Financial Management Bill, 2011; The Intergovernmental Relations Bill, 2011; The Intergovernmental Fiscal Relations Bill, 2011; The Transition to Devolved Government Bill, 2011; The Urban Areas and Cities Bill, 2011 and The Devolved Governments Bill, 2011.

The appointment of the Chief Justice, the Deputy Chief Justice and the Director of Public Prosecutions were completed after a rigorous vetting by the Judicial Service Commission that was established on December 30, 2010 and mandated to oversee administrative, managerial and operational reform within the judiciary. However, the Controller of Budget is yet to be selected and vetted. This is an important office as the national and county governments have to seek approval from the Controller of Budget before the withdrawal of public funds.

## **5.4 Other successes**

### **5.4.1 Consultative nature in development of key legislations**

CIC has ensured public participation through the launch of an interactive website where citizens can access bills. CIC further enhanced effective stakeholder participation in the implementation process by ensuring that each of the bills under consideration was subjected to a review by stakeholders from Nairobi and counties across the country.

Other successes have been the consultative nature in the development of key legislation for example the Public Finance Management law. On June 17, 2011, CIC held a technical workshop on key issues arising from the draft Public Finance Management Bill. The resolutions of that meeting fed into the CSO Consultative Forum on the Public Finance Management Bill stakeholder forum held on June 27, 2011.

#### 5.4.2 Stakeholder meetings by CIC and TFDG

CIC and the TFDG have convened several workshops and consultative meetings/ fora with key stakeholders to gather views and comments from various stakeholders for purposes of enriching the TFDG report and legislations.

A meeting convened by the Institute for Social Accountability (TISA) and CIC on May 25, 2011 brought together non-state actors. The meeting determined the need for increased collaboration between CIC and civil societies.

The Task Force visited all the counties to gather views that were incorporated in the interim report. The TFDG followed up with report validation meetings in all counties. All Kenyans were also invited to submit memoranda and written views to the Task Force.

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

## 6.0 Emerging Challenges

### 6.1 The Cost of Counties

The greatest emerging concern is the likely cost of counties. The TFDG has proposed numerous institutions on top of those already provided for in the constitution and this is inevitably going to push up the cost of the county administration. The other challenge is the level of salaries; Parliamentarians, Ministers and a number of permanent secretaries presently earn very high salaries pegged on private sector rates. This is likely to introduce inflationary pressure due to an exorbitant wage bill. This will also reduce the amount of money available for service delivery. The present tussle between and esteemed institutions like the CIC and Government over salary rates is an unfortunate indicator of things to come and could undermine the ability of counties to deliver services entirely.

### 6.2 Fragmented Approach to Reform:

The adversarial style of our politics is also manifest in government operations. Unhealthy competition and vested political interests is likely to generate discordant laws which have conflicting provisions. This will also undermine the ability of the government to come together to undertake the biggest project it has ever embarked on, that of bringing 47 new governments into operation in 12 months time. We urge the government players to put aside selfish political interests to work together at this time of reform in the interests of poor and marginalized Kenyans who have been ravaged by years of poor governance.

### 6.3 Local Authorities and staff transition

Will Counties inherit Corruption? Some of the most contentious issues of the present reform process is the transition of local authorities, and the transition of government staff from their present docket to the new county positions. And how to ensure the process does not transfer inefficiency and corruption to counties. There is also the challenge of how to deal with grabbed public assets especially public utilities. There is the question of how to deal with local



authority debt, especially odious debt which may have accrued due to corruption. Given the political sensitivity of these issues the taskforce has proposed a powerful Transition Authority to midwife the Devolution process and deal with the issues of transfer of staff. Will the national government agree to let go of their vested political interests and allow this transition to be established and function effectively?

#### **6.4 Provincial Administration:**

The insistence by some government quarters that the provincial administration should be retained is a demonstration of inevitable conservatism in some government quarters intent on maintaining the status quo and seeking to derail the reform process. Such calls are out of step with the reform demands of the time and should be ignored.

#### **6.5 Transparency of Counties:**

The 2012 elections will see the election of 5 different candidates by each voter at the national and county levels. There is a need to pass and enact a strong Ethics and Anti Corruption Commission with the powers and resources to vet all candidates for these offices once they receive a nomination to test their eligibility to hold public office. It is a matter of grave concern that the Ethics and Anti Corruption bill along side other bills is delayed by the Cabinet for weeks. This threatens to compromise the quality of debate on the bills, the ability of parliamentary committees to scrutinise the bills and may result in rushed legislation with weak provisions. Is this an attempt to derail the reform process?

#### **6.6 Slow pace of ICT adoption by government:**

The slow pace to computerize government is also a key stumbling block to the reform process as critical assets transfers especially in contentious land matters is hampered by the absence of the needed information. We are pleased to note that the government recently launched the ICT Rapid Results Initiative and we will monitor the outcomes of that effort.

## 7.0 Recommendations

So whereas we recognise that numerous positive steps have been taken in the constitution reform process, we note that the next 12 months constitute the most delicate stage of the implementation process. We urge all responsible institutions to rise to the occasion and not fail Kenyans at this critical time.

### 7.1 Cost of Counties:

- 7.1.1 There is a need for the Task Force on Devolved Government (TFDG) to rationalise the proposed County institutions under the proposed county structure.
- 7.1.2 There is an urgent need to rationalise salaries to ensure all public and state officers pay tax, and adhere to existing public service guidelines. The Commission on Implementation of the Constitution (CIC) should lead by example and accept the proposed salaries as a service to their country. Those not interested in serving the country within the provided government rates should not take up these positions. Once the Salaries and Revenue Commission comes into force it should rationalise the exorbitant parliamentary salaries to make sure parliamentary salaries and allowances from 2012 onwards conform with public service standards.
- 7.1.3 The constitution provides for no more than 20 ministries. The government needs to give a plan to rationalise its ministries immediately.
- 7.1.4 National Philosophy Kenya lacks a national philosophy upon which to base its reform agenda and craft its public service institutions. The embrace of neo-liberal policies has also introduced unfettered capitalism in the public service mindset. There is urgent need to borrow from growing economies such as those of South East Asia and South America who have embraced government directed

growth and directed capitalism to successfully put their countries on a path of growth. There is a need to refocus Vision 2030 within a strong ideological framework.

### **7.2 Staff redeployment by the Ministry of Public Service:**

It is not clear when the Ministry of Public Service will embark on the process of staff redeployment if it has not already started. All staff transfers need to be done within a framework that allows a headcount of the existing staff and their skills, the number of staff needed by counties and the skills needed. Capacity building and reorientation needs of staff and lastly the vetting of staff for adherence with chapter 13 of the Constitution on public service values. We therefore request that the Ministry of Public Service give an indication of how the staff and assets process will be managed and how it will be made open to stakeholder participation. We look forward to the establishment of a County Transition Authority to manage the County transition process and hope the Cabinet and Parliament will prioritise the passage of the County Transition Bill as the key to a successful transition.

### **7.3 Good governance is the Responsibility of all Kenyans:**

Lastly, good governance is the business of all Kenyans. In August 2010, we gave ourselves a new Constitution-the product of the relentless effort of national activism since the early 1990's. It is the responsibility of every Kenyan to ensure the constitution is implemented in accordance with the provisions provided within it. It is the civic duty of all Kenyans to get involved in the job of sensitization and civic education first by understanding what the constitution says and by sharing the same with others. So if you haven't already, make sure that you read and understand the constitution with those close to you.

***God bless Kenya!***



P O Box 48353-00100 Nairobi

Tel: +254 20 4443676

Email: [info@tisa.or.ke](mailto:info@tisa.or.ke)

[www.tisa.or.ke](http://www.tisa.or.ke)

for a copy of this report and subsequent updates visit  
<http://www.tisa.or.ke/countdown-to-counties/>



**USAID**  
FROM THE AMERICAN PEOPLE



This report is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are The Institute for Social Accountability's (TISA's) responsibility and do not necessarily reflect the views of USAID or the United States Government or Pact Inc or Pact Kenya.