

THE CONSTITUTION OF KENYA REVIEW BILL, 2008

ARRANGEMENT OF CLAUSES

Clause

PART I — PRELIMINARY

- 1 —Short title.
- 2 —Interpretation.
- 3 —Objects and purpose of constitutional review process.
- 4 —Organs of review.
- 5 —Guiding principles.

PART II — ESTABLISHMENT AND COMPOSITION OF COMMITTEE OF EXPERTS

- 6 —Establishment and membership of the Committee of Experts.
- 7 —Procedure for appointing members.
- 8 —Qualification for appointment as member.
- 9 —Chairperson and deputy chairperson.
- 10—Tenure of office.
- 11—Vacancy.
- 12—Removal of member of Committee of Experts.
- 13—Filling of vacancy.
- 14—Independence of Committee of Experts.
- 15—The Director.
- 16— Staff of the Committee of Experts.
- 17— Oath of office.
- 18—Code of Conduct.
- 19—Protection from personal liability.
- 20—Liability of the Committee of Experts for damages.

PART III — FUNCTIONS AND POWERS OF THE COMMITTEE OF EXPERTS

- 21—Functions of the Committee of Experts.
- 22—Powers of the Committee of Experts.
- 23—Procedure of the Committee of Experts.
- 24—Records of the Committee of Experts.
- 25—Civic education.

PART IV — REPORT OF THE COMMITTEE OF EXPERTS AND ACTION THEREON

- 26—Completion of work.
- 27—National discussion of draft Constitution.
- 28—Approval of draft Constitution by Parliamentary Select Committee.
- 29—Debate of draft Constitution by National Assembly.
- 30—Publication of the new Constitution.
- 31—Civic education on Proposed New Constitution.

PART V — THE REFERENDUM

- 32—The Referendum question.
- 33—Conduct of referendum.
- 34—Notice of holding referendum.
- 35—Right to vote in referendum.
- 36—Procedure for conduct of referendum.
- 37—Code of conduct.
- 38—Process after ratification.
- 39—Petition to court to challenge referendum.
- 40—Composition of court.
- 41—Powers of court.
- 42—Determination on priority basis.
- 43—Court decision is final.
- 4—Withdrawal of petition.
- 45—Certain provisions of Cap. 7 to apply.
- 46—Other procedure.

PART VI — EXPENSES OF THE REVIEW PROCESS

- 47—Funds for expenses of the review process.
- 48—Constitution of Kenya Review Fund.
- 49—Remuneration and allowances of Members.
- 50—Accounts and audit.

PART VII — GENERAL PROVISIONS

- 51—Disobedience of summons.
- 52—Privileges and immunities of Members and the Director during office.
- 53—Regulations.
- 54—Act to bind the Government.

**PART VIII — DISSOLUTION OF ORGANS OF REVIEW AND
FINAL PROVISIONS**

55—Dissolution of Committee of Experts.

SCHEDULES

- | | | |
|------------------------|---|--|
| FIRST SCHEDULE | – | Procedure for Nominating Commissioners
by the Parliamentary Select Committee. |
| SECOND SCHEDULE | – | Oath of office of a member. |
| THIRD SCHEDULE | – | code of conduct for members and staff
of committee of experts. |

A Bill for

**AN ACT of Parliament to facilitate the completion of the
review of the Constitution of Kenya, and for
connected purposes**

ENACTED by the Parliament of Kenya as follows—

PART I — PRELIMINARY

Short title and
commencement.

1. This Act may be cited as the Constitution of Kenya Review Act, 2008 and shall come into force upon its publication in the Gazette which shall not be later than fourteen days from the date of assent.

Interpretation.

2. In this Act, unless the context otherwise requires—

“Director” means the director appointed under section 15.

“existing draft constitutions” means the Proposed New Constitution 2005, and the document commonly known as the Bomas Draft produced by the National Constitutional Conference on 15th March, 2004 under the expired Act.

“expired Act” means the Constitution of Kenya Review Act which expired on 31st January 2006;

“National Dialogue and Reconciliation Committee” means the Committee established under auspices of the Panel of Eminent African Personalities to resolve the crisis arising from the December 2007 elections.

“member” means a member of the Committee of Experts appointed under section 6;

“Minister” means the Minister for the time being responsible for matters relating to constitutional affairs;

“Panel of Eminent African Personalities” means the African Union Panel of Eminent African Personalities spearheading the mediation of the crisis arising from the December 2007 elections;

“Parliamentary Select Committee” means the Parliamentary Select Committee on the Review of the Constitution ;

“Proposed New Constitution 2005” means the Proposed New Constitution of Kenya submitted to the referendum on 21st November 2005 under the expired Act.

Objects and
purpose of
constitutional
review process.

3. The object and purpose of the review of the Constitution is to secure provisions therein—

- (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- (b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action;
- (c) recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
- (d) promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
- (e) respecting ethnic and regional diversity and

communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;

- (f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;
- (g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;
- (h) strengthening national integration and unity;
- (i) creating conditions conducive to a free exchange of ideas;
- (j) ensuring the full participation of people in the management of public affairs; and
- (k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus.

Organs of review.

4. The organs through which the review of the Constitution shall be completed are—

- (a) the Committee of Experts;
- (b) the Parliamentary Select Committee;
- (c) the National Assembly; and
- (d) the referendum.

Guiding principles.

5. In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4 shall—

- (a) ensure that the national interest prevails over regional or sectoral interests;
- (b) be accountable to the people of Kenya;
- (c) ensure that the review process accommodates the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
- (d) ensure that the review process—
 - (i) provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution;
 - (ii) is guided by the principle of stewardship and responsible management;
 - (iii) is, subject to this Act, conducted in an open manner; and
 - (iv) is guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy;
- (e) ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

PART II – ESTABLISHMENT AND COMPOSITION OF COMMITTEE OF EXPERTS

Establishment and

6.(1) There is established a committee to be known as

membership of the
Committee of
Experts.

the Committee of Experts.

(2) The Committee of Experts shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging, or disposing of movable and immovable property; and
- (c) doing or performing all such other acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

(3) The provisions of the State Corporations Act shall not apply to the Committee of Experts.

(4) The Committee of Experts shall consist of seven persons appointed by the President of whom—

- (a) three shall be non citizens nominated by the Panel of Eminent African Personalities in consultation with the National Dialogue and Reconciliation Committee; and
- (b) four shall be citizens of Kenya nominated by the Parliamentary Select Committee in accordance with the procedure prescribed in the First Schedule.

(5) The Attorney-General and the Director shall be *ex officio* members of the Committee of Experts without the right to vote.

(6) In nominating persons for appointment as members of the Committee of Experts, the nominating

bodies shall have regard to—

- (a) the experience and academic qualifications of the applicants;
- (b) the principle of gender equality; and
- (c) with respect to persons nominated under subsection 4 (b), Kenya's national character and diversity.

Procedure for
appointing
members.

7.(1) The nominating bodies shall, within fourteen days of the commencement of this Act, submit the names of their nominees to the Minister, for onward transmission to the President.

(2) The Minister shall within seven days of receipt of the names of the nominees transmit the names to the President.

(3) The President shall, within seven days of receipt of the names forwarded by the Minister, notify the appointment of the members of the Committee of Experts in the Gazette.

Qualification for
appointment as
member.

8.(1) To qualify for nomination for appointment as a member of the Committee of Experts a person shall have proven knowledge of and experience in at least one of the following areas—

- (a) comparative constitutional law;
- (b) systems and structures of democratic governments;
- (c) human rights;
- (d) women and gender issues;
- (e) land and land law;

- (f) governance, ethics and accountability;
- (g) public finance and administration;
- (h) electoral systems and designs for democratic elections;
- (i) anthropology; or
- (j) mediation and consensus building.

(2) Notwithstanding the provisions of subsection (1), no person shall be qualified for appointment as a member of the Committee of Experts—

- (a) unless such person—
 - (i) is of sound mind; and
 - (ii) is of high moral character and integrity;
- (b) if such person—
 - (i) is an undischarged bankrupt;
 - (ii) was a commissioner of the Constitution of Kenya Review Commission established under the expired Act; or
 - (iii) is a member of the National Assembly or holds or is acting in any office in the public service.

Chairperson and
deputy
chairperson.

9.(1) The Minister shall within seven days of the appointment of the Committee of Experts convene its first meeting at which the Committee of Experts shall elect the chairperson and the deputy chairperson from amongst its members.

(2) Each of the positions in the Committee of Experts specified in subsection (1) shall be held by persons of opposite gender.

(3) The chairperson shall—

- (a) preside over all meetings of the Committee of Experts;
- (b) be the spokesman of the Committee of Experts; and
- (c) supervise and direct the work of the Committee of Experts.

(3) In the absence of the chairperson, the vice-chairperson shall perform the functions of the chairperson under subsection (3).

Tenure of office.

10. The term of office of a member of the Committee of Experts shall be from the date of appointment under section 6 and shall, unless the office falls vacant earlier owing to any reason specified in section 11, terminate on the dissolution of the Committee of Experts.

Vacancy.

11.(1) The office of a member of the Committee of Experts shall fall vacant if the person—

- (a) dies;
- (b) resigns from office in writing to the president;
- (c) is removed from office in accordance with the provisions of section 12;
- (d) is adjudged bankrupt;
- (e) is convicted of an offence and sentenced to imprisonment for a term of six months or

more without the option of a fine;

- (f) is in breach of the code of conduct prescribed under section 18;
- (g) without reasonable excuse, fails to attend three consecutive meetings of the Committee;
- (h) is by reason of physical or mental infirmity, unable to discharge his duties as a member; or
- (i) is for any other reason, unable or unwilling to act as a member of the Committee of Experts,

and in any case to which paragraphs (e), (f), (g) and (h) apply, the breach, failure, inability or unwillingness is noted by the Committee of Experts in its records and supported by a resolution of two-thirds majority of the members and the person is informed of the termination of the appointment in writing through the director, or where the affected person is the director, through the chairperson.

(2) The President shall notify every vacancy in the Gazette within seven days of the occurrence of the vacancy.

(3) Where any vacancy occurs in the Committee of Experts, the relevant nominating body under section 6 shall within twenty one days of the notification under sub section (2), submit to the President through the Minister the name of a person qualified under this Act and nominated by that body, to fill the vacancy.

(4) No act or proceedings of the Committee of Experts shall be invalid by reason only of a vacancy or defect in the composition of the Committee of Experts.

Removal of

12.(1) The chairperson or a member of the Committee

members of
Committee of
Experts.

of Experts may be removed from office by the President for misbehavior or misconduct in accordance to the procedure provided for under subsections (2) to (7).

(2) A person who wishes to have a member of the Committee of Experts removed from office for misbehavior or misconduct may apply for removal of the member of the Committee of Experts to the President through the Minister, and such application shall be copied to the chairperson.

(3) Where the chairperson is the subject of an application for removal from office, the application under subsection (2) shall be made to the President through the minister and copied to the vice-chairperson.

(4) The Minister shall, within seven days of receipt of the application, forward the application to the Parliamentary Select Committee to inquire into the matter.

(5) The Parliamentary Select Committee shall inquire into the matter and make recommendations to the President as to whether or not the chairperson or the member of the Committee of Experts ought to be removed from office.

(6) In undertaking the inquiry under subsection 5, the Parliamentary Select Committee shall afford the concerned person an opportunity to be heard.

(7) Where the question of removing the chairperson or a member of the Committee of Experts has been referred to the Parliamentary Select Committee under subsection (4), the President may suspend the chairperson or the member of the Committee of Experts concerned.

(8) The suspension shall cease to have effect if the Parliamentary Select Committee recommends that the chairperson or the member of the Committee of Experts, as the case may be, should not be removed from office.

(9) A member of the Committee of Experts shall be removed from office if two thirds of the members of the Parliamentary Select Committee vote to remove the member.

Filling of vacancy.

13.(1) Where a vacancy occurs in the membership of the Committee of Experts under section 12, the President shall appoint a replacement—

- (a) where the vacancy is in respect of a citizen of Kenya, from among the short-listed persons considered by the Parliamentary Select Committee in accordance with the First Schedule, giving due consideration to the rankings and comments of the Parliamentary Select Committee; and
- (b) where the vacancy is in respect of a non-citizen, from a list of persons recommended by the Panel of Eminent African Persons.

(2) A member of the Committee of Experts who is appointed in place of a member whose office has become vacant under this section shall hold office for the remainder of the term of office of that member of the Committee of Experts.

Independence of the Committee of Experts.

14. In the performance of its functions under this Act, the Committee of Experts shall not be subject to the control of any person or authority.

The Director.

15.(1) There shall be a Director of the Committee of Experts who shall be appointed by the Parliamentary Select Committee on such terms and conditions of service as the Parliamentary Select Committee may, in consultation with the Minister, determine.

(2) Paragraphs 1, 2 and 3(a) of the first Schedule shall apply with necessary modifications with respect to the appointment of the Director.

(3) The Director shall be the chief executive of the Secretariat and the accounting officer of the Committee of Experts and shall serve on a full-time basis.

(4) The Director shall be responsible for the—

- (a) the day to day administration and management of the affairs of the Committee of Experts;
- (b) the co-ordination of the studies, research and evaluations of the Committee of Experts;
- (c) the recording of the proceedings of the Committee of Experts;
- (d) custody of all records and documents of the Committee of Experts; and
- (e) performance of such other duties as may be assigned by the Committee of Experts from time to time.

(5) The Director may be removed from office by the Parliamentary Select Committee only for—

- (a) inability to perform the functions of his office arising out of physical or mental incapacity;
- (b) misbehavior or misconduct; or
- (c) incompetence.

Staff of the
Committee of
Experts.

16.(1) The staff of the Committee of Experts shall comprise—

- (a) four deputy directors appointed by the Committee of Experts each of who shall be responsible for one of the following—

- (i) research, drafting and technical support;
 - (ii) finance and Administration;
 - (iii) mobilization, logistics and outreach;
 - (iv) civic education and public information.
- (b) such officers and other staff as the Committee of Experts may appoint to assist it in the discharge of its functions under this Act; and
- (c) such public officers as may be seconded to the Committee of Experts upon its request.

(2) A public officer who is seconded to the Committee of Experts under subsection (1), shall, during the secondment, be deemed to be an officer of the Committee of Experts and subject to its direction and control.

(3) The reputable human resource firm referred to under paragraph 3 of the first schedule shall in addition to any other functions it may be required to discharge, advice on recruitment of the Director and staff of the Committee of Experts.

Oath of office.

17. (1) A member of the Committee of Experts and the Director shall each, according to their religious or other beliefs—

- (a) make and subscribe to the oath prescribed in the Second Schedule; or
- (b) make the solemn affirmation in the form prescribed in the Second Schedule before

the Chief Justice, prior to embarking on their duties.

(2) Every oath and affirmation made and subscribed to under this section shall be deposited with the Director and with the Chief Justice.

Code of Conduct.

18.(1) For the better discharge of the functions of the organs of the review process specified in section 4 and the Secretariat, the code of conduct prescribed in the Third Schedule shall apply.

(2) A person who breaches the provisions of the code of conduct shall—

- (a) in the case of a member of the Committee of Experts or the director, subject to the provisions of section 11(1)(f), be disqualified from holding office as such; and
- (b) in the case of a member of staff of the Committee of Experts, be liable to such disciplinary action as the Committee of Experts may prescribe.

Protection from personal liability,

19. No matter or thing done by a member of the Committee of Experts or any officer, employee or agent of the Committee of Experts shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Committee of Experts, render the member, officer, employee or agent personally liable to any action, claim or demand whatsoever.

Liability of the Committee of Experts for damages.

20. The provisions of section 19 shall not relieve the Committee of Experts of the liability to pay compensation for damage to any person for any personal or proprietary interest sustained by the person as a result of the exercise of any power conferred by this Act or by the failure, whether wholly or partially, of any works.

**PART III – FUNCTIONS AND POWERS OF THE
COMMITTEE OF EXPERTS**

Functions of the
Committee of
Experts.

21. The Committee of Experts shall—

- (a) identify the issues already agreed upon in the existing draft constitutions;
- (b) identify the issues which are contentious or not agreed upon in the existing draft constitutions;
- (c) solicit and receive from the public written memorandum and presentations on the contentious issues;
- (d) undertake thematic consultations with caucuses, interest groups and other experts;
- (e) carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems;
- (f) articulate the respective merits and demerits of proposed options for resolving the contentious issues;
- (g) make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in the context of the greater good of the people of Kenya;
- (h) prepare a harmonized draft Constitution for presentation to the National Assembly;
- (i) facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;

- (j) liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution; and
- (k) do such other things as are incidental or conducive to the attainment of the objects and principles of the review process.

Powers of the
Committee of
Experts.

22. The Committee of Experts shall have all powers necessary for the execution of its functions under this Act.

Procedure of the
Committee of
Experts.

23.(1) Subject to this section, the Committee of Experts shall regulate its own procedure.

(2) The Committee of Experts shall hold such number of meetings in such places, at such times and in such manner as the Committee of Experts shall consider necessary for the discharge of its functions under this Act.

(3) The quorum of the Committee of Experts shall be two-thirds of its members.

(4) All decisions the Committee of Experts shall be determined by consensus, but in the absence of consensus, decisions of the Committee of Experts shall be determined by a two-thirds majority of the members present and voting.

Records of the
Committee of
Experts.

24.(1) The Committee of Experts shall keep a verbatim record of the proceedings of every meeting of the Committee of Experts.

(2) The Committee of Experts shall consult with the Kenya Broadcasting Corporation and other licensed broadcasting stations and media houses, in order to secure suitable—

- (a) allocation of air-time and space for purposes of disseminating information about the activities of the Committee of

Experts through the electronic and print media; and

- (b) provision of a sign language inset or subtitles in all television programmes aired for purposes of paragraph (a), all newscasts, civic educational programmes and in all other programmes covering the constitutional review process.

(3) Where a broadcasting station is consulted by the Committee of Experts under subsection (2), the station shall make suitable arrangements to air the programmes specified by the Committee of Experts.

Civic education.

25.(1) The Committee of Experts shall, in furtherance of the completion of the review process, facilitate and promote civic education in order to stimulate public discussion and awareness.

(2) The Committee of Experts shall ensure that civic education materials are made available in a form accessible to the various categories of persons with disabilities.

PART IV – REPORT OF THE COMMITTEE OF EXPERTS AND ACTION THEREON

Completion of work.

26.(1) The Committee of Experts shall complete its work within a period of twelve months of the commencement of this Act.

National discussion of draft Constitution.

27.(1) The Committee of Experts shall study all existing draft constitutions and such other material as it may consider appropriate and prepare a report which shall identify—

- (a) the issues that are not contentious and are agreed upon; and
- (b) the issues that are contentious and not

agreed upon.

(2) The Committee of Experts shall invite representations from the public, interest groups and experts on the contentious issues and prepare a harmonized draft Constitution with the issues that are not contentious identified as agreed and closed and the issues that are contentious identified as outstanding.

Approval of draft
Constitution by
Parliamentary
Select Committee
of Experts.

28.(1) The Committee of Experts shall—

- (a) upon preparation of its report and the harmonized draft Constitution referred to in section 27—
 - (i) publish the draft Constitution for a period of thirty days; and
 - (ii) ensure that the report and the draft Constitution are made available to the public;
- (b) upon the expiry of the period provided for in paragraph (a)(i), review the draft Constitution and incorporate the views of the public; and
- (c) within twenty one days of the expiry of the period provided for in paragraph (a) (i), present the draft Constitution and the report to the Parliamentary Select Committee for deliberation and consensus building on the contentious issues on the basis of the recommendations of the Committee of Experts.

Debate of draft
Constitution by
Parliamentary
Select Committee.

29.(1) If the Parliamentary Select Committee reaches agreement on the draft Constitution, the Committee of Experts shall revise the draft Constitution taking into account the achieved consensus.

(2) The Committee of Experts shall submit the revised

draft Constitution and its final report to the Parliamentary Select Committee within twenty one days.

(3) The Parliamentary Select Committee shall, within seven days of receipt of the report and the draft constitution under subsection (2), table the report and draft Constitution before the National Assembly.

(4) The National Assembly shall, within fifteen days of the tabling of the draft Constitution under subsection (3), debate it and—

- (a) approve the draft Constitution without amendment and submit it to the Attorney-General for publication; or
- (b) propose amendments to the draft Constitution and submit the draft constitution and proposed amendments to the Committee of Experts for consultation and redrafting.

(5) Where the National Assembly submits the draft Constitution to the Committee of Experts for consultation and redrafting under subsection (4) (b), the Committee of Experts shall, within seven days of receipt of the draft Constitution, consider the proposed amendments and submit the draft Constitution to the National Assembly.

(6) The National Assembly shall approve the draft constitution and shall, within fourteen days of receipt of the draft Constitution under subsection (5) submit the draft Constitution to the Attorney –General for publication.

(7) The National Assembly may, before approval and submission of the draft Constitution to the Attorney General, seek expert opinion on any issue in the draft Constitution.

Publication of the
proposed
Constitution.

30.(1) The Attorney-General shall, within thirty days after receipt of the draft Constitution from the National Assembly under section 29, publish the draft Constitution.

(2) The Attorney-General shall not effect any alteration to the draft Constitution, except for editorial purposes, in consultation with the Parliamentary Select Committee.

(3) The Electoral Commission shall, within sixty days of the publication of the draft Constitution hold a referendum on the Proposed Constitution.

Civic education on Proposed New Constitution.

31.(1) The Committee of Experts shall, upon publication of the Proposed Constitution referred to in section 30, facilitate civic education on the Proposed Constitution for a period of thirty days.

PART V – THE REFERENDUM

The Referendum question.

32.(1) The Electoral Commission shall within seven days of the publication of the draft Constitution by the Attorney-General under section 30, frame and publish the question to be determined by the referendum.

(2) The question referred to in subsection (1) shall be framed in consultation with the Parliamentary Select Committee.

(3) The question to be submitted to the referendum shall require the voter to indicate whether the voter approves or does not approve the Proposed New Constitution and shall be so framed as to require the answer “Yes” or the answer “No.”

(4) The voting at a referendum shall be by secret ballot.

Conduct of Referendum.

33. The Electoral Commission shall organize, conduct and supervise a referendum held under this Act.

Notice of holding referendum.

34.(1) The Electoral Commission shall, within fourteen days after publication of the question under section 32 (2) by notice in the Gazette specify—

- (a) the day on which the referendum is to be held;
- (b) the polling time of the referendum;
- (c) the referendum campaign period;

(2) The returning officer of every constituency shall notify the public of the referendum within twenty one days of publication of the notice by the Electoral Commission

(3) The Electoral Commission shall on publication, of the notice specified in paragraph (1), suspend the registration of voters.

Right to vote in
Referendum.

35. A person whose name is entered in the register of voters shall, unless prohibited from voting by any written law, be entitled to vote at the referendum.

Procedure for
conduct of
referendum.

36. The procedure for conducting elections to the National Assembly shall apply with necessary modifications to the conduct of a referendum under this Act.

Code of conduct.

37. The code of conduct applicable to elections under the National Assembly and Presidential Elections Act shall apply to the conduct of the referendum and shall bind all persons participating in the referendum.

Process of
ratification.

38.(1) The Electoral Commission shall publish the result of the referendum in the Gazette within two days of the holding of the referendum.

(2) If no petition is made under section 39 challenging the conduct or result of the referendum within the time limit for making such petitions, the result of the referendum shall be final upon the expiry of that time limit.

(3) If a petition is made under section 39 challenging the conduct or result of the referendum within the time

limit for making petitions, the result of the referendum shall not be final until all such petitions are finally disposed of.

Petition to court to challenge referendum.

39.(1) The conduct or result of the referendum may be challenged only by petition to the High Court made within fourteen days after the publication of the result of the referendum under section 38.

(2) A petitioner shall give notice of the petition to the Attorney-General and the Electoral Commission within seven days after the petition is made and the Attorney-General shall publish a notice of each petition of which notice has been received, in the Gazette within seven days of the expiry of the period prescribed in subsection (1).

(3) The petitioner shall within seven days after the petition is made deposit two million shillings with the court as security against costs.

(4) If security is not given in accordance with subsection (3), the petition shall be dismissed.

Composition of court.

40.(1) A petition under section 39 shall be determined by a panel of five judges appointed by the Chief Justice.

(2) Unless otherwise ordered by the Chief Justice, interlocutory matters shall be dealt with by a single judge from the panel.

Powers of court.

41.(1) On a petition under section 39 challenging the conduct or result of the referendum the Court may—

- (a) dismiss the petition;
- (b) declare the published result to be incorrect;
- (c) order the Electoral Commission to repeat the polling in any place or places; or
- (d) annul the result of the referendum.

(2) The court shall not annul the result of the referendum unless it is satisfied that the applicable law has not been complied with and such non-compliance has materially affected the result of the referendum.

Determination on priority basis.

42.(1) The hearing of a petition shall not commence until after the expiry of seven days after the publication by the Attorney-General of the notices referred to in section 39.

(2) A petition presented under section 39 shall be heard and determined by the Court on a priority basis, and in any event within fourteen days of the commencement of the hearing.

Court decision is final.

43. The determination by the Court of a petition under section 39 shall be final.

Withdrawal of petition.

44. A petition under section 39 may be withdrawn by the applicant on notice to the other parties and the Court, subject to any order of the Court as to costs.

Certain provisions of Cap.7 to apply.

45. The following provisions of the National Assembly and Presidential Elections Act shall apply, with necessary modifications, to a petition under section 39—

- (a) section 22;
- (b) section 23(1);
- (c) section 25;
- (d) section 26; and
- (e) section 29.

Other procedure.

46. Subject to sections 39 to 45 the Chief Justice may give directions with respect to the procedure for a petition under section 39.

PART VI – EXPENSES OF THE REVIEW PROCESS

Funds for expenses
of the review
process.

47.(1) The expenses incurred by the Committee of Experts and the referendum in accordance with this Act shall be charged on and issued out of the Consolidated Fund without further appropriation than this Act.

(2) Without prejudice to subsection (1), there may be made to the Committee of Experts grants, gifts, donations or bequests towards the achievement of the objects of the review process specified in section 3.

(3) The Committee of Experts shall not accept any grant, gift, donation or bequest made on any condition that the Committee of Experts performs any function or discharge any duty or obligation other than duties under this Act.

Constitution of
Kenya Review
Fund.

48.(1) There is established a Fund to be known as the Constitution of Kenya Review Fund which shall be administered, on behalf of the Committee of Experts, by the Director.

(2) There shall be paid into the Fund—

- (a) such monies as may be appropriated out of the Consolidated Fund pursuant to this Act; and
- (b) any grants, gifts, donations or bequests received under section 47(2).

(3) There shall be paid out of the Fund all payments in respect of any expenses incurred in pursuance of the provisions of this Act.

(4) The Director shall, in administering the Fund, consult with the Permanent Secretary to the Treasury and, subject to provisions of the Exchequer and Audit Act,

Cap. 412.

manage the Fund in such manner as promotes the objects and purposes of this Act.

(5) Upon the dissolution of the Committee of Experts under section 55, any assets to the credit of the Constitution of Kenya Review Fund shall, subject to any condition attached to a gift, donation or bequest, be credited to the Consolidated Fund.

Remuneration and allowances of Members.

49. The Minister shall, in consultation with the Minister in charge of finance, determine the remuneration and allowances of members and shall scrutinize and approve the budget of the Committee of Experts.

Accounts and audit.

No. 12 of 2003

50. The accounts of the Constitution of Kenya Review Fund shall be kept, audited and reported upon to the National Assembly in accordance with the Public Audit Act.

PART VII – GENERAL PROVISIONS

Disobedience of summons.

51. Any public officer who, without lawful cause, fails to appear before the Committee of Experts pursuant to any summons by the Committee of Experts under section 16 (2) commits an offence and shall be liable on conviction to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding three months, or to both.

Privileges and immunities of members and the Director during office.

52.(1) A member or the Director shall not be liable to any civil action suit for or in respect of any matter or thing done or omitted to be done in good faith as a member or as the Director.

(2) A member of the Committee of Experts or the Director shall not be liable to arrest under civil process while participating in any meeting of the Committee of Experts.

(3) No person who appears before the Committee of Experts shall, whether such appearance is in pursuance of

any summons by the Committee of Experts under this Act or not, be liable to any criminal or civil proceedings, or to any penalty or forfeiture whatsoever in respect of any evidence or information given to the Committee of Experts by such person.

Regulations.

53.(1) The Committee of Experts shall make Regulations generally for the better carrying out of its functions under this Act.

(2) Without prejudice to the generality of subsection (1), regulations under this section may—

- (a) prescribe anything required by this Act to be prescribed;
- (b) subject to this Act, prescribe the procedure for—
 - (i) electing the chairperson, and deputy chairperson and filling any vacancies arising in respect thereof;
 - (ii) facilitating and promoting the provision of civic education;
 - (iii) resolution of any disputes arising under this Act; or
- (c) prescribe the disciplinary procedures applicable to members and staff of the Committee of Experts.

(3) The Electoral Commission may make Regulations prescribing any matter relating to the holding of the referendum.

Act to bind the Government.

54. This Act shall bind the Government.

**PART VIII – DISSOLUTION OF ORGANS OF
REVIEW AND FINAL PROVISIONS**

Dissolution of
Committee of
Experts.

55.(1) If the final result of the referendum is that the people of Kenya have ratified the draft Constitution; the Committee of Experts shall stand dissolved forty-five days after the day the President proclaims the new Constitution to be law and this Act shall thereupon lapse.

(2) If the final result of the referendum is that the people of Kenya have not ratified the draft Constitution, the Committee of Experts shall stand dissolved forty-five days after that result becomes final.

(3) During the period prescribed in subsections (1) and (2), the Committee of Experts shall ensure that its affairs are wound up in an orderly manner and, in particular, shall ensure that—

- (a) those aspects of its work that will be of value to other institutions are preserved, documented and transferred; and
- (b) its files and records are preserved and transferred to the Kenya National Archives and Documentation Service.

(4) Upon the dissolution of the Committee of Experts under subsections (1) and (2), any assets and liabilities of the Committee of Experts, other than assets described in subsection 48(5), shall become assets and liabilities of the Government.

(5) The terms of members shall expire upon the dissolution of the Committee of Experts.

FIRST SCHEDULE (s.6)

**PROCEDURE FOR NOMINATING MEMBERS OF THE
COMMITTEE OF EXPERTS BY THE PARLIAMENTARY
SELECT COMMITTEE**

1. The Parliamentary Select Committee shall, within fourteen days of the commencement of this Act, by advertisement in at least three daily newspapers with national circulation, invite applications from persons qualified under this Act for nomination as members of the Committee of Experts.

2. Application under paragraph 1 shall be forwarded to the Parliamentary Select Committee within twenty-one days of the advertisement.

3. The Parliamentary Select Committee shall, within seven days of the expiry of the period prescribed under paragraph 2 and with the assistance of a reputable human resource firm—

(a) consider all the applications received under paragraph (2); and

(b) recommend to the National Assembly suitably qualified persons for nomination as members of the Committee of Experts.

4. The Parliamentary Select Committee shall rank and provide comments regarding each of the nominees to the National Assembly.

5. The National Assembly shall, upon receipt of the recommendations of the Parliamentary Select Committee under paragraph 3, nominate six persons for appointment as members of the Committee of Experts and shall submit the list of nominees to the Minister for onward transmission to the President.

6. The Minister shall forthwith forward the names of the persons nominated in accordance with paragraph 3 to the President who shall, by notice in the Gazette, appoint therefrom

the first four persons on the list to be members of the Committee of Experts.

7. In nominating or appointing persons as members of the Committee of Experts, the National Assembly and the President shall have regard to Kenya's national character and diversity and gender equity.

SECOND SCHEDULE

(s .17)

OATH OF OFFICE OF A MEMBER

I being appointed a member under the Constitution of Kenya Review Act do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such member I shall not be influenced by any political party, religious society or other organization or person which may have nominated me for appointment. So help me God.

.....
MEMBER

.....
CHIEF JUSTICE

SOLEMN AFFIRMATION OF A MEMBER

I being appointed a member under the Constitution of Kenya Review Act do solemnly declare and affirm that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such member I shall not be influenced by any political party, religious society or other organization or person which may have nominated me for appointment.

.....
MEMBER

.....
CHIEF JUSTICE

OATH OF OFFICE OF THE DIRECTOR

I, being appointed the Director under the Constitution of Kenya Review Act do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such Director, I shall not be influenced by any political, religious or other interest, or by any person. So help me God.

.....
DIRECTOR

.....
CHIEF JUSTICE

SOLEMN AFFIRMATION OF THE DIRECTOR

I, being appointed the Director under the Constitution of Kenya Review Act do solemnly and sincerely declare and affirm that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such Director, I shall not be influenced by any political, religious or other interest, or by any person.

.....
DIRECTOR

.....
CHIEF JUSTICE

THIRD SCHEDULE (s.18)

**CODE OF CONDUCT FOR MEMBERS AND STAFF
OF THE COMMITTEE OF EXPERTS**

Impartiality and Independence of Members

1. Every member of the Committee of Experts shall serve impartially and independently and perform the functions of his office in good faith and without fear, favour or prejudice.

2. No member of the Committee of Experts may—

- (a) by his or her membership, association, statement, conduct or in any other manner jeopardize the perceived independence of the member, or in any other manner prejudice the credibility, impartiality, independence or integrity of the Committee of Experts ;
- (b) make private use of or profit from any confidential information gained as a result of being a member of the Committee of Experts.

Disclosure of Conflicting Interests

3. If a member of the Committee of Experts is directly or indirectly interested in any contract, proposed contract or other matter before the Committee of Experts, such member shall disclose the fact and shall not take part in the consideration or discussion of, or vote on, any question with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter.

4. This Code shall apply with necessary modifications to the staff of the Committee of Experts.

MEMORANDUM OF OBJECTS AND REASONS

This Bill is the result of the deliberations of the National Accord and Reconciliation Committee formed after the political crisis triggered by the disputed elections held on 27th December, 2007. The Committee held its deliberations under the auspices of the Panel of Eminent African Personalities comprising the former Secretary-General of the United Nations, His Excellency Kofi Anan, His Excellency Benjamin Mkapa, former president of Tanzania and Her Excellency Madam Graca Machel. Its deliberations culminated in the signing of an agreement on the principles of partnership of coalition Government, amendment of the Constitution of Kenya to create the office of the Prime Minister, the enactment of the National Accord and Reconciliation Act and ultimately the establishment of a coalition Government.

As a lasting solution to the underlying problems that brought about the political crisis, the National Dialogue and Reconciliation Committee resolved to complete the comprehensive review of the constitution of Kenya within a period of twelve months. This bill therefore seeks to give effect to the completion of the comprehensive review of the constitution.

Part I: This part provides for preliminary matters, the objectives of the Constitution review, the organs for review and the guiding principles. The objectives of the Constitution review include guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well being of the people of Kenya; establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action; recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya; promoting the people's participation in Governance of the country through democratic, free and fair elections and the devolution and exercise of power; and respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities.

The Bill provides that the review process shall be completed through a well coordinated process involving the following four organs namely; the Committee of Experts, the Parliamentary Select Committee, the National Assembly and the referendum.

The Bill further provides that the review organs shall be guided by principles of national interest, accountability to the people of Kenya and accommodation of the diversity of the Kenyan people. The process will be participatory and will ensure that the review process reflects the wishes of the Kenyan people.

Part II: Provides for the establishment and composition of the Committee of Experts. The Committee of Experts shall be comprised of seven people three of whom shall be non-citizens nominated competitively by the Parliamentary Select Committee. There shall also be a Director of the of the Committee of Experts who shall be responsible for the day to day running of the affairs of the Committee.

Part III: This part provides for the functions and powers of the Committee of Experts. The Committee of experts shall:

- (a) identify the issues already agreed upon in the existing draft constitutions;
- (b) identify the issues which are contentious or not agreed upon in the existing constitutions;
- (c) solicit and receive from the public written memorandum and presentations on the contentious issues;
- (d) undertake thematic consultations with caucuses, interest groups and other experts;
- (e) carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional system;
- (f) articulate the respective merits and demerits of proposed options for resolving the contentious issues;

- (g) make recommendations to the Parliament Select Committee on the resolution of the contentious issues in the context of the greater good or the people of Kenya;
- (h) prepare a harmonized draft Constitution for presentation to the National Assembly;
- (i) facilitate civic education to create public awareness of constitutional issues;
- (j) liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution; and
- (k) do such other things as are incidental or conducive to the attainment of the objects and principles of the review process.

It is provided that the Parliamentary Select Committee shall resolve any contentious issues on the basis of the recommendations given by the Committee of Experts.

Part IV: This part provides for the Report of the Committee of Experts and action thereon. Upon completion of its work, the Committee of Experts is expected to present its report and the draft Constitution to the Parliamentary Select Committee which shall facilitate the resolution of the identified contentious issues. The parliamentary Select Committee will then table the agreed draft Constitution before the National Assembly for debate and approval subject to any proposals for amendment. Thereafter the Attorney General will publish the Bill for the Electoral Commission to conduct the referendum.

Part V: Provides for the conduct of the referendum and disposal of petitions challenging the referendum result. A petition shall be heard and disposed of on a priority basis by a panel of five judges appointed by the Chief Justice, within fourteen days of the commencement of the hearing.

Part VI: Provides for the expenses of the review process to be charged on and issued out of the Consolidated Fund and for this purpose establishes the Constitution of Kenya Review Fund to be administered on behalf of the Committee of Experts by the Director.

Part VII: Provides that Committee shall be dissolved forty five days after the day the president proclaims the new Constitution to be law, or forty five days after the publication of the final result of the referendum, if the proposed new Constitution has not been ratified.

The enactment of this Bill shall occasion additional expenditure of the public funds which shall be provided for through estimates.

Dated the 19th June, 2008.

MARTHA KARUA,
Minister for Justice, National Cohesion
and Constitutional Affairs.