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CONTENT

Act—

PAGE

The Constitution of Kenya Review (Amendment) Act, 2004.....243

**THE CONSTITUTION OF KENYA REVIEW
(AMENDMENT) ACT, 2004**

No. 9 of 2004

Date of Assent: 29th December, 2004

Date of Commencement: 22nd April, 2005

AN ACT of Parliament to amend the Constitution of Kenya Review Act to provide for participation of the people of Kenya in the making of a new Constitution through the National Assembly and a referendum and to provide for certain other matters

ENACTED by the Parliament of Kenya as follows:-

1. This Act may be cited as the Constitution of Kenya Review (Amendment) Act, 2004.

Short title

2. Section 4(2) of the Constitution of Kenya Review Act, in this Act referred to as "the principal Act", is amended by deleting the words "section 32" and substituting therefor the words "Part VI".

Amendment to
s 4(2) of Cap
3A

3. Section 15(1) of the principal Act is amended by deleting the words "terminate on the date of the repeal of this Act under section 32, subject to the provisions of that section as to the winding up of the financial and administrative affairs of the Commission" and substituting therefor the words "terminate in accordance with section 33".

Amendment to
s 15(1) of Cap
3A

4. Section 17 of the principal Act is amended by inserting the following new paragraphs after subparagraph (xvi) -

Amendment to
s 17 of Cap
3A

- (e) conduct and facilitate civic education to support the referendum under section 28;

- (f) monitor the conduct of the referendum under section 28.

Replacement of
Part IV of Cap
3A

5. Part IV of the principal Act is repealed and the following substituted therefor —

**PART IV – THE MAKING OF A NEW
CONSTITUTION**

Sovereign
right and
power of
people of
Kenya to
make new
Constitution

26. Recognizing that the people of Kenya collectively have the sovereign right and power to replace the Constitution with a new Constitution, sections 27, 28 and 28A are enacted to facilitate the exercise of that right and power

Proposal of
new
Constitution

27.(1) Within ninety days after this section comes into operation the National Assembly shall -

- (a) debate the draft Bill as adopted by the National Constitutional Conference on 15th March 2004 and a report by the Commission; and
- (b) submit to the Attorney General, the draft Bill and recommendations only on contentious issues as identified and recommended by the Parliamentary Select Committee on Constitution Review for approval by the National Assembly

(2) In considering the report and the

2004

draft Bill, the National Assembly may undertake consultations to initiate, facilitate and promote a national consensus on contentious issues as recommended by the Parliamentary Select Committee on Constitutional Review and approved by the National Assembly.

(3) Within thirty days after the National Assembly submits the draft Bill to the Attorney-General, the Attorney-General shall publish the proposed new Constitution based on the draft Bill and amendments as approved by the National Assembly.

Ratification by
the people of
Kenya by
referendum

28.(1) Within ninety days after the Attorney-General publishes the proposed new Constitution under section 27(3), the Electoral Commission shall hold a referendum to give the people of Kenya the opportunity to ratify the proposed new Constitution.

(2) The question upon which the people shall vote in the referendum shall be whether they are for or against the ratification of the proposed new Constitution.

(3) The proposed new Constitution shall be ratified by a simple majority of the votes cast in the referendum.

(4) The persons who may vote in the referendum are the persons who are

registered to vote in elections to the National Assembly.

Cap 7

(5) The National Assembly and Presidential Elections Act shall apply, with necessary modifications, with respect to the conduct of the referendum, subject to the regulations under section 34(3).

Cap 66

(6) The Election Offences Act shall apply with respect to the referendum as though it were an election within the meaning of that Act.

(7) The Commission shall facilitate and coordinate civic education on the referendum.

Process after
ratification
referendum

28A.(1) The Electoral Commission shall publish the result of the referendum in the Gazette.

(2) If no application is made under section 28B challenging the conduct or result of the referendum within the time limit for making such applications, the result of the referendum shall be final upon the expiry of that time limit.

(3) If an application is made under section 28B challenging the conduct or result of the referendum within the time limit for making such applications, the result of the referendum shall not be final until all such applications are finally disposed of.

(4) If the final result of the referendum is that the people of Kenya have ratified the proposed new Constitution, the President shall, within 14 days promulgate and publish the text of the new Constitution in the Gazette.

(5) The new Constitution shall become law when it is proclaimed to be law under subsection (4) and it shall come into operation immediately, subject to any provisions in the new Constitution for its commencement.

Application to
court to
challenge
referendum

28B.(1) The conduct or result of the referendum may be challenged only by application to the High Court made within fourteen days after the publication of the result of the referendum under section 28A(1).

(2) The applicant shall give notice of the application to the Attorney-General and the Electoral Commission within seven days after the application is made.

(3) The applicant shall publish a notice of the application in the Gazette within fourteen days after the application is made.

(4) Within seven days after the application is made the applicant shall deposit five million shillings with the court as security against costs.

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

Composition
of court

28C.(1) An application under section 28B 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

28D.(1) On an application under section 28B challenging the conduct or result of the referendum the Court may -

- (a) dismiss the application;
- (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 and order a new referendum to be held.

(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.

(3) In subsection (2), the "applicable law" means -

(a) this Act; and

Cap 7
Cap 66

(b) the National Assembly and Presidential Elections Act and the Election Offences Act as those Acts apply under section 28.

(4) If the court orders a new referendum to be held, subsections (2) and (3) of section 28 and sections 28A to 28I shall apply with respect to that new referendum.

Determination
on priority
basis

28E. An application under section 28B shall be heard and determined by the Court expeditiously and in any event within forty five days.

Court decision
is final

28F. The determination by the Court on an application under section 28B shall be final.

Withdrawal

28G. An application under section 28B 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

28H. The following provisions of

Cap 7 to
apply

the National Assembly and Presidential Elections Act apply, with necessary modifications, to an application under section 28B -

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

Other
procedure

28I. Subject to sections 28B to 28H the Chief Justice may give directions with respect to the procedure for an application under section 28B.

Validity of
past work of
Commission
and
Conference

28J. To ensure there is no doubt as to their validity, the following are declared to have been authorized by, and to have been done in accordance with, this Act:—

- (a) the work of the Commission;
- (b) the work of the National Constitutional Conference in discussing, debating, amending and adopting the draft Bill.

Insertion of s
30A into Cap
3A

6. The principal Act is amended by inserting the following new section immediately after section 30 —

Disposal of
assets and
liabilities on
dissolution of
Commission

30A. Upon the dissolution of the Commission under section 33, any assets and liabilities of the Commission, other than assets described in subsection 30(5), shall become assets and liabilities of the Government.

7. Section 33 of the principal Act is repealed and the following new section substituted therefor —

Replacement of
s 33 of Cap
3A

Dissolution
of the
Commission

33.(1) If the final result of the referendum is that the people of Kenya have ratified the proposed new Constitution, the Commission shall stand dissolved thirty days after the day the President proclaims the new Constitution to be law.

(2) If the final result of the referendum is that the people of Kenya have not ratified the proposed new Constitution, the Commission shall stand dissolved thirty days after that result became final.

(3) During the period described in subsection (1) or (2), the Commission shall ensure that its affairs are wound up in an orderly way 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 to the relevant ministry; and

- (b) its files and records are preserved and transferred to the relevant Ministry.

(4) The terms of the Commissioners shall expire upon the dissolution of the Commission.

(5) Upon the dissolution of the Commission, persons who have served as Commissioners or staff of the Commission for three years or more shall be entitled to such gratuities and other benefits as the Minister responsible for finance may determine.

Amendment to
s 34 of Cap
3A

8. Section 34 of the principal Act is amended –

- (a) by deleting paragraph (2)(d);
(b) by inserting the following new subsection after subsection (2) -

(3) The Electoral Commission, in consultation with the Commission and the Parliamentary Select Committee on Constitutional Review, may make regulations prescribing the procedure for the holding of a referendum under section 28.

Insertion of s
36 into Cap 3A

9. The principal Act is amended by inserting the following new section immediately after section 35 —

Expiry of
Act

36.(1) This Act shall expire when the Commission is dissolved.

(2) The expiry of this Act shall not affect the operation of section 33(4).

10. The principal Act is amended by inserting the following new section immediately after section 36 -

Insertion of s 37
into Cap 3A

Time may be
extended
upon
request

37. The National Assembly may extend the time prescribed under the Act by such period as it may deem appropriate.