



NATIONAL ASSEMBLY

**REPORT OF THE PARLIAMENTARY SELECT
COMMITTEE ON THE REVIEW OF THE CONSTITUTION
ON THE REVIEWED HARMONIZED DRAFT
CONSTITUTION**

**Comprising the Recommendations agreed upon as a result of the
deliberations of the Parliamentary Select Committee on the
Review of the Constitution in accordance with Section 32(1)(C) of
the Constitution of Kenya Review Act, 2008 and Presented to the
Committee of Experts Pursuant to Section 33(1) of the
Constitution of Kenya Review Act, 2008 on 29th January, 2010**

29TH JANUARY 2010

**Kenya National Assembly
Parliament Buildings
NAIROBI**

29th January 2010

PREFACE

The National Assembly appointed the Parliamentary Select Committee on the Review of the Constitution through a resolution of the House on Wednesday, December 17, 2008. The Parliamentary Select Committee on the Review of the Constitution is established pursuant to the provisions of Section 7 of the Constitution of Kenya Review Act (No. 9 of 2008) and section 123 of the Constitution.

Section 7 of the Review Act states as follows-

- 1. The National Assembly shall establish, in accordance with its Standing Orders, a Select Committee to be known as the Parliamentary Select Committee on the Review of the Constitution (hereinafter referred to as the “Parliamentary Select Committee”) consisting of twenty seven Members, to assist the National Assembly in the discharge of its functions under this Act.*
- 2. In constituting the Parliamentary Select Committee, the National Assembly shall ensure regional and gender balance in the composition of the Committee.*

Section 123 of the Constitution provides as follows-

‘Parliamentary Select Committee’ means the Parliamentary Select Committee on the Review of the Constitution’.

The Committee comprises the following Members-

The Hon. Mohammed Abdikadir, M.P.	-	Chairperson
The Hon. Ababu Namwamba, M.P.	-	Vice-Chairperson
The Hon. Martha Karua, M.P.		
The Hon. Uhuru Kenyatta, M.P.		
The Hon. Mutula Kilonzo, M.P.		
The Hon. David Musila, M.P.		
The Hon. Moses Wetangula, M.P.		
The Hon. Danson Mungatana, M.P.		
The Hon. Wilfred Moriasi Ombui, M.P.		
The Hon. Kambi Kazungu, M.P.		
The Hon. Amina Abdallah, M.P.		
The Hon. Peter Munya, M.P.		
The Hon. Mwangi Kiunjuri, M.P.		
The Hon. Jeremiah Kioni, M.P.		
The Hon. Ekwee Ethuro, M.P.		
The Hon. Isaac Ruto, M.P.		
The Hon. Musalia Mudavadi, M.P.		
The Hon. Chachu Ganya, M.P.		
The Hon. Najib Balala, M.P.		
The Hon. (Dr.) Sally Kosgei, M.P.		
The Hon. William Samoei Ruto, M.P.		
The Hon. James Orengo, M.P.		
The Hon. Millie Odhiambo, M.P.		
The Hon. Sophia Abdi, M.P.		

The Hon. Joseph Nkaissey, M.P.
The Hon. Charity Ngilu, M.P.

On Friday, 8 January 2010, the Committee received the Reviewed Harmonized Draft Constitution from the Committee of Experts which it deliberated on during its Retreat at Naivasha from 18-28 January 2010.

This report contains the recommendations of the Committee which were arrived at after lengthy deliberations on the Harmonized Draft Constitution. The deliberations culminated in the subsequent modification of the Draft. The recommendations of the Committee are appended to this report.

In reviewing the Harmonized Draft Constitution, the Committee has taken into consideration the views of the public as contained in the reports of the Committee of Experts, and especially in an attempt to resolve the contentious sections. It has made reference to provisions in the Constitution of Kenya, the draft Constitutions compiled by CKRC, the Bomas conference and the Proposed New Constitution (Wako draft). It also referred to Constitutions of other jurisdictions. It is the hope of the Committee that the report and its recommendations will facilitate and assist in the finalization of the review process.

I take this opportunity to thank the Members of the Select Committee for their commitment and dedication to the process, the Speaker and Clerk of the National Assembly for facilitating the committee work, the experts who appeared before the committee to share insight on matters before it and the Secretariat for their hard work during the long sitting hours which on many occasions extended into the night. Their efforts and efficiency made the production of this report on the Draft Constitution possible.

It is now my pleasure and privilege to present this report of the Parliamentary Select Committee on Review of the Constitution on the reviewed Harmonized Draft Constitution to the Committee of Experts pursuant to section 33 of the Constitution of Kenya Review Act, 2008.

**HON. ABDIKADIR MOHAMMED, MP
(CHAIRPERSON)**

DATE

1.0 INTRODUCTION

The Parliamentary Select Committee on the Review of the Constitution (PSC) was appointed by the National Assembly through a resolution of the House on 17 December 2008. Section 5 of the Review Act (2008) identifies the Parliamentary Select Committee as one of *'the organs through which review of the Constitution shall be completed'*. The other organs are the Committee of Experts, the National Assembly and the referendum.

The mandate and functions of the PSC are stipulated in the Review Act (No. 9 of 2008) and the Constitution of Kenya (Amendment) Act (No. 10 of 2008) which were formulated by the grand Coalition Government to facilitate the completion of a comprehensive review of the Constitution that stalled following the referendum of 2005.

The PSC has several functions in the constitutional review process as follows:-

- (a) It is an organ of review;
- (b) Constituting the four bodies necessary for the completion of the review process, namely-
 - (i) Committee of Experts, CoE (Section 8 of the Review Act, 2008);
 - (ii) Interim Independent Electoral Commission, IIEC (Section 2 of the Constitution of Kenya (Amendment) (No.10 Act, 2008);
 - (iii) Interim Independent Boundaries Review Commission, IIBRC (Section 2 of the Constitution of Kenya (Amendment) (No.10 Act, 2008); and
 - (iv) Interim Independent Constitutional Dispute Resolution Court, IICDRC (Section 7 of the Constitution of Kenya (Amendment) (No.10 Act, 2008)

These bodies have been constituted and are now operational.

Pursuant to the provisions of section 30 (1), the CoE is mandated to prepare a report and Harmonized Draft Constitution, as follows-

'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.'*

The CoE is required to submit the report and draft Constitution to the Parliamentary Select Committee on the review of the Constitution (PSC) pursuant to section 32 (1), as follows-

'The Committee of Experts shall-

- a) upon preparation of its report and the harmonized draft Constitution referred to in section 30-
 - 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 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.'*

The CoE released the Harmonized Draft Constitution to the public on 17 November 2009 and consequently received views that culminated into the review of the Harmonized Draft Constitution. The CoE in the discharge of its functions under section 32 (1) (c) presented a report and the Revised Harmonized Draft Constitution to the PSC on Friday, 8 January 2010.

During its sitting on 8 January 2010, the PSC deliberated on its mandate and functions relating to the reviewed Draft Constitution. It was at the meeting that the Committee resolved to hold a one week retreat at the Great Rift Valley Lodge, Naivasha, on 18-22 January 2010, to consider on the Harmonized Draft Constitution in furtherance of its functions under the Review Act. The Committee was however unable to finalize its work by 22 January and therefore extended the period of the retreat by a further five days, until Thursday 28 January 2010.

2.0 MODUS OPERANDI OF THE COMMITTEE

In the execution of its mandate and functions, the Parliamentary Select Committee operated pursuant to the provisions of the Constitution of Kenya Review Act (2008), the National Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya, the Standing Orders, practices and procedures of the National Assembly.

The Committee's sittings in Naivasha culminated in the production of this report. It held a total of ten sittings some of which extended into the night, in order to meet the deadline stipulated in the law.

All decisions of the Committee were arrived at by consensus.

3.0 THE REVIEWED HARMONIZED DRAFT CONSTITUTION

The Parliamentary Select Committee (PSC) deliberated on the Reviewed Harmonized Draft Constitution (HDC) based on the recommendations of the Committee of Experts (CoE) as per the requirements of Section 32(1) (c). In arriving at its recommendations, the PSC made reference to various Draft Constitutions compiled earlier in the constitutional review process which stalled following the referendum of 2005. The Draft Constitutions include-

1. the Draft Constitution compiled in 2002 by CKRC;
2. the National Constitutional Conference of 2004 (*Bomas* Draft); and
3. the proposed new Constitution of 2005 (*Wako* Draft)

The Committee made reference to the Constitution of Kenya and Constitutions of other countries.

The PSC also considered the Harmonized Draft Constitutions and reports of the CoE, as follows:-

1. the Revised Harmonized Draft Constitution of 2010;
2. the Harmonized Draft Constitution of 2009;
3. the Preliminary report of 17 November, 2009; and
4. the final report of 8th January, 2010.

Pursuant to Section 30(1) of the Review Act (2008), the Committee of Experts identified three contentious issues on which it collected and collated views from the public and which were incorporated in the Reviewed Harmonized Draft Constitution. The CoE listed the contentious issues, as follows-

- i) System of Government;
- ii) Devolution; and
- iii) Transitional and consequential provisions.

These issues are covered in Chapters Ten, Twelve and Nineteen of the Reviewed Harmonized Draft Constitution.

The CoE also identified issues that were non-contentious as follows-

- i) Prisoners' Rights;
- ii) Limitations of Rights in the Bill of Rights;
- iii) Electoral System
- iv) *Kadhis* Courts; and
- v) Land.

The CoE observed that the three Draft Constitutions (CKRC, *Bomas* and *Wako*) were in agreement on these issues but they had some differences, including drafting approaches.

The Parliamentary Select Committee is mandated by the Review Act (2008) to build consensus on the Reviewed Harmonized Draft Constitution by the CoE, and to make the necessary recommendations towards that end.

4.0 SUMMARY OF THE PROCEEDINGS ON THE REVIEWED HARMONIZED DRAFT CONSTITUTION

The Parliamentary Select Committee considered the Draft Constitution and made recommendations in furtherance of its mandate. It invited experts to clarify various issues especially pertaining to representation. A summary of the proceedings of the Committee are presented here below.

4.1 The Preamble

The Preamble was agreed to, with minor amendments being made. The preamble was adopted as providing the guiding principles of the Constitution.

4.2 Chapter One: *Sovereignty of the People and Supremacy of the Constitution*

The Committee considered this Chapter and removed details which could be provided through legislation.

4.3 Chapter Two: *The Republic*

The Committee edited this Chapter to remove the name of the capital and merged Articles 11 and 12 as in the reviewed draft by the PSC.

4.4 Chapter Three: *National Values and Culture*

The Committee noted that the aforementioned draft Constitutions contained a chapter on National Values but not amalgamated with culture as in the Reviewed Harmonized Draft Constitution. However, the Committee was of the view that culture need not be entrenched in the Constitution and recommended for its deletion from the Harmonized Draft Constitution. The Committee recommended for the deletion of Article 13(2) and its redrafting to give a broad statement, while also recommending for the merging of Articles 13 and 12, and consequent amendment to the title to read ‘**National Values, Days and Symbols.**’

4.5 Chapter Four: *Citizenship*

The Committee noted that despite the slight difference in the drafting, this chapter has broadly remained the same in all the Draft Constitutions. The Committee edited the Chapter to remove content which could be contained in an Act of Parliament, and to make it technically sound. Subsequently, the Committee made changes as contained in its recommendations accompanying this report. In particular, Article 16 and 17 were merged.

Further, details on the application and interpretation of the Bill of Rights were deleted as that remains the function of the courts.

4.6 Chapter Five: *The Bill of Rights*

The various Draft Constitutions provide, in greater detail, for the rights of individuals and communities to ensure social, economic and cultural justice, and the realization of full potential and dignity of all human beings. The Chapter also outlines the special circumstances under which these rights are limited or curtailed.

The Committee analyzed the contents of the Articles in the Chapter and made changes it deemed necessary. In particular the whole of part 3 on specific application of rights was deleted in the draft except Article 67(1) and (2) on family, and proposed the provisions on this part could be provided by enabling legislation.

The Committee further noted that the deleted part was not providing any additional right not granted elsewhere in the Constitution.

4.7 Chapter Six: *Land and Environment*

The issue of land was not identified as a contentious issue by the Committee of Experts although it remained an issue of concern in the country since independence. Land issues were in fact identified under agenda 4 as having contributed in the events leading to the post election violence in Kenya in 2008.

In making its recommendations on this Chapter, the Committee took into account relevant articles relating to land covered elsewhere in the Harmonized Draft Constitution. The comprehensive land policy recently passed by Parliament, also apply in this Section. In particular, the provisions of Article 47 of the chapter on the Bill of Rights were cited.

Due to the significance attached to the environment and the close linkage with land, the environment-related issues have been mainstreamed in the Constitution under this Chapter on land.

4.8 Chapter Seven: *Leadership and Integrity*

To ensure that the leadership is made accountable to the people and to provide checks and balances on the integrity of the people appointed to hold public office, Chapter Eight provides for criteria for the appointment and conduct of public officers. The Committee considered this Chapter and effected minimal changes by removal of details which could be contained in enabling legislation.

In particular the Committee deleted Article 95 relating to the establishment of Ethics and Anti-Corruption Commission in this Section since it is already provided by an Act of Parliament.

4.9 Chapter Eight: *Representation of the People*

The Committee debated at length the factors to be considered in the delineation or determination of constituency boundaries including population and area, among other factors. In order to ensure equity and equality in representation, the Committee considered the application of a standard mathematical formula as a basis for allocating seats.

The Committee noted that population, area, whether an area was in urban or rural settings and whether it was sparsely populated was important in determining constituencies in Kenya.

Consequently the Committee recommended a total of 290 constituencies subject to be delineated by the Interim Independent Boundaries Review Commission (IIBRC) taking into cognizance the following-

- i) That, the delineation of electoral areas shall take into account a mean deviation of 30% for all areas, save for sparsely populated areas and cities, which will have a delineation of no more than 40%.
- ii) That, the boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota.
- iii) Definition of population quota: **“the number obtained by dividing the number of inhabitants of Republic of Kenya by the number of constituencies into which the country Republic of Kenya is divided”**.
- iv) As demographics and level of development change, the number and boundaries shall be reviewed and adjusted to bring the deviations close to the mean.

Accordingly the committee reviewed Articles 107 (3) – (8) to reflect these recommendations. The Committee also recommended the retention of the 210 constituencies, as delineated (for only the next election) and additional 80 constituencies.

4.10 Chapter Nine: *The Legislature*

After lengthy deliberations, the Committee resolved that Kenya should have a two chamber parliament consisting of the National Assembly and a Senate. The National Assembly shall have more legislative power than the Senate, which will coordinate the activities of the regional assemblies.

The specific changes introduced in this Chapter include-

- i. The provisions for two houses: National Assembly (Upper House) and Senate (Lower House).
- ii. The provisions of Senate in a presidential system.
- iii. The Membership of the National Assembly was agreed at 349 composed of 290 elective constituencies, 47 county representatives and 12 nominated seats.
- iv. The membership of the Senate was agreed at 63 (47 counties and 16 special seats). The 47 county seats to be reserved for women for 20 years following the promulgation of the New Constitution.
- v. The Leaders of the majority and minority parties to be given status equivalent to a Minister.
- vi. The profile of the Chairpersons of parliamentary committees to be enhanced.
- vii. The Clerk of the National Assembly provided with the security of tenure.
- viii. The quorum for the National Assembly and Senate are fixed at 50 and 15, respectively.
- ix. The amendment of the membership of the Parliamentary Service Commission to Nine composed of the Speaker, Minister for Finance (ex officio Member), five Members and two from private sector.
- x. Removal of Article 149 (5) in the Harmonized Draft Constitution relating to the functions of Parliamentary Service Commission, and replacing it by section 45B (5) of the current Constitution of the republic of Kenya.

4.11 Chapter Ten: *The Executive*

The Committee debated at length on the merits and demerits of Presidential, Parliamentary and Hybrid Systems of Government based on the proposals on the three Draft Constitutions (CKRC, *Bomas*, and *Wako*) and the Reviewed Harmonized Draft Constitution. The Committee took into consideration views expressed by the public that they want to elect the President directly, and made the following recommendations on the system of government to enhance/ensure checks and balances-

- 1) There be separation of powers.
- 2) The President be elected by universal suffrage with a majority vote of 50%+1, and wins 25% in more than half the counties.
- 3) The President be both head of State and Government. He / she should have a running mate.

- 4) The Members of the Cabinet be appointed from outside Parliament by the President and approved by Parliament; If a Member of Parliament is appointed to the Cabinet he/she relinquishes seat.
- 5) The Chairs of Parliamentary Committees be given a higher profile commensurate with status equal to Ministers.
- 6) The appointment of directors of state corporation to be vetted by relevant Departmental Committees.
- 7) Parliament to have its own calendar.
- 8) Parliamentary and Presidential elections to be held separately.
- 9) Impeachment of the president for gross misconduct and violation of the constitution.
- 10) If the President vacates office, the running mate (Deputy President) to serve the remainder of the term, and if the running mate serves more than half the original term, this be construed to be full term.
- 11) The President should be nominated by a political party.
- 12) The Cabinet should consist of not more than twenty-five Ministers and that not more than two-thirds of the Cabinet should be of either gender.
- 13) The Cabinet should reflect the regional diversity of Kenya.
- 14) The President should have the power to establish offices, other than constitutional offices, in the public service

Based on these guiding principles which the Committee considered would provide checks and balances of the Executive, it recommended the Presidential System of Government as proposed by the CKRC Draft Constitution as basis to recast and amend the Articles on this Chapter.

4.12 Chapter Eleven: *Judiciary*

The Chapter on Judiciary was not considered contentious by the Committee of Experts although Judiciary is one arm of Government that has raised concern among the public in its dispensation of justice and the question of its independence. The Committee deliberated on the Chapter and made to remove clauses which could be addressed through legislation.

One of the most notable modifications in the Chapter is the removal of the Constitutional Court from the Harmonized Draft as it was considered an *ad hoc* institution (formed when need arises) and that its functions will best be performed by the Supreme Court. The Committee also made major changes in the composition of the Judicial Service Commission to reflect cross section of professionals.

4.13 Chapter Twelve: *Devolved Government*

In line with the desire of the people for a devolved decision making and dispersal of power to the grassroots which has been expressed in their views to CoE and provided for in all the Draft Constitutions, the Committee deliberated on this Chapter taking into account the operations of the Local and Central Governments, and the Constituencies' Development Fund mechanism. The Committee agreed on the following-

- 1) The principle of devolution is necessary;
- 2) Two-tier system of devolved Government;
- 3) There should be a Senate at National level and a regional assembly based at counties.
- 4) Creation of 47 counties were accepted as contained in the Harmonized Draft.

- 5) One person elected per county to the Senate through universal suffrage.
- 6) Senate will be the lower House. An equalization fund consisting of 0.5% of revenue collected would be set up.
- 7) Senate to deal with the following matters touching on devolved units-
 - a) proposals for allocation of equalization fund to the counties in the national annual estimates of revenue and expenditure;
 - b) annual proposals for division of revenues among the counties;
 - c) any terms and conditions on which the national government may guarantee external loans to county governments;
 - d) any Bill in the National Assembly that may seek to amend, abrogate or alter the taxation and borrowing powers of a devolved government;
 - e) approve such appointment by the executive as may be required by written law;
 - f) any Bill in the National Assembly that affects or concerns devolved governments;
 - g) oversight over devolved funds; and
 - h) initiate legislation on matters relating to devolved units.
- 8) A Bill shall concern devolved governments if its implementation affects-
 - a) the boundaries of the counties;
 - b) taxation and borrowing powers of devolved governments;
 - c) election of members of devolved governments;
 - d) allocation of equalization funds to the county governments; and
 - e) division of revenues between the national and county governments.
- 9) A proposal by the Senate to a Committee of the National Assembly shall be tabled by the Committee in the House which may only veto or vary such proposal by a two-thirds majority vote.

The Committee made changes on the Harmonized Draft Constitution to reflect these agreed issues.

4.14 Chapter Thirteen: *Public Finance*

The contents provided in the Articles under this chapter were amended to take into account equitable distribution of resources in view of the proposed two tier system of devolved government and to remove details in the Harmonized Draft Constitution which are provided by an Act of Parliament.

The major amendment made in this Section is the removal of Articles 253-255 in the revised Harmonized Draft Constitution and replacement with Article 259(2)-(9) of the Harmonized Draft Constitution of 2009. The details of these changes are reflected in the amended revised Harmonized Draft by the PSC.

4.15 Chapter Fourteen: *The Public Service*

One of the major modifications in this Chapter is deletion of Article 268 and its replacement as in the Draft of the PSC appended to this report. The Committee recommended for the inclusion of the qualifications and the number of Commissioners to the Public Service

Commission in the Constitution. It recommended further that the Commissioners be vetted by Parliament.

The Committee made changes to the Draft Constitution by deleting parts 4 and 5 which provides for the establishment of the Health Service Commission and the Kenya Correctional Service given that they could be adequately catered for in the relevant Acts of Parliament.

4.16 Chapter Fifteen: National Security

The Committee recommended for the removal of Kenya Police Service in the Harmonized Draft Constitution and replaced by Kenya Internal Security Services to encompass the Regular Police and the Administration Police as independent units to be headed by Inspector General.

The functions of the:-

- i) National Security Council;
- ii) Director-General of the Service;
- iii) National Intelligence Council; and
- iv) Inspector-General;

were proposed for deletion in the Harmonized Draft Constitution, and that these be provided for by the enabling legislations.

4.17 Chapter Sixteen: Commissions and Independent Offices

This section was considered in relation to the changes that have already been introduced in chapters Seven and Fifteen, on Leadership and Integrity and on Public Service, respectively. The Committee made consequential amendments with the removal of the Ethics and Anti-Corruption Commission, the Health Services Commission, the Commissioner of Political Parties and the Police Service Commission. It introduced the Kenya Internal Security Service and Parliamentary Service Commission into the Draft Constitution. An amendment to provide for the position of Secretary to Commissions, as the Chief Executive Officer, was introduced in Article 293.

4.18 Chapter Seventeen: Amendment of the Constitution

The provisions of this chapter were adopted with minor amendments on Article 302 to reflect the proposed structure of the legislature.

4.18 Chapter Eighteen: General Provisions

The Committee adopted this chapter with minor amendments of Article 306 and in particular inclusion of population quota under the chapter on the representation.

4.19 Chapter Nineteen: Transitional and Consequential Provisions

The amendments made under this section are generally consistent with the changes that have been made in the preceding chapters of the Harmonized Draft Constitution. The major recommendations include-

1. The deletion of Oath of Office of the Prime Minister at Section 90 of the Third Schedule.
2. The reduction of time period within which Parliament provide for legislations, at Section 306 (1) of the fifth schedule, relating to-
 - a) Legislation on citizenship
 - b) Legislation on Elections
 - c) Establishment of Independent Boundaries Commission
 - d) Membership of the Senate and National Assembly
 - e) Procedure of Presidential election
 - f) All legislations for the establishment and operation of devolved government
 - g) Relationship between governments at different levels.
3. Removal of Sections 5 (1)-(3) of the Sixth Schedule with reference to Commission on the Implementation of the Constitution since implementing the Constitution rest nor with parliament.
4. The removal of Sections 5 (5) – (9) relating to Commission on Implementation of Constitution (CIC) and the establishment of a Parliamentary select Committee on Implementation thereof within one month of the effective date.
5. Retention of the Provincial Administration by removal of Sections 16 (1) – (5) and replaced with the words **“Provincial Administration will be retained and restructured to take into account the provision of this Constitution”**.
6. Removal of Sections 36 and 37 of Part 5 (Miscellaneous). The Truth, Justice and Reconciliation Commission (TJRC) has been established to address the provisions of these Sections.

5.0 CONCLUSION

The making of a Constitution is a challenging task which requires the cooperation of all stakeholders. The Committee has utilized public views as expounded in the Reports of the Committee of Experts. It is the hope of the Committee that with the cooperation of all the stakeholders and bodies of the review process Kenya will be able to complete this comprehensive review of the Constitution.