

From Bommas to Leisure Lodge

**Gains and Losses in Select Thematic
Areas of the Proposed Constitution**

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I Foreword

Living under a new Constitutional dispensation has been the aspiration of many Kenyans for a long time. The Constitution reform process has gained considerable momentum, including widespread popular support, before and during the Constitutional Conference at the Bomas of Kenya. Since then, the way forward has not been clear, or at least, it has been subject to heated debate.

A Constitution reform process is, of course, not an end in itself. It is an opportunity for a society to revisit the key questions, “How do we want to live together?” and “How do we want to be governed?” In this context it must contribute to bring a society, in this case the Kenyan people, closer together and to broaden consensus amongst the citizens. Such results can only be achieved, if lessons from past oppression and injustices are being learnt and translated into a better Constitutional dispensation.

This process is still ongoing in Kenya today. The Publication of the draft Constitutional Bill by the Attorney General has, only re-ignited the debate. As part of our contribution to the process we have prepared this publication. We wish to thank Francis Ang’ila who prepared the manuscript. We are also grateful to the League of Kenya Women Voters, Citizens Coalition for Constitutional Change, Kenya Land Alliance, Media Council of Kenya, Association of Local Government Authorities of Kenya, Youth Agenda, Koki Muli and Barack Muluka for their input and to my colleague Collins Odote who coordinated the process. It is hoped that this publication will aid Kenyans in determining the merits and demerits of the proposed new Constitution.

Fritz Kopsieker
Resident Director, FES

I Introduction

The process of reviewing Kenya's constitution, which began in the early 1990s with debate on whether or not it should be reviewed or overhauled, is projected to soon come to an end. Its result may be known a few days after November 21, which is the date that the Electoral Commission of Kenya (ECK) has set aside for the referendum on the draft of The Proposed New Constitution of Kenya. It is a process that has been as lengthy as it has been acrimonious. Although a legislative framework for reviewing the Constitution was agreed on in November 2000, it was not until December 2001 that work began in earnest – after negotiations to merge the government-appointed Constitution of Kenya Review Commission (CKRC) with the faiths-led People's Commission of Kenya (PCK).

Between December 2001 and July 2002, the CKRC went round the country collecting and collating the views of Kenyans of all walks of life concerning the issues they wanted addressed in the new constitution. The CKRC produced a report and a Draft Constitution by October 2002. The National Constitutional Conference, which started in November of that year, was scuttled when the President dissolved Parliament prior to the 2002 General Elections. It resumed in April 2003 but it was not until March 2004 – one year later – that the delegates adopted a draft constitution. Government “consensus-building” efforts resulted in a revised draft, published by the Attorney-General in August 2005. Barring any changes to the schedule set by the ECK, a referendum is to be held on November 21, 2005 at which Kenyans will vote for or against the Proposed New Constitution.

Unsurprisingly, there has been a lot of debate on the issues raised by The Proposed New Constitution. Since the publication of The Proposed New Constitution, there have been a number of commentaries of varied character, depth and intent. There are those who have formed the opinion that The Proposed New Constitution is a hotchpotch of badly drafted provisions sitting on a poor institutional design, amongst other fatal defects. Then there are those who say that the document is an overall improvement on the existing Constitution, albeit with some defects that can be remedied in future. Others insist that the draft is both illegitimate and a claw-back on reform since the process of developing a draft ended when the delegates of the National Constitutional Conference at Bomas adjourned after adopting a Draft Constitution in March 2004. Another shade of opinion is that that though the document has its shortfalls, voting for it is a sure way of keeping Kenya on a reform trajectory.

Public Forum on the Proposed New Constitution

Friedrich Ebert Stiftung (FES) which has been doing work on various issues that are the subject of the proposed New Constitution, in association with the Citizens' Coalition for Constitutional Change (4Cs), Youth Agenda (YAA), Association of Local Government Authorities of Kenya (ALGAK), the Kenya Land Alliance (KLA), the Media Council of Kenya (MCK) and the League of Kenya Women Voters (LKWV), convened a public forum on The Proposed New Constitution on September 15, 2005. To aid the discussions, FES had commissioned a consultant to compare the current constitution (as amended by 2000) with the Bomas Draft (adopted by The National Constitutional Conference on 15th March 2004) and the Proposed New Constitution (published by the Attorney-General on August 23, 2005). The analysis covered 7 themes that the associating organisations had been working on, that is to say, Representation; Women's Issues; Devolution; Land and Natural Resources; Media; Executive Powers; and Youth.

The aim of this exercise was to discuss The Proposed New Constitution (the reality) in light of what specific stakeholder groups wanted (the ideal). In this sense, the current constitution was illustrative of the old order, while the Bomas Draft was the product of the National Constitutional Conference and The Proposed New Constitution the final document on which the referendum may be held. Based on the presentations made by the panellists, and the views of the participants, the following summary has been produced as a basis for continuing debate and civic education on the themes that were discussed.

Highlights of the Proposed New Constitution vis-a-vis the Current Constitution and the Bomas Draft

1. Representation of the People			
Bomas Draft	Current Constitution	Proposed New Constitution	What did Stakeholders Want?
<p>Overall Summary Kenyans would have been represented by elected representatives based on a First Past the Post electoral system with special seats for women and other groups</p>	<p>Overall Summary Kenyans are represented by elected representatives on the basis of a First Past the Post electoral system. There are 210 elected MPs and 12 nominated by political parties on the strength of the seats won by each political party</p>	<p>Overall Summary Kenyans to be represented by elected representatives on the basis of various electoral systems. While the system for electing the president will be First Past the Post, the MPs and representatives in district governments will be elected on the basis of a “mongrel” Mixed Member Proportional electoral system</p>	<p>Overall Summary Stakeholders wanted a more representative system of government. They wanted fairer representation for women, youth and other sections of society such as people with disabilities and workers. However, they also expected a system that was both clear and easy to implement. There is reason to fear that Parliament will become an unwieldy burden on taxpayers (estimates put the numbers at between 390 and 600) but may not necessarily be an effective check on the Executive</p>
<p>A decisive majority and critical support in the regions required to win a presidential election</p>	<p>A simple majority and critical support in the provinces required to win a presidential election</p>	<p>A decisive majority and critical support in the districts required to win a presidential election</p>	

Representation of the People contd...

Bomas Draft	Current Constitution	Proposed New Constitution	What did Stakeholders Want?
Representation based on a first past the post electoral system with modifications to provide affirmative action for women and other groups	People are represented by MPs and councillors elected through a first past the post electoral system	Representation based on a “mongrel” mixed member proportional electoral system with special constituencies for women and affirmative action quotas for women and minorities (s. 116). In addition to the speaker and Attorney General, unelected ministers will also be ex-officio MPs	People wanted a fairer system of representation
To be elected as president, a candidate would have been required to get over 50% of the votes cast and at least 25% of the votes cast in more than 1/2 the regions	To be president, one must garner at least 25% of the votes cast in at least 5 provinces, in addition to having the majority votes	To be elected as president, candidate will have to get over 50% of the votes cast and at least 25% of the votes cast in more than 1/2 the districts	People wanted a president who would also enjoy cross-regional support in the country besides winning a decisive majority
Parliament would have been bicameral (2 chambers)	Parliament is unicameral	Parliament will be unicameral	People wanted a more representative parliament
Independent candidates would have been allowed	All candidates for elections must be nominated by a political party	Independent candidates will be allowed	People wanted the undemocratic tendencies of political parties checked and independent candidates allowed to run
Right to vote would have been recognised and protected	Right to vote not constitutionally recognised and protected	Right to vote will be recognised and protected	People wanted the protection of the right to vote

Representation of the People contd...

Bomas Draft	Current Constitution	Proposed New Constitution	What did Stakeholders Want?
Transparent ballot boxes would have been mandatory	Transparent ballot boxes not mandatory	Transparent ballot boxes will be mandatory	People wanted transparent ballot boxes and a free and fair election process
The number of MPs would have varied from election to election	The number of MPs is set at 222 and 2 ex officio	The number of MPs will vary from election to election	People wanted a reasonable number of MPs
Election supervised by independent Electoral and Boundaries Commission (3-10 people)	Elections supervised by an "independent" Electoral Commission appointed by the President	Election supervised by independent Election and Boundaries Commission (3-9 people)	People wanted the election to be supervised by an independent and impartial body
No ex officio members although there is a Speaker in addition to the other members	The Attorney-General and Speaker are ex officio MPs	The Attorney-General, Speaker and Ministers appointed under s. 168(5) are ex officio MPs	People wanted a representative Parliament

2. Land and Natural Resources

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
Overall Summary Protection of property rights would have been more holistic to include the rights of spouses	Overall Summary Property rights, including those related to land, protected but not adequately. The President has special powers under ordinary legislation to make grants to individuals of government land	Overall Summary Protection of property rights will be more holistic to include the rights of spouses	Overall Summary The provisions on land and other natural resources were supposed to outline the main policy issues that must be addressed if land reform is to achieve its aims

Land and Natural Resources contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
<p>Environmental management gained significance and land use was to be regulated</p>	<p>No recognition of environmental rights (EMCA contains right to a clean and healthy environment) and no requirements on regulation of land use</p>	<p>Environmental management gained significance and land use to be regulated</p>	<p>These include:</p> <ul style="list-style-type: none"> • redress the injustices of colonial and independent regimes-based land dispossession; • deal with the inequitable distribution of land ownership; • the need for security of tenure for all; • the need for sustainable use of land; • the need for equitable access to land and associated resources for development and poverty reduction; • the need to administer and manage public land in an efficient and effective manner; and • the need to guarantee existing property rights; while simultaneously placing the state under constitutional duty to provide redress to unlawfully acquired property
<p>There would have been expanded recognition of land as a national resource (ss. 58, Chapter 7)</p>	<p>The Constitution only recognises Trust Land in regard to which the president has wide powers to alienate. This</p>	<p>There will be expanded recognition of land as a national resource (s. 38, Chapter 7)</p>	<p>People wanted recognition of land as an important natural resource</p>

Land and Natural Resources contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
	power has been abused in the past to hand out large parcels of land as a gift for political support while many Kenyans go without land as a basic means of production and livelihood		
Requirement for a national land policy	Requirement for a national land policy	Requirement for a national land policy	People wanted a national policy on the use of land as a national resource
Land belongs to Kenya as a nation and is designate as public, community or private	It is not clear who land belongs to and designations in ordinary laws are equally unclear. Indeed, the Government Lands Act give the president special powers to make grants or dispositions of any estate, interests or rights in or over unalienated government land	Land belongs to Kenya as a nation and is designate as public, community or private	People wanted a stop to the theft of land and recognition of land as a common heritage for all Kenyans
Property rights of spouses were to be protected	Property rights of spouses not protected and could actually be whittled down by recognition of customary law	Property rights of spouses will be protected	People wanted fairer land ownership
Land use was to be regulated	Land use unregulated	Land use to be regulated	People wanted land use to be regulated

Land and Natural Resources contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
Non-citizens to only hold land on leasehold for not more than 99 years	Non-citizens can hold any interest in land of any term	Non-citizens to only hold land on leasehold for not more than 99 years	People wanted justifiable limitations placed on the land rights of foreigners
National Land Commission was established	No National Land Commission	National Land Commission established	People wanted a National Land Commission
National Environment Commission was established	National Environment Council, NEMA, etc. established under ordinary law with a number of other agencies	National Environment Commission established	People wanted constitutional protection of the environment and natural resources
There was to be expanded protection of natural resources (Chapter 8)	The constitution does not accord protection to the environment and natural resources	There will be expanded protection of natural resources (Chapter 8)	People wanted constitutional protection of the environment and natural resources

3. Women

Bomas Draft	Current Constitution	Proposed New Constitution	What did Stakeholders Want?
Overall Summary The Bill of Rights emphasised the rights of women and minorities. Additionally, it also provided protection for their property rights and	Overall Summary The legal status of women, despite non-discrimination requirements, remains inferior to that of men	Overall Summary The Bill of Rights emphasises the right to equal treatment. Besides protection for women's property rights, it seeks to enhance their participation	Overall Summary People wanted women and other diversities to enjoy equal legal status. They also wanted fairer representation in leadership and decision-

Women contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
sought to ensure their enhanced representation in leadership and decision-making	Gender equality was only recognised with respect to nominated MPs	in leadership and decision-making. However, it is less than what the Bomas Draft had offered	making for women and other diversities
Bill of Rights emphasises the rights of women and minorities (Chapter 6)	Bill of Rights does not accord emphasis to the rights of women. Provisions on citizenship discriminate against women (ss. 89&90). While a man can confer citizenship on a child born of a foreign woman, a woman cannot confer citizenship on a child conceived with a foreign man	Bill of rights emphasizes right to equal treatment and the need for special measures to redress imbalances (s. 38)	People wanted a Bill of Rights that would address historical discrimination adequately. Male and female citizenship rights were supposed to be equal
Prohibition of any law (including customary law) that treats men and women differently	Legal status of women negated by exceptions relating to recognition of customary law in respect to personal law matters (s. 82)	Prohibition of any law (including customary law) that treats men and women differently	People wanted a constitution that would protect women against discriminatory laws
Property rights of women accorded recognition and protection (s. 77)		Property rights of women accorded special protection (s. 38)	People wanted more protection for women's property rights
At least 1/3 of the affirmative action seats reserved for women. Representation in the senate to include at least two women from each region	12 nominated MPs to be chosen with due regard to gender equality (s. 33)	Special seats for women and at least 1/3 of the party list seats reserved for women	People wanted fairer representation for women and other diversities in leadership and decision-making

Women contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
Gender balance to be a criterion for political party funding	No party funding and no links to gender balance	Gender equality and equity required in principle but no relationship to party funding	People wanted political parties constrained to treat women and other diversities more fairly
Guaranteed seats on constitutional commissions	No guaranteed seats on constitutional commissions or other public bodies	No guaranteed seats on constitutional commissions or other public bodies	People wanted greater participation of women and other diversities in decision-making
More ample provisions for the Kadhis courts	Provisions for the Kadhis courts	Provisions for Kadhis and other religious courts	People wanted Kadhis courts to enjoy some recognition and to provide for the unique needs of the Muslim community and Islam as a way of life
Senate had reserved seats for women and other diversities	No senate	No senate	People wanted fairer representation of women and other diversities

4. Media

Bomas Draft	Current Constitution	Proposed New Constitution	What did Stakeholders Want?
Overall Summary There were to be guarantees for freedom of the media, freedom of expression and access to	Overall Summary Freedom of expression recognised but with many limitations. The right of access to public information	Overall Summary There will be guarantees for freedom of the media, freedom of expression and access to information.	Overall Summary Media stakeholders had wanted independence of the media, provisions to be made for an independent

Media contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
<p>information. Media freedom was to benefit from the reduction of limitations on rights generally</p>	<p>is not protected. No media rights as such is not protected. No media rights as such</p>	<p>Media freedom will benefit from the reduction of limitations on rights generally</p>	<p>media regulator and the existing provision on access to information made clear</p>
<p>Freedom of the media provided for in addition to freedom of expression (s. 50)</p>	<p>Freedom of expression recognised but limited by broad exceptions based on defence, public safety, public order, public morality or public health</p>	<p>Freedom of the media provided for in addition to freedom of expression (s. 50)</p>	<p>People wanted the media to be protected from unnecessary interference by the state</p>
<p>Access to information also guaranteed (s. 51)</p>	<p>Constitutional protections of freedom of the press allow the existence of laws that restrict access to information and claw back at that freedom, such as the Official Secrets Act and the twice withdrawn Media Bills</p>	<p>Access to information also guaranteed (s. 51)</p>	<p>People wanted greater access to information in the hands of the state and a shift from the current culture of secrecy in which corruption and other ills find a safe haven</p>
<p>Limitation of rights limited to circumstances justifiable in a democratic state and where it is expressly stated as such and not by necessary construction</p>	<p>Sweeping limitations of rights</p>	<p>Limitation of rights limited to circumstances justifiable in a democratic state and where it is expressly stated as such and not by necessary construction</p>	<p>People wanted greater protection of their rights and a shift from the current “Bill of Exceptions”</p>

5. Devolution

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
<p>Overall Summary There was to be devolved government with 3 levels of devolution. The Senate was the link between the devolved governments and the national government in national law and policy-making</p>	<p>Overall Summary The current constitution establishes a unitary state. Local governments are established under statute and the provincial administration coordinates implementation of government programmes at provincial, district and lower levels – right up to the village</p>	<p>Overall Summary There will be devolved government with one level of devolution. There is no Senate, but a National Forum for District Governments whose utility is questionable</p>	<p>Overall Summary People wanted power to be devolved from the centre in a more genuine way than the current system of local government and the provincial administration. They wanted a greater re-assurance that the national cake would be shared equitably and that they would have a certain amount of control on the use of their own resources</p>
<p>Extensive provision for a devolved government (Chapter 14)</p>	<p>Current constitution establishes a unitary state. The only mention of local governments is in the sections relating to trust lands</p>	<p>Extensive provision for a devolved government (Chapter 14)</p>	<p>People wanted genuine devolution of power</p>
<p>3 levels of devolution (regions, districts, locations)</p>	<p>Local governments established under an Act of Parliament but the relationship is pretty much that of a horse and rider</p>	<p>1 level of devolution (districts)</p>	<p>People wanted genuine devolution of power through economically viable and more representative units</p>
<p>Establishment of the Senate as a link to regional governments</p>	<p>Provincial administration not provided for in the constitution but is an ever-present phenomenon at the local level, with a history of repression and other ills</p>	<p>No Senate and National Forum for District Governments is of questionable utility</p>	<p>The Senate was expected to be the link between the central government and the devolved governments as well as the protector of devolution</p>

Devolution contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
National government would not have been able to suspend the district or other regional government	No such provisions	Government can suspend district government for reasons stated in the proposed New Constitution	People wanted genuine devolution of power

6. Executive Powers

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
<p>Overall Summary</p> <p>There was to be power sharing between the President (Head of State) and the Prime Minister (Head of Government). Executive authority was to be vested in the President and other people, including the Prime Minister. Key appointments would have required parliamentary approval. A mixed system</p>	<p>Overall Summary</p> <p>The President is both the Head of State and Government. All public servants serve at the pleasure of the president. The president is the focus of all power: a presidential system but with a truly imperial president</p>	<p>Overall Summary</p> <p>The president is both the Head of State and Government (no power sharing), with the Prime Minister being merely the Chief Minister, a first amongst equals. Executive authority is vested in the president only. Key appointments will require parliamentary approval. A presidential system with some checks and balances. Harder to impeach the president</p>	<p>Overall Summary</p> <p>Kenyans wanted a new constitution because:</p> <ul style="list-style-type: none"> • too much power was vested in the presidency; • the presidency was all over and the concentration of power in the presidency affected development in areas that did not support the president politically; and • there was impunity, torture, harassment etc as a result of which the Rule of Law was not observed <p>They wanted a process that would reconstruct the state, and a product that would:</p>

Executive Powers contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
			<ul style="list-style-type: none"> • recognize sovereignty of the people; • foster national cohesion; • make provision for separation of powers clear and unambiguous; • have checks and balances that are secure; • devolve power vertically and horizontally; • secure social justice and enhances participation of the Kenyan people; and • guarantee affirmative action
<p>Executive authority was to be vested in the President, the Deputy President, the Prime Minister, and Ministers, all of whom, in the performance of their respective functions, are required to “work in harmony for the good of Kenya and the progress of the people of Kenya.”</p>	<p>Executive authority vests in the President and may be exercised by persons subordinated to him</p>	<p>Executive authority vested in the President</p>	<p>People wanted the excessive powers of the president dispersed to other institutions without necessarily weakening the presidency to the point of ineffectiveness</p>
<p>President was to be Head of State with delineated powers (Commander in Chief of the</p>	<p>President both the Head of State and Government</p>	<p>President is the Head of State, Head of Government, Commander in Chief of the</p>	<p>People wanted the excessive powers of the president dispersed to other institutions</p>

Executive Powers contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
Armed Forces, prerogative of mercy, etc)		Kenya Defence Forces, and a host of other responsibilities as well	without necessarily weakening the presidency to the point of ineffectiveness
Deputy President with defined roles	Vice-President has no defined roles, besides being principal assistant	Deputy President with defined roles	People wanted the president's principal assistant to have more defined roles and enjoy certain protection in office
President and Deputy President barred from holding office in a political party	President can hold office in a political party	President and Deputy President barred from holding office in a political party	People did not want the president to dabble in partisan politics
President can be impeached on the motion of 2/3 of the National Assembly. If an impeachment motion succeeds, only the President leaves office	The president cannot be impeached. Parliament can pass a vote of no confidence by a majority of all the members but the president does not have to leave office and can dissolve parliament instead	President can be impeached on the motion of over 50% of the National Assembly, but the vote on the impeachment has to be over 75% of Parliament. If an impeachment motion succeeds, only the President leaves office	People wanted to be able to discipline the president for grave breaches of the law and to reduce the tendency for the president to act as if he or she was above the law
Prime Minister is Head of Government with defined powers	Executive consists of the President, Vice-President, Ministers, and Assistant Ministers. No Prime Minister	Prime Minister is merely a Chief Minister, a first amongst equals	People wanted the excessive powers of the president dispersed to other institutions without necessarily weakening the presidency to the point of ineffectiveness

Executive Powers contd...

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
Prime Minister assisted by 2 Deputy Prime Ministers and Ministers appointed by him/her	No prime minister	Prime Minister assisted by 2 Deputy Prime Ministers and Ministers appointed by the President	People wanted the excessive powers of the president dispersed to other institutions without necessarily weakening the presidency to the point of ineffectiveness
President cannot dismiss Prime Minister at will	No prime minister	President can hire and fire Prime Minister at will	People wanted the excessive powers of the president dispersed to other institutions without necessarily weakening the presidency to the point of ineffectiveness

7. Youth

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
Overall Summary Recognised the special status of youth, provided for equal treatment and endeavoured to ensure their participation in national affairs	Overall Summary Generally not youth-friendly. Does not define youth or deal with youth concerns in a specific way. Places age barriers to access to youth leadership at the presidential level	Overall Summary Recognises the special status of youth, provides for equal treatment and endeavours to ensure their participation in national affairs	Overall Summary Young people expected a fairer system of representation and suitable recognition of their numbers as well as contribution to the development of the country
Special recognition of youth concerns and rights (ss. 30, 39)	There are no special provisions to recognise the status and role of the youth	Special recognition of youth concerns and rights (s. 40)	People wanted recognition of the role of young people in national affairs

7. Youth

Bomas Draft	Current Constitution	Leisure Lodge	What did Stakeholders Want?
Protection of participation rights, through affirmative action, especially in elections and representation (ss. 101, 102, 219)	No protection of participation rights. Voting age is 18 at minimum. Presidential Candidature minimum is 35 years; Parliamentary is 21 and civic is 18.	Protection of participation rights, through affirmative action, especially in elections and representation (ss. 101, 116)	Young people wanted to be assured of a certain level of representation due to historical discrimination and other negative factors
Specifically protected even at the district level (s. 102)	No special recognition at local level	Although not specifically provided for, could be part of the special interests to whom affirmative action applies	Young people expected fairer treatment at all levels of government

Conclusion

The above comparison has been done to enable all Kenyans to have a more informed understanding of the differences and similarities amongst the different “Constitutional” documents in the run up to the referendum. Hopefully, it will assist people to make a more informed choice.

