

Decreeing and establishing a constitutional order: challenges facing Kenya

Yash Ghai

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There is a renewed interest in a new constitutional order in Kenya. A bad constitution is blamed for the post-election crisis, allowing the president to pack the electoral commission with his cronies shortly before the election; a largely unaccountable electoral commission declaring presidential election results without proper counting or reliable records; enormous powers vested in the office of, or illegally appropriated by, the president; the centralisation of power in Nairobi; the lack of public participation; the lack of autonomy, effectiveness and legitimacy of state institutions, particularly those for accountability and justice, principally judges, police, prosecution and the attorney general; opportunistic political parties and unprincipled politicians; and resulting corruption and wide scale impunity.

People often ask: would Kenya have been a better place today if the “Bomas” draft had not been sabotaged? This essay argues that a good constitution, while critical, is not equivalent to constitutional order. Enactment of a constitution is distinct from the adherence to its values, institutions and procedures. A constitution by itself makes no difference. Kenyan society determines the extent to which the constitution will be observed, manipulated, or disregarded, and therefore the extent to which constitutional reforms will have meaning.

The notion of a constitutional order is broader than merely the text of the constitution. It represents a fundamental commitment to the principles and procedures of the constitution and therefore emphasises behaviour, practice, and internalisation of norms. A central feature is the depersonalisation of power. Power belongs to state offices, not to individuals, however exalted. The purpose for which power must be used and the mode of its exercise are set out in the law. The holders of even the highest state offices are subject to the law, not above it. This aspect of constitutionalism has proved extremely hard to realise in Africa—where public office has its own aura, and expectations of the people merely encourage the whimsical, or capricious and biased, exercise of state power.

Most elements of the framework of constitutionalism are unacceptable to those who gain access to state power, for they interfere with their primary objective of accumulation. This has been the essence of the Kenya experience. Constitutionalism has been rejected, and constitutionally sanctioned power has been exercised or abused in the name of ethnicity but in practice deployed for personal aggrandisement. The politics of the ‘Bomas’ process demonstrate this rejection of the values of the constitution: a professional phase where independent experts consulted with the people in accordance with national goals and prepared a draft constitution, and a deliberative and consensus-building phase with the representatives of the people, regions/communities, and civil society, were followed by a parliamentary phase where, against logic and democracy, politicians had a veto. It was illogical because all the Members of Parliament (MPs) were automatically members of Bomas where they had ample opportunities to have their say and to persuade others of the rightness of their positions. It was undemocratic because MPs could override a decision of a much larger, and more democratic and legitimate body than Parliament. While the ‘Bomas’ process afforded Kenyans for the first time ever the chance to decide on the values and rules by which they wished to govern themselves, politicians held a narrow interest in the constitution, focusing on access to state power, and their own personal prospects of securing that access. During the Bomas, most politicians, including ministers, about half of whom barely ever entered Bomas, showed little interest in human rights and social policies, including environmental and land

policies. But they were passionately opposed to popular participation in and controls over the exercise of state power. They had little time for fair administration and public accountability of state officials.

As the analysis in the Waki Report on Post Election Violence in Kenya so vividly demonstrates, the process of accumulation cannot easily be secured within the parameters of a democratic constitution through mechanisms and procedures for accountability. Indeed the point that emerges with sharp and sad clarity is that it is only by constant and systemic violations of the constitution and the law that this political class is able to accumulate and establish its control over society—and its opponents. The horrendous consequences of these violations are graphically described in the Waki Report: corruption, institutionalisation of violence, the extensive use of militias, and the loss of the state monopoly of force (with weaknesses and divisions in state security forces). In particular the Report emphasises the role and prevalence of violence in Kenyan politics and society. It attributes many failings of the state to the personalisation of power in the president (and with it the absence of the separation of powers). The economy has become closely intertwined with state patronage and ethnic politics, and leads businesspeople to become architects of violence, and to collude in other violations of the law. There is little accountability for the exercise of public power. Impunity for the friends of the regime and for compliant state officials is rampant—and indulged despite public outcry. All these demonstrate the absence of the rule of law. The way successive presidents have misgoverned Kenya is proof that these violations are in fact the norm.

Serious consequences follow from this, not least the loss of state legitimacy. The state is not perceived as a social and political force for the common good. It is regarded, accurately, as partisan, throwing its weight behind specific communities and interests. The subordination of the electoral commission, the police, and the judiciary to the executive has resulted in their inability to resolve national problems, though this is why they are set up, with independent powers. The police are particularly singled out by the Waki Commission for their failure to ensure Kenyans' security, and consequently are held responsible for numerous murders, rapes, and the displacement of the people. They are no longer able or willing to protect the people against violence and plunder by private and politically sponsored militias. The judiciary is so discredited that no one believed that it was capable of impartial adjudication of election disputes. The Waki Commission doubts the veracity of the statements of the attorney general about his attempts to enforce the law. The Waki Commission concludes, "Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators, has led to a culture of impunity and a constant escalation of violence". The government and politicians have not only sanctioned violence, but they have also ethnicised politics and violence. Consequently the state has failed to perform functions intimately connected with the exercise of public power, indeed major reasons why we establish a state in the first place.

Despite the emphasis placed on constitutional reform by Kofi Annan, other eminent Africans, Kenyans and the international community, there is no guarantee that many of the reforms proposed by them and the Kriegler and Waki Commissions will help to get Kenya out of the hole in which successive regimes have placed it. I have said enough to indicate how vested interests, among politicians, businesspeople, and the bureaucracy will sabotage reforms (as they have done ever since Kenya's independence). Despite the ravages wreaked upon the state, it still remains the primary means to accumulate wealth and power—and those who are in control of it will fight to maintain their control, regardless of the rules of the constitution.

It is hard to provide the answer to this dilemma, that the very sponsors of reform are its principal saboteurs. What we know is that constitutionalism cannot be willed; it must be established by deep commitment and sustained activity. The constitution cannot achieve anything by itself: like Marx's commodities, it does not have arms and legs. It must be mobilized, acted upon, used, etc. This idea is also expressed by Granville Austin (2000), in his monumental study of the working and impact of the Indian Constitution, in which he says that a constitution, however living, is 'inert'. A constitution does not work, it is worked. He says his book is 'about those who acted upon the Constitution, how and why they did so, and about those the Constitution acted upon, or neglected. It is about Indians working their Constitution...'

One way to understand the potential of a constitution to impose its imprint on state and society is to examine two key factors. One is internal to the constitution, and the other, external (society). The internal concerns the ways in which the constitution distributes power, the institutions it sets up for different tasks, modes of accountability, and methods for the enforcement of the constitution, including respect for and protection of human rights. The balances within the constitution can do something to guide state institutions and empower the people. It is safe to say that constitutions may succeed in setting up institutions and giving them authority, but they often fail in the fulfilment of national values or directive principles—for the paradoxical reason that those who accede to these institutions may have little commitment to the values. It is interesting to note in this context that at Bomas, politicians paid almost no attention to values, but were obsessed about institutions—knowing well that if they got hold of institutions, they would be able to ignore values. As we know, most African constitutions contain excellent values and procedures, but, for the most part, they have failed to produce excellent states. In Kenya, even the essential pre-conditions of a constitutional state are missing: an independent judiciary, honest electoral commissioners, absence of impunity, policies that are inclusive, the rule of law—and most importantly, ethical and moral standards in public life. These difficulties are compounded by many unresolved historical injustices.

They have failed in substantial part because of the second factor, which is external to the constitution, namely society. The constitution operates within society and seeks to influence its development. The distinguished Indian sociologist, Andre Beteille, believes that a constitution can provide directions for the national development and self-realization, but whether, and the pace at which, the development takes place depends on society. The constitution may set out guidelines for the exercise of power and the aspirations that the state must fulfil. But society also affects the constitution, sometimes pushing policymakers to uphold the principles enshrined in the constitution and sometimes negating those principles. I have already indicated that in Africa we have placed unjustified reliance on the capacity of the constitution to influence society. I have also indicated that the political order intended to be set up by the constitution competes with other models and realities—and in the end it is society that determines the extent to which the constitution will be observed, manipulated, or disregarded.

The African constitution not only fails to mould civic values or the behaviour of key political actors, it also fails to generate a state that is capable of sound social policies and fair and honest administration. Andre Beteille's brilliant insight needs to be supplemented by a consideration of the obstacles to progress placed by the inherited, pre-constitution bias of the state apparatus. Perhaps inadequate attention has been paid to these obstacles, as opposed to

societal obstacles, because it is assumed that the constitution, par excellence, designs and structures the state. However, as I have mentioned above, it may structure institutions, but may fail to infuse them with values and principles. The constitution tends to structure macro institutions but often says little about values and procedures of the administration of the state (which may persist from one constitution to another).

The implication of this is that political reform has to go beyond the constitution. It is one thing to make a constitution. It is quite another to breathe life into it, making it a living, vibrant document which affects, and hopefully improves, the reality of people's lives. A living constitution is one that citizens use in their daily existence, that governs and controls the exercise of state power, and promotes the values and aspirations expressed in it.

For these reasons, implementing a constitution is not about this or that provision, or even the totality of the constitution, important as these are. It is about the inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts and other bodies authorised to interpret the law, giving effect to judicial decisions, acceptance of the limits on the government, respecting and promoting human and collective rights, the participation and empowerment of the people. Ultimately the people have to be guardians of the constitution.

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Professor Emeritus Yash Ghai chaired both the Constitution of Kenya Review Commission and the Kenya National Constitutional Conference ("Bomas"). His areas of research and publication include public law, ethnic relations, autonomy and federalism, human rights, comparative constitutions, and sociology of law. He has taught at the Law Faculty of a range of universities including the University of Hong Kong University and Uppsala University, and been a visiting scholar in Harvard and Yale. In 2005-2008, Prof. Ghai was the Special Representative of the UN Secretary General for human rights in Cambodia.