THE CONSTITUTION
AND THE ECONOMY

Paper presented by Prof. Yash Pal Ghai
Chairman of The Constitution of Kenya Review Commission
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The views expressed in this paper are the author’s and not necessarily those of the Constitution of Kenya Review Commission.
A NOTE FROM THE IEA

The Institute of Economic Affairs (IEA) heartily thanks Prof. Yash Pal Ghai for accepting to deliver this lecture. We are indeed indebted to him for providing invaluable insights and illumination to a subject that is quite nebulous to grasp. The Paper is attractive for its clarity of thought and compelling force of argument. We believe that students, business people, professionals and the general public will find this paper extremely useful even long after the review process has been concluded. The IEA wishes you a happy reading.

INTRODUCTION

As a mere lawyer, I feel greatly honoured to be invited by the Institute of Economic Affairs (IEA) to deliver its annual lecture. I also feel intimidated since the theme on which I have been invited to speak is the Constitution and the Economy, and many in this audience are better qualified to speak on it than I.

I will speak, to begin with, in general terms about the relationship between constitution and economies, and then discuss the economic dimensions of the review of our own constitution.

THE CONSTITUTION AND THE ECONOMY: THE LINKAGES IN AN IDEOLOGICAL AND HISTORICAL CONTEXT

- Some Basic Elements and Functions of A Constitution

Regardless of the type of the preferred economy, a good constitution establishes conditions in which the economic system can operate and flourish. The constitution establishes the government which has to ensure law and order. The constitution provides for the succession to power to promote political stability. It creates institutions and mechanisms broadly acceptable to the people to settle disputes and develop national consensus on laws and policies. It establishes the legal infrastructure to facilitate the operation of the economy, such as by defining property and the modes of transactions to create rights and obligations. It generally succeeds in legitimising values and institutions of the government and the economy.
Perhaps the most important influence on the values and shape of a constitution has been the economy. This is not always clear as the influence is mediated through legal and constitutional concepts, which may obscure the close connection between the constitution and the economy. Relations between citizens and the state and among citizens themselves are mediated through these concepts, rather than directly. I would say that the influence of the market economy is of this kind, while the connection between a Marxist socialist economy and the constitution is more explicit. For example, constitutions of communist states used to, and in China still does (despite moves towards opening up its economy), describe the economy as a state owned economy, vest the means of production in the state, require the state to adopt development plans, restrict the uses of private property and the scope of private enterprise and the right to employ others.

• **Nexus Between A Market Economy and Liberal Constitutions**

The modern liberal constitution arose in the West with the emergence of capitalism. Fundamental constitutional concepts and institutions are a reflection of the market economy. This constitution served to redefine the powers and structures of the state, to register the victory of the bourgeoisie over feudal lords, and later over the monarchy.

Since the market economy is a private economy, dependent on the initiatives, decisions, and organisations of individuals or groups, the task of the constitution is to create conditions in which there are minimal restraints on the activities of these private actors, while resources and the means of production are freed from state or communal constraints.
Since the market economy is a form of class rule, the role and status of the state is crucial—direct control of the state may suit the bourgeoisie (and was indeed the practice in the early days of capitalism in Europe as well as the Americas), but this lays bare the exploitation of the system and was difficult to sustain for long—especially as it clashed with the ideology of the market. Consequently the concern shifted instead to the taming of the state.

The market economy requires certain instruments, like contracts (to facilitate exchange and planning for the future), currency, weights and measures, and exclusive rights, particularly over property. The ability to predict and plan for future outcomes is crucial, and to achieve this result, it is necessary to have general rules, as for example, rules that limit the functions and powers of the state as well as regulate its powers of intervention. It is equally necessary to have mechanisms for settling disputes (the market system is extraordinarily productive of disputes and quarrels and the legal system sometimes even allows parties to resile from their obligations—even though in return for penalties), which are faithful to these rules and the arrangements the parties have themselves agreed on (relying on these rules).

- **Constitutional Devices for a Market Economy**

Some of the standard devices of the liberal constitution are a response to the needs of the market economy. Foremost among them are *fundamental rights and freedoms*, which are oriented towards the individual and seek to free her from the constraints of the community. In their origin in the bourgeoisie revolutions in the West, rights served to celebrate the autonomy of the individual, to mark the man as an entrepreneur. He (and I use the masculine form
advisedly) was equipped with the right to property, contract, association, and mobility without which capitalism could not have flourished. The political analogue of the man as an entrepreneur was the citizen, with citizenship based on equal rights and obligations, and with obligations on the state geared towards a national economy.

Another set of concepts was directed at *limiting the power of the state* - concepts like the separation of powers, checks and balances, and the rule of law. The last of these was essential to limit the discretion of state officials, and to prescribe the rules to govern the exercise of the discretion.

Another device was the *independence of the judiciary*, to hold the pre-determined balance between the state and the economy, between the government and the citizen. An independent and competent judiciary also serves to uphold the legal framework within which individuals and corporations interact with other individuals and corporations, especially in making their economic decisions and transactions.

• The State and Markets

It was also the role of the state, through the constitution, laws and other methods to provide legitimations for the economic system. Thus the role of the state is central to the market economy. However, market system requires a particular form of social and political order that cannot be generated by the state, but only by restrictions on state powers/functions, and good mechanisms to enforce those powers. The fact is that every economy is a political construct. The relationship between the state and market (particularly the market economy) is generally problematic,
for the greater the burden on the state to sustain capitalism, the more likely it is that the state will be forced into the regulation of the market.

Thus the relationship between the state and the market is not static, nor has it been uniform, shaped to some extent also by the historical and cultural traditions of societies. The relationship has changed over time—from mercantilism (when the bourgeoisie needed the state to subdue feudalism and to open the path to expansion overseas) to laissez faire (when the bourgeoisie felt confident in the self-sustaining capacity of the market system), changing nature of economy (as between agriculture and industry, see Charles Beard’s brilliant study of the economic origins of the US constitutionalism), and tensions within the system itself which generated change (e.g., the rise of trade unions, and pressures for the extension of the franchise which led to the growth of the welfare state). The rise of democracy introduced a new dialect between the market and the state, and the justifications for the market shifted from the purely economic to the political.

- *The Challenge of Globalisation to Constitutionalism*

Nor has the saga ended, for we are now entering, or rather re-entering with renewed zeal, the age of globalisation, which represents a very significant shift from the power of the state to international economic institutions, the large corporations and international trade and financial organisations. Economic power is once again being stripped of its political clothings, and the rationalism of the market is now advanced largely in economic terms, even the downgrading of the political.
'Governance' is now primarily an economic concept, edging out democracy and participation as the primary values. This shift in the locus and mode of power has already had profound effect on constitutions - (see, for example, the new constitutions of Eastern Europe, to an extent established under the aegis of the American Bar Association, which entrench the mechanisms of a 'self-sustaining' market). More importantly, are the constitutional responses to supra-state markets, of which the outstanding example is the economic and political union of European states, carrying profound consequences for the political order of these states, with the stripping away of layer after layer of sovereignty.

Small states like Kenya, heavily indebted to outsiders, with economies nurtured in various forms of protectionism and state interventions, are even more vulnerable to globalisation. We can neither defend our sovereignty nor our economy. What can be the foundations of a constitution in such a state? Some years ago, when it was fashionable to talk of the end of 'everything' - which fashion incidentally pre-dates Francis Fukiyama’s *End of History*, I gave a lecture on the end of constitutions, my premise being that state power, along with the instruments of sovereignty, had leaked away to global corporations and their home governments, and there was little for the constitution to do, other than a pretense at outmoded gestures of sovereignty. Clearly it would not do to take this ‘defeatist’ attitude to the review of our constitution, for globalisation does offer opportunities just as it exposes our vulnerabilities.

The challenge of constitution making in the age of globalisation are profound. They are challenges from below and from outside, but also niches that can be appropriated.
The nature and functions of state require a careful re-examination as do the roles and opportunities for entrepreneurs, for it is through the flexibility and the quickness of responses that one can cope with, and turn to advantage, the stresses of globalisation.

Thus the relationship between the state and the private sector has to be reviewed, especially as the ideology and doctrines of globalisation seek to de-legitimise what we have taken to be the core functions of the state. I am of course not advocating the capitulation of the constitution to globalisation, for I believe that the advocates of globalisation and others underestimate the burdens that it throws on the state for preserving fragile national consensus and essential human welfare, making the state more rather than less relevant to our well being.

THE ECONOMIC DYNAMICS OF KENYA’S CONSTITUTIONAL JOURNEY

There is, unfortunately, not enough time today to relate the above analysis to Kenya’s experience or to discuss the high lights of its constitutional journey. So I shall have to be content with a few broad and broadly sketched observations.

The first is that the lineage of the present constitutional arrangements goes back beyond Lancaster House in the cold winter of 1962. The independence constitution sought to make a decisive break from the colonial order in politics as well as the economy. The colonial economy, as elsewhere, was profoundly contradictory. It could operate as a market economy, to which it had pretensions, only by denying the fundamental principles of that economy equal rights and
opportunities, an autonomous private and civic sector, mobility of resources, including human rights, free internal markets, free competition, collective bargaining, and so on.

Instead, the economy was highly regulated and administered, to privilege particular communities, and to limit the natural consequences of free markets to minimise their impact on the exigencies of the political control over the colonised. These inequalities were reflected in the political sphere as well, which was dominated by the dual control of the typical colonial order - the dominance by the governor of the colony, and the dominance of the governor by London.

With the partial exception of land provisions, the 1963 constitution tried to create the conditions for a free market, with pride of place to the Bill of Rights, with a singularly strong protection of property rights, horizontal and vertical dispersal of the previously political and administrative powers of the governor and the Colonial Office, and an independent judiciary. The constitution was cast in the mould of a liberal state. But by now, the roots of colonialism had established themselves deeply in our administrative and economic structures, and for a variety of reasons, these structures proved more attractive to the new rulers than the restraints and delicate balances of the liberal state.

But not having the resources of the colonial state and being constrained to some extent by the ‘liberalism’ of the constitution, the new rulers’ political trajectory took a different form, marking the emergence of the patrimonial state. The patrimonial state was characterised by the personalisation of power and the politics of patronage, and the ethnicisation of politics, which sustained it.
The justification of what was essentially a patrimonial state took the form of the imperative of the development state. That enabled the state to be armed with extraordinary powers of political and administrative interventions in the economy. But these powers were not used to promote development, as the concept was usually understood. Instead they were used to create an economic base for the new elite, to use access to the apparatus of the state for private accumulation, to plunder natural resources, and to rely increasingly on coercion as the limits of patrimonialism became obvious. Let us see what happens to a liberal constitution when turned to tasks alien to its values and institutions.

To some extent, the changed political and economic trajectory was accommodated within the constitution by amending it - this is particularly true of the way in which the political opposition was emasculated and finally destroyed. But more importantly, for our purposes today, is to examine what happened to the institutions of a liberal constitution under the weight of patrimonialism.

First, there is the subordination of the economy to politics. Second, there is the constant violation of the rule of law, for it only by departing from general rules and their impartial applications that public resources can be appropriated for private accumulation or other opportunities channeled for patronage purposes. Third, there is a huge increase in corruption, for corruption is a means both of accumulation for officials and the public to benefit from the disregard of general rules and procedures. Fourth, the powers and functions of public institutions are seriously distorted, and sometimes effectively negated. Fifth, the institutions of
accountability, including the judiciary, suffer the most. They are co-opted or subordinated, but even their outward independence is turned to the purposes of corrupt officials, for example, by securing judicial decisions which effectively uphold breaches of the law.

The market economy can scarcely function in a system so distorted by practices alien to it. The decline in the economy is frequently attributed to political risks, the lack of commercial security, the unpredictability of judicial decisions, the prevalence of corruption, and the distortion and failure of institutions. The overall system runs into a series of crises, and its ability to legitimise it, at least in terms of the original constitutional values, suffers seriously. Alternative ideologies, which in many countries find themselves in similar situations, may take the form of ethnicity, communalism or fundamentalism, requiring the services of court intellectuals. But they are seldom satisfactory, even when they do not generate even more intractable problems.

THE MANDATE AND AGENDA OF THE REVIEW ACT

I cannot be sure whether this sort of trajectory has led to the review we are presently engaged in. I have been out of the country for several years, but much of the literature, including that produced by our hosts today, that I have read, seems to support that assumption. If so, the reaction in the Review Act is to emphasise the older verities and to recall us to the virtues and ideology of, essentially, a liberal state.

The Review Act is not restricted to procedural questions only. It also sets out the object and purpose of the review of

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the Constitution. The object and purpose reflect the consensus on the future constitution that was achieved at the series of national conferences at Safari Park in the late 1990s. The most obvious object is the establishment of the liberal state: the Act says that the new constitution must include provisions for a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity.

Good governance includes the principle of public accountability by holders of public or political offices and good and effective management of public finances. These goals are to be achieved through, inter alia, the separation of powers and checks and balances. The new constitution must also promote people’s participation in the governance of the country through democratic, fair and free elections; and during the review we must all examine ways which in the electoral system can be improved. People’s participation must also be increased through the devolution and exercise of power and in other ways to ensure ‘the full participation of people in the management of public affairs’.

Another device for the fair exercise of power and the accountability of public officials that must be part of the new constitution is independent commissions, such as the electoral, public service and judicial service commissions - which of course are not devices for people’s or politicians’ participation, but instead to restrict it, following the classical liberal distrust of popular politics.

The judiciary still remains the centrepiece of the scheme for the enforcement of the constitution and the protection of the public against the arbitrary and oppressive behaviour of the
state. That not all is well with the judiciary is recognised in the Act when we are required to ‘examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary’.

While there is considerable emphasis on human rights, the status of citizenship does not stand out as sharply as one would expect in a liberal, market oriented constitution. The centrality of citizenship is also undermined by the requirement that the new constitution must respect ‘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’ (although this injunction can be restricted to the private domain - note the singling out of ‘culture’). But the emphasis on non-discrimination, which, the Act tells us that the provisions on citizenship must uphold, is certainly central to the market economy, which seeks to tap the talents and participation of all in the economy. The constant stress on gender equality or parity will undoubtedly expose the gender inequalities that are embedded in communal and ethnic practices and law (and which the present constitution preserves in the face of the general equality provisions). The Act goes beyond what is usual in most constitutions when it enjoins us all to examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all (these latter provisions do not sit entirely comfortably with the respect for ethnic and regional cultural practices).
Fundamental rights and the cardinal principle of equality - standard devices in liberal states to ensure the autonomy and enterprise of individuals - feature prominently in the Review Act. New provisions must ‘secure the fullest enjoyment of land and other property rights’. Rights serve to distance the state from the citizen and to prevent the arbitrary exercise of power by public authorities. On the other hand, the constitution must ensure the basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources. Liberal constitutions have eschewed economic, social and cultural rights, and have not considered it the business of the state to redistribute resources to alleviate the hardship of particular groups. Nor has it looked with favour upon affirmative action - for which programme the Act provides ample support.

The final point to note is the considerable emphasis on regional and international co-operation. New constitutional provisions must promote and facilitate regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights. The Act says that the review must ‘examine and recommend on the treaty-making and treaty-implementation powers of the Republic and any other matter to strengthen good governance and the observance of Kenya’s obligations under international law’. The emphasis on internationalism is balanced by the overriding object of national unity and regional diversity - a nice re-capitulation of the dynamics of globalisation which has not only forced greater international integration and co-operation, but also triggered off local and ethnic identities, with the state trying, increasingly
unsuccessfully, to balance these tendencies around its own imperatives.

The Review Act thus provides us with a mixed, and we might say contradictory, bag of objects and purposes. Globalisation is pitted against nationalism, and nationalism itself against regionalism or ethnicity. The ‘fullest enjoyment of the rights of property’ is paired off with meeting the basic needs of all Kenyans and the equitable framework for economic growth and equitable access to national resources. Gender parity and gender equity are bracketed with regional and ethnic culture and identities - and communal rights, which have traditionally denied gender parity. Populism is balanced by independent and professional commissions vested with key state functions. Underlying all these objects is the unspoken assumption of the prevalence of a market economy.

Now, I would argue, there is nothing surprising in this mixture. It reflects in part the post-modern distrust of the big narrative. But more importantly, it reflects the realities in which we live, which are a composition of many impulses and aspirations. Quite correctly, the Review Act refuses to see the state merely as the facilitator of a market economy, or the market as merely and solely the framework for managing the economy - which is a crucial weakness of globalists or globalisers. It faces squarely the tensions between nationalism and ethnicity and those between modernity and culture. The task of the constitution and the challenge to its makers is to balance these aspirations and interests in a fair, acceptable and coherent form.
For achieving this balance, I believe the Act does provide us with both guidance and instruments. The vision of Kenya that springs from the Act is that of an inclusive political community which values the free exchange of ideas and in which citizens resolve national issues on the basis of democracy and consensus. It is a community which cherishes diversity but in which cultural practices should not override the imperatives of human dignity, particularly in the role, status and rights we give to women, children and the disabled. Above all, it is a community which is deeply concerned with social justice, redressing the injustices of the past to individuals and groups. These fundamental values must guide not only our state and civic institutions, but also the management of the economy.

- **Rights Based Approach to Society and Development**

The Review Act requires a rights-based approach to development. The rights based approach is premised on the centrality of human rights in the making and implementing of policies, the drawing of the national budget and the allocation of resources, and the accountability that is explicit in the human rights regime. Let us see, for example, the connection between human rights and poverty (but we could draw similar analyses of connections between rights and democracy, and rights and corruption, etc).

Development policies and allocations of resources, which are not based on the framework of human rights, are unlikely to advance human welfare or enhance social stability. The notion of development divorced from rights offers a temptingly comfortable matrix for the international community and domestic policy makers because it treats the problem of poverty in terms of its being merely a technical
problem that is to be resolved incrementally, and dependent on the allocation of ‘available resources’.

On the other hand, the rights discourse refuses to treat the condition of poverty as acceptable and sees the presence of poverty as a rights violation that demands immediate accountability. The idea of inalienable rights reminds us of the obligations incumbent upon public authorities to secure policies and institutions in which existing entitlements can be realised through the efforts of institutions, individuals, families and communities (and does not require charity or handouts).

The separation of development and human rights is also artificial because human rights must be both the means and the end of development, as Amartya Sen has reminded us so eloquently. The framework of human rights alerts us to the real purpose of development, which is the achievement of all aspects of human development - the protection of entitlements to food, health, shelter, work, literacy, participation, and a life in freedom, association and solidarity. The framework is based on the fundamental equality of all human beings. It provides a balance between aspirations and interests of individuals and communities, and a way of reconciling them, thus preventing the lurches to extremes of economic or social policies and ideologies.

The prime asset in generating a sustainable economy and a sustainable programme for the eradication of poverty, is human beings equipped with capacities, interacting in a full and free manner with the institutions which govern them and confident that those institutions will enforce, protect and fulfill their human rights. Human rights provide targets, benchmarks and indicators for the evaluation of social,
economic and political policies and the modalities of their implementation.
I have touched only on one dimension of the agenda established by the Review Act - democracy, popular participation and social justice. There are other important objectives. But you will have no doubt concluded from it that the lawyer may well have less to do with (and be less qualified to do so) than the economist, the political scientist and the sociologist. The disciplines and the skills they represent are in short supply in the Review Commission, and I invite you to assist us in analysing and fulfilling our statutory mandate.

THE TIME AND WAY FORWARD

Where does this analysis leave us with the task at head - the drafting of a new constitution, as we are more than half way through the time allotted to us by Parliament for the completion of this task? We hear voices urging us to complete the task on time, so that we move away from the stagnation of the economy, the disarray of political parties, the dangers that lie ahead if we cannot, through the new constitution, forge a national consensus on the new political and economic order.

We also hear the voices of skeptics, who believe that the task cannot be completed on time and we shall be denying Kenyans the opportunity they have waited for so long to participate in the review and to make known their options for change. We are reminded of countries which took several years to device new constitutions. Protagonists on each side, who come in a variety of forms, deploy different reasons for similar conclusions. I can only speak for myself, drawing on my personal experiences elsewhere and a life long study of
Institute of Economic Affairs

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