

# THE IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS

## *Challenges and Prospects*

THE IMPLEMENTATION OF MODERN AFRICAN  
CONSTITUTIONS: Challenges and Prospects

In *The implementation of modern African Constitutions: challenges and prospects*, the authors try to identify obstacles to constitutional implementation in Africa and, on the basis of good practice, assess how this could be overcome. A single volume like this cannot unravel the complexity of the causes and effects of, and solutions to, the problem of non-implementation of constitutions in Africa: the subject is far too intricate. Nevertheless, this study, represents a first attempt to draw attention to the issue, and hopes to open a serious debate about it and pave the way for making this issue an integral consideration in constitution-building in the future.

The variety of perspectives provided in analysing the challenges to constitution-implementation in this volume should make it to appeal to academics, practitioners, policy makers and postgraduate research students interested in the intricacies of comparative African constitutional law.



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Edited by CHARLES MANGA FOMBAD

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# **THE IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS: Challenges and Prospects**

**Charles Manga Fombad (Editor)**

Licence en Droit (Yaounde), LLM PhD (University of London),  
Diploma Conflict Resolution (Upsalla)  
Professor of Law, Institute for International and Comparative Law in Africa,  
Faculty of Law, University of Pretoria

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***The implementation of modern African Constitutions: Challenges and prospects***

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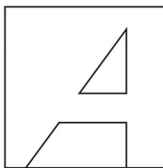
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# FOREWORD

For supporters of democratic rights and freedoms, the separation of powers and respect for the rule of law, studying a good number of African constitutions is comparable to reading a sheet of harmonic, exuberant music. Unfortunately, the orchestra is not performing in such a way that the intended fine sound of this music can be heard by the proposed audience.

Equally, well-crafted African constitutional texts are rarely transformed into legal reality. All over the continent, the arduous, time-consuming and expensive enterprise of drafting a constitution is not followed by serious efforts at implementation.

The focus of this book is on the challenges of implementation that emerge after a constitution is drafted. The transformation of the constitutional text into action is as crucial as writing the text itself. This is particularly so given that the constitution is the supreme law of the land. It is the basis for the state, as all state bodies, powers, institutions and laws are derived from it. The values, vision, and underlying understanding of the state, its people and the balance between their various interests, are embodied in the constitution, and provide the legitimization of a state's existence as well as the limitations of its power.

A constitution is often full of general and abstract principles, so on its own it is not suitable as a practical guide for everyday business. As such, concrete and clear legal steps are necessary to translate the constitution into action and allow the text to enter into perceived reality for the people. Without implementation, the goal of every constitution remains unachieved. As a result, the text may be valued as a nice piece of poetry – but little more.

It goes without saying that the objectives of a constitution would not be met if its implementation were left at the discretion of the heads of state and other state officials. Since the people are the owners of the constitution, the state is obliged to implement its provisions for the common good as efficiently and rapidly as possible. There are no legal grounds excusing any delay.

Moreover, only a timely and complete implementation will prevent a disconnection of the people from the state. Looking at current developments on the continent, the reluctance by those in authority to accept and respect state power is striking. This depressing trend goes hand-in-hand with the misuse of power and the arbitrary, self-serving interpretation of laws and constitutions. Submission to the rule of law by all members of society, regardless of their status, is crucial. Given the problematic history of state-building in Africa, reliable constitutions are of fundamental importance.

The transformation of a constitution into reality requires continuous and disciplined action. This task has to be carried out not only by the three branches of government (the executive, the legislature and the courts) but

by ordinary citizens. Constitutional implementation also requires a favourable legal framework developed from and consistent with the constitution. In some cases, specialised implementation commissions created by the constitution itself drive the process. In such cases, the independence and impartiality of the implementing commission is critical to its success. It is worth noting too that constitutional implementation happens at all levels within a state. Its success depends on several other factors, including the level of citizens' knowledge of their fundamental constitutional rights and duties, access to justice and the availability of independent judicial enforcement mechanisms.

The chapters of this edited volume are selected from papers presented at the University of Pretoria in June 2016 at a conference entitled "Implementation of modern African constitutions: challenges and prospects". The event was organised jointly by the Institute for International and Comparative Law in Africa of the Faculty of Law, University of Pretoria, and the Konrad Adenauer Stiftung Rule of Law Program for Sub-Saharan Africa.

The objective of the conference was to enable scholars, legal practitioners, judges and civil society activists from different countries in sub-Saharan Africa to examine and debate the challenges that countries on the continent face in implementing their constitutions. This book reflects some of the pertinent issues raised by the current state of implementation of several modern African constitutions and comes up with many interesting ideas on how the situation could be improved. I hope policy-makers, constitutional law scholars, researchers and indeed all Africans will find this study useful.

I wish to express my appreciation to the authors for their thought-provoking and well-researched contributions, which undoubtedly will enrich the debate by providing deeper understanding of the reasons for constitutions' failure and success. In addition, the authors provide fresh and insightful perspectives which can ensure that the promising words of the many African constitutions become a living reality. There is no need for Africa to become a graveyard for beautiful constitutions.

Finally, special thanks are given to Professor Charles Fombad for his hard work in editing the contributions for this collection.

**Dr Arne Wulff**

# CONTRIBUTORS

**Lukman A. Abdulrauf** is a lecturer in the Department of Public Law, University of Ilorin, Nigeria. He holds an LL.B from the Ahmadu Bello University, an LL.M from the University of Ilorin and an LL.D from the University of Pretoria. He was called to the Nigerian bar in 2010 and qualifies as a barrister and solicitor of the Supreme Court of Nigeria. Dr Abdulrauf has also undergone some professional training in Alternative Dispute Resolution (ADR). His research and teaching interests are in privacy and data protection laws, Information and Communication Technology (ICT) law and criminal law. He currently teaches courses around these areas at both undergraduate and postgraduate levels at the Faculty of Law, University of Ilorin, and has published widely in these areas in local and international journals.

**Tinashe C. Chigwata** holds a PhD in Public Law from the University of the Western Cape (UWC) in Cape Town, South Africa. He is currently a postdoctoral fellow at the Multilevel Government Initiative (MLGI) of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at UWC. His research focuses on the role of local and provincial governments, decentralisation and federalism (multilevel government), particularly how these ways of organising a state can be used to advance development, deepen democracy and realise peace. He is also interested in research that focuses on the intersection between the state, law and society, and he believes in multidisciplinary approaches to analysing and finding solutions to governance problems in Africa and beyond. He has authored several publications on decentralisation, the role of local government and governance issues in general. In 2015, he was appointed as a guest researcher at the Institute of Federal Studies, University of Fribourg (Switzerland), where he undertook research on decentralisation in Zimbabwe.

**Charles M. Fombad** is Professor of Law and heads the Comparative African Constitutional Law Unit at the Institute for International and Comparative Law, Faculty of Law, University of Pretoria. He holds a Licence en Droit (University of Yaounde), LL.M and PhD (University of London) and a Diploma in Conflict Resolution (University of Uppsala). He has taught at the University of Botswana (1997-2009), the University of Yaounde II at Soa (1988-1997) and was visiting Professor at the Universities of Dschang and Buea in Cameroon. From 2003 to 2007 he was also a Professor *Extraordinarius* of the Department of Jurisprudence, School of Law, University of South Africa. Professor Fombad is the author of several books and has published numerous articles in local and international peer-reviewed journals. He has published more than two dozen book chapters and numerous other publications and conference papers. He is a member of the editorial board of several international journals and a member of many professional associations. He is currently a Vice President of the International Association of Constitutional Law (IACL). He is also a member of the Academy of Science of South Africa (ASSAf) and a fellow of the Stellenbosch Institute for Advanced Study (STIAS). His research interests are in comparative African constitutional law, media



law, the African Union and legal history, especially issues of legal harmonisation.

**Nathaniel A. Inegbedion**, PhD, B.L. is a Professor of Law and Dean in the Faculty of Law, University of Benin, Benin City, Edo State, Nigeria. He was the Head of Department of Public Law for several years first in the State University, Ambrose Alli University, Ekpoma, Edo State, and the later in the Federal Government-owned University of Benin. At the University of Benin, he was for seven years the coordinator of the postgraduate programmes. His research interest is in public law with an emphasis on constitutional law and comparative criminal law. He has published widely in peer-reviewed journals in Africa and the United Kingdom. He is a member of the Council of Legal Education, Abuja, a Resource Person with the National Institute of Legislative Studies, Abuja and an Adjunct Professor with Ambrose Alli University. Called to the Nigerian Bar in 1989, he is a Notary Public of the Supreme Court of Nigeria. He has served as the Chairman of the local branch of the Nigerian Bar Association (2009-2011) and has been a member of its Election Working Group and its National Executive Committee (2004-2006 and 2009-2011). He is a member of the National Association of Law Teachers and the African Network of Constitutional Lawyers. He serves as an external examiner and external assessor to a number of universities in Nigeria.

**Palesa Madi** is an attorney based at the Centre for Applied Legal Studies (CALS), School of Law, University of the Witwatersrand (Wits). While studying towards her LLB at Wits between 2009 and 2012, she became a member of the Wits Volunteer Programme and founding member and Chairperson of the Wits Chapter of Students for Law and Social Justice. In 2013 Palesa interned at Amnesty International, South Africa and CALS. At CALS, her work cuts across all five programmes, viz., Gender, Basic Services, Rule of Law, Environmental Justice and Business and Human Rights. She has also been involved in domestic violence matters, the Marikana Commission of Inquiry, eviction matters, matters for the advancement of rights to water, sanitation and electricity, and remand condition matters. She has organised community workshops and made oral submissions in Parliament for legislation.

**Makanatsa Makonese** is the Executive Secretary/Chief Executive Officer of the Southern African Development Community (SADC) Lawyers Association. She holds a Bachelor of Laws (Honours) degree, a Master's in Women's Law and is currently awaiting results for a Doctorate in Law with a focus on women's law and women's land rights in Zimbabwe. Her most recent publications and research focus on women's land rights under the new Zimbabwean Constitution, the role of the legal profession in promoting the independence of the judiciary and the role of customary law in promoting women's rights in South Africa, Lesotho and Botswana. She has previously worked with UN Women in Zimbabwe and the Zimbabwe Gender Commission (ZGC) in developing an Investigations and Complaints Handling Manual for the ZGC. Makanatsa's research and academic interests are in the areas of women's rights, land law and the development of the legal profession in Africa. She has sat on the boards of many

organisations, including the Zimbabwe Environmental Law Association (ZELA), the International Institute of Law Association Chief Executives (IILACE) and is an Advisory Board Member for a Salvation Army Shelter for Abused Women and Victims of Human Trafficking in Pretoria.

**Thulani R. Maseko** is an admitted attorney and practices law in his own law firm, T.R. Maseko Attorneys in Mbabane. Maseko holds a Bachelor of Arts (BA Law) and Bachelor of Laws (LLB) degree from the University of Swaziland. He also holds a Master's degree in Human Rights and Democratisation from the Centre for Human Rights, University of Pretoria. He is a Hubert H. Humphrey Fellow and graduated with a Master's degree in International Legal Studies from the American University Washington College of Law. Maseko is an activist and in his legal practice focuses on human rights and constitutional litigation. In 2009 he was arrested and charged under the Subversive Activities Act of 1938. The matter is pending. In 2014 he was arrested and charged for the alleged offence of contempt of court. After serving 15 months of a two-year jail sentence, he was acquitted and discharged by the Supreme Court, after huge international and national pressure for his unconditional release as a prisoner of conscience.

**Wandisa Phama** is a human rights lawyer at the Centre for Applied Legal Studies (CALS), School of Law, University of the Witwatersrand (Wits). She holds a law degree from the same institution. Prior to joining CALS, Wandisa worked in various human rights institutions including the Human Rights Commission, University of Cape Town Refugee Rights Project and the Equal Education Law Centre. Her work includes assisting communities with access to basic services, holding corporations accountable for human rights violations and assisting communities to assert their rights to gatherings and protests. At CALS, Wandisa has also participated in international and regional dialogues on business and human rights issues. She has published on transformation of the legal profession, business and human rights in Africa, and the history of South African law in relation to miners.

**Jane Serwanga** is an Advocate of the High Court of Kenya. She holds a Bachelor of Laws (LLB) degree from Makerere University (Uganda), a postgraduate diploma in Legal Practice from Kenya School of Law and a Master's of Law (LLM Human Rights and Democratisation in Africa) degree from the University of Pretoria (South Africa). She is a certified mediator and a trainer in trial advocacy. She is an ardent advocate of human rights and gender justice and has more than ten years' experience in continental and national-level litigation, advocacy, research and programme management. She has engaged state, non-state and intergovernmental organisations across Africa to advocate for ratification, domestication and implementation of key AU human rights instruments, including the Protocol on the Rights of Women in Africa and the African Court Protocol. She has led capacity-building projects to promote implementation of human rights instruments by lawyers and judges in East Africa. At national level, she has engaged in providing legal aid and access to justice programming. She has undertaken litigation and advocacy for the enactment and

implementation of gender-sensitive laws. She currently serves as Gender Specialist in the UNDP/UN Women elections project, Strengthening Electoral Processes in Kenya.

**Kamotho Waiganjo** is an Advocate of the High Court of Kenya of more than 25 years' standing. He holds a Bachelor of Laws and a Master's in Law degree specialising in International Trade Law from the University of Nairobi. Kamotho has served in numerous capacities in the private bar, in consultancy, in civil society and in the public sector, culminating in his appointment as a Member of the Commission for the Implementation of the Constitution in Kenya in 2010. In the Commission he was the Convenor of the Public Finance Management thematic area, which was also tasked with overseeing fiscal decentralisation. He also co-convened the Devolution thematic area and served as a member of numerous committees including the Intergovernmental Budget and Economic Council. Kamotho is a regular commentator on national issues and a weekly columnist for Kenya's second-largest newspaper, *The Sunday Standard*.

**Donald Rukare** holds an LL.D from the University of Pretoria. He is an access to justice and human rights specialist with 20 years' experience working in legal, justice, rule of law and human rights issues in Uganda and the region. Dr Rukare's experience cuts across the public, private, international community and academic sectors. He has worked in Uganda as a lawyer, as a governance advisor with the Inspectorate of Government (IG), as well as with bilateral aid donors (Irish Aid) and civil society. He has managed large multilateral initiatives (European Union) focused on human rights and access to justice and has undertaken consulting and research assignments on justice, governance and human rights issues. He is currently the Chief of Party of the USAID Rights and Rule of Project managed by Freedom House in Uganda. Dr Rukare is also a part-time lecturer in international law and human rights at Makerere University and is a regular guest lecturer at the International Law Institute, Kampala and the Center for Human Rights, University of Pretoria, South Africa. He is an external examiner at both Makerere and Pretoria Universities.

**Arne Wulff** holds PhD in law and is a lawyer. He was born in 1958 in Northern Germany. He worked briefly as an attorney before going into administration. He worked for two years in the Ministry of the Interior in Mecklenburg-Vorpommern, one of the new counties in Germany after the reunification, and later moved to another county (Schleswig-Holstein), where he worked with Parliament as a CEO for a political faction. Thereafter he worked in the Ministry of the Interior (Police Department) and was the elected President of the City Council of Kiel. In 2005 he was appointed by the Prime Minister as the State Secretary for Finance in Schleswig-Holstein (this position is equivalent to Principal Secretary in some African governments). Four years later he was appointed by the Prime Minister as the Head of the State Chancellery. He retired in 2012 because of a change in the government. Currently Dr Wulff works for the Konrad Adenauer Stiftung. In March 2014 he took over the position of the Head of the Rule of Law Program for Sub-Saharan Africa.

*Charles M. Fombad*

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## 1 Background

This volume comprises a selection of papers that were presented at a conference in June 2016 organised jointly by the Institute for International and Comparative law in Africa (ICLA), based at the Faculty of Law of the University of Pretoria, South Africa, and the Konrad Adenauer Stiftung Rule of Law Program for Sub-Saharan Africa, based in Nairobi, Kenya. The theme was: “The implementation of modern African Constitutions: challenges and prospects”. The goal was to identify obstacles to constitutional implementation in Africa and, on the basis of good practice, assess how they could be overcome.

This volume cannot pretend to capture the complexity of the causes and effects of, and solutions to, the problem of non-implementation of constitutions in Africa: the subject is far too intricate. Nevertheless, this study, representing a first attempt to draw attention to the issue, hopes to open debate about it and make it an integral consideration in constitution-building in the future.

From the 1990s to the present day, Africa has had a fervour for crafting and re-crafting constitutions. The emphasis has been on constitutionalism, good governance and the rule of law, all of which raised high hopes that the era of repressive, arbitrary and autocratic rule is over. A clear sign of the fundamental change in African governance was the collapse of the former bastions of apartheid, Namibia and South Africa, countries that were once symbols of human tragedy. In the case of South Africa, the new era was marked by its 1996 Constitution, which most constitutionalists regard as one of the most liberal and transformative modern constitutions in the world.

In terms of their scope and content, many of the post-1990 African constitutions incorporated provisions aiming to protect citizens against the worse aspects of abuse of power and arbitrary rule. They contained a

catalogue of human rights, and placed constraints on governments to promote, inter alia, democracy, transparency, accountability and service delivery. Many also had provisions limiting presidential terms to ensure alternation of power. However, as we move towards the end of the third decade since the winds of change of the 1990s, the reality is that few of those original hopes have been met.

Good constitutions do not lead in and of themselves to constitutionalism, good governance and respect for the rule of law. For example, many of the key innovative constitutional provisions of the post-1990 era, such as presidential term limits, have been easily and arbitrarily amended, or simply ignored. Similarly, constitutional institutions introduced to disperse power, enhance accountability and limit the scope for abuse of powers often either have not been established or are not functioning as they are meant to. A combination of complacency, naïveté and growing cynicism has perpetuated the post-independence culture of constitutional infidelity.

Nevertheless, modern African constitutions, especially those in Anglophone Africa, reflect in their ideals and content many of the aspirations and desires of the people. But constitutions do not implement themselves. It can be argued that, until the 2010 Kenyan Constitution, the critically important issue of constitutional implementation had been mainly ignored in most of the constitutionalism discourse of the last three decades. It is a truism that a constitution, no matter how elaborate and comprehensive it may purport to be, serves no purpose if it is not fully implemented or can only be implemented selectively at the whim of those in leadership. Although considerable efforts were made since the 1990s to craft constitutions that provide reasonable prospects for constitutionalism, the rule of law, good governance and democracy, little attention was paid to the question of how these constitutions would be implemented. This is surprising, given that post-independence constitutionalism was generally nipped in the bud by leaders who so regularly and easily ignored obligations imposed on them by constitutions.

The chapters in this volume provide some indication of the nature and scope of the dilemma of constitutional implementation in Africa. The book is divided into four parts. Part 1 offers an introductory synopsis of the challenges of constitutional implementation, while Part 2 contains country case studies, in particular four contrasting studies of constitutions that were adopted at various stages during the wave of democratisation in Africa in the 1990s.

The first study looks at the situation in Nigeria under its 1999 Constitution. This Constitution, while reflecting a transition from military dictatorship to a liberal democracy, was largely crafted and imposed by the departing military junta. The second case study examines the challenges of constitutional implementation under the Swaziland Constitution of 2005,

which was supposed to transform the kingdom into a constitutional monarchy. Implementation of that constitution remains problematic, because the King reigns with little or no constraints imposed on him by the Constitution. The third case study focuses on Zimbabwe. Its Constitution of 2013 is one of a new generation of liberal constitutions influenced by the 1996 South African Constitution. However, its full, effective implementation depends on President Robert Mugabe, whose 36 years of authoritarian rule have left the country on the brink of economic collapse.

This part of the volume ends with the case of Uganda, whose 1995 Constitution promised so much after decades of conflict and repressive rule. Its implementation has been hamstrung, though, by an increasingly autocratic leader, President Yoweri Museveni, who has transformed himself virtually into a president for life.

Thereafter, Part 3 explores the role of civil society organisations (CSOs) in constitutional implementation. One of the two chapters in this part discusses the role of CSOs as well as special constitutional institutions in South Africa (popularly known as Chapter 9 institutions). The second chapter concerns the role of CSOs in Zimbabwe.

Part 4 of the volume deals with specialised constitutional implementation commissions. The focus of the two chapters is on the Kenyan Commission for the Implementation of the Constitution (CIC). The role the CIC played in the constitutional implementation process in Kenya is examined from two perspectives: firstly, from the perspective of a CIC insider, and secondly, from that of an outsider. The last part of the book highlights the main lessons that can be drawn from these diverse experiences.

Turning now from the outline above of the book's overall plan to consider its trajectory in closer detail, in Chapter 2, "Problematising the Issue of Constitutional Implementation in Africa", Charles Fombad provides an overview of the problems arising in Africa from non-compliance with constitutional obligations. He begins by contending that without a concerted effort to implement a constitution, what is generally held to be the fundamental law of the land may amount to little more than a printed exercise in futility. In view of Africa's poor record of constitutional obedience and fidelity, Fombad maintains that one of the major flaws of the post-1990 constitution-making processes was the failure to attend to the challenges of constitutional implementation. He argues that unless serious corrective measures become the norm, for instance through institutions like Kenya's now defunct CIC, constitutional non-implementation will continue to subvert Africa's efforts to entrench constitutionalism and the rule of law.

Fombad notes that the arguments against constitutional disobedience and its consequences go to the core of constitutionalism. If a constitution

that incorporates all the core elements of constitutionalism is not fully implemented, the prospects for constitutional governance are compromised. In this regard, he points out that implementation failures distort the compromises that constitutions usually reflect and thus further betray the confidence of citizens.

Fombad identifies the formal and informal mechanisms for implementing African constitutions and, in considering the different actors involved in the process of implementing a constitution, argues that the Kenyan Constitution went the furthest to provide a specialised implementation regime, albeit only for the first five years of the constitution's life. He concludes that it must be recognised that a constitution will achieve its purposes of promoting constitutionalism, good governance and respect for the rule of law only if its implementation and enforcement can be guaranteed and do not hinge on the goodwill and caprice of any individual, group or institution.

The purpose of the country studies in Part 2 is to gain insight into how constitutions are being implemented in selected countries. The scope of each country study encompassed an overview of the manner in which the constitution was drafted to see if this contributed in any way to the extent to which it was implemented. In addition, each author set out to identify the main actors in the implementation process; the key challenges to this process; the lessons that emerged; and the recommendations that could be proffered for enhancing constitutional implementation.

The country studies start with the Nigerian experience. In Chapter 3, Nathaniel Inegbedion describes how the Constitution of the Federal Republic of Nigeria 1999 emerged from a protracted political crisis precipitated by the annulment of the 12 June 1993 election and was hurriedly drafted by the military junta without adequate public participation. The absence of popular participation, he contends, may have denied it legitimacy and negatively impacted on its implementation.

Indeed, although more than 153 institutions were provided for and are up and running, other administrative, political and economic structures have not been fully implemented. Inegbedion points out that the gap and omissions relate to, inter alia, aspects of local government; fiscal federalism; Chapter II of the Constitution (its provisions dealing with the fundamental objectives and directive principles of state policy); political party finances; and the mechanisms for the recall of members of the legislature. An examination of some of the decided cases reveals that the courts have had a mixed impact on the constitutional implementation process.

Apart from having their basis in inadequate public consultation during the making of the constitution, Nigeria's challenges of implementation arise from the absence of a constitutional culture due to many years of

military rule, challenges which are aggravated by the complex, heterogeneous nature of the Nigerian state and society. Inegbedion concludes by suggesting that, given the young age of the Constitution, full implementation may be achievable in time, particularly in view of the ongoing efforts to amend the Constitution.

In Chapter 4 Thulani Maseko and Lukman Abdulrauf examine the implementation of the 2005 Swaziland Constitution, They begin by noting that it was adopted 32 years after King Sobhuza II unlawfully abrogated the independence Constitution of 1968. The 2005 Constitution created optimism that the era of arbitrary rule was over and that it would transform the Kingdom into a constitutional monarchy. It was hoped that all organs of government and its agencies would conduct their business in line with the dictates of the Constitution, thus making Swaziland a country governed by the rule of law and the basic principles of constitutionalism.

However, the authors maintain this has been far from the case. They show that in many respects those who hold public office, including the King, have failed to give meaning and effect to the Constitution. Maseko and Abdulrauf refer in particular to the arbitrary fashion in which the Prime Minister, ministers, judges, Members of Parliament, and other senior state officials have been appointed with scant regard for constitutional requirements.

According to the authors, the net effect of this failure of implementation is a corresponding failure to promote and protect basic human rights and fundamental freedoms. In their view, the evidence of the last decade suggests that although the leadership of Swaziland adopted the Constitution, it never had any intention of applying it in a way that might threaten the King's otherwise absolute powers. This, they argue, has made the Constitution meaningless to the poor and marginalised, whose enjoyment of the rights it confers, particularly those in the Bill of Rights, hinges on the goodwill of the King and his officials. They conclude that, because interference in the work of the judiciary has prevented it from acting as a genuine guardian of constitutionalism, the Swazi traditional system has, as was the case before 2005, positioned itself beyond the reach of the Constitution.

In Chapter 5, "Three Years into the Implementation of the Zimbabwean Constitution of 2013: Progress, Challenges, Prospects and Lessons", Tinashe Chigwata discusses the situation in Zimbabwe. In 2013 the country adopted a new constitution following a constitutional review process that began in 2009. Before then, it had been governed by a compromise constitution; negotiated at the Lancaster House Conference in 1979, it was largely a transitional document. The adoption of a new constitution was preceded by several failed attempts at constitutional reform, which began in the late 1990s.



Chigwata argues that, compared to its 1980 predecessor, the 2013 Constitution is progressive in many respects as it provides greater prospects for constitutionalism, respect for the rule of law, democracy and good governance. He sees this constitution as full of promise for the improved well-being of ordinary citizens, but points out that only its full implementation will determine whether these possibilities materialise for their benefit or remain mere aspirations.

The chapter therefore looks at the progress made in implementing the Constitution since it was adopted in 2013. It examines some of the key challenges hindering full implementation and what lessons can be learnt from the Zimbabwean experience. Chigwata concludes that although significant strides have been made in implementing the Constitution, much more is still needed to bring about its full implementation.

Donald Rukare concludes the country case studies with his examination of the constitutional implementation experience of the Ugandan 1995 Constitution. In 1988 a much-touted, highly participatory process was put in place to involve Ugandans in developing a people-responsive Constitution. Seven years later the 1995 Constitution was adopted, and there were high hopes it would return the country to constitutional order after the military dictatorship of the 1970s and 1980s. According to Rukare, most Ugandans welcomed the ostensibly progressive Constitution as the dawn of a new era. Twenty years of its application thus provides an opportunity to assess the country's record of constitutional implementation.

Rukare's chapter considers whether the Constitution provided a solid basis for entrenching and sustaining constitutionalism and respect for the rule of law in Uganda. It explores how the constitution was drafted and how successfully it has been implemented by those vested with this mandate, such as Parliament, the judiciary and oversight agencies like the Uganda Human Rights Commission, the Inspectorate of Government and the Equal Opportunities Commission. The chapter also discusses the challenges that have been faced in the implementation process over the last 20 years. One of Rukare's conclusions is that there is still a long way to go to make the 1995 Constitution a living reality for the majority of Ugandans it purports to protect.

As mentioned, Part 3 deals with the role of CSOs. CSOs in Africa came alive in the early 1990s and were at the forefront of the fight for democracy and constitutional reforms. But have they become complacent since the transition to democracy and constitutional governance, or have they kept up the pressure on Africa's recalcitrant autocrats?

In Chapter 7, Wandisa Phama and Palesa Madi examine the significant role played by CSOs and the "state institutions supporting democracy" provided for in Chapter 9 of the South African Constitution

in compelling the government to comply with its obligations. Because of the frequent intervention of CSOs before the courts, a number of groundbreaking Constitutional Court judgments have provided much-needed guidance on how to interpret and enforce constitutional provisions such as the right to housing, the right to health care and numerous other fundamental human rights recognised and protected by the Constitution.

The authors focus on the Public Protector and the South African Human Rights Commission (SAHRC). Two case studies dealing with complaints lodged at the SAHRC illustrate how these Chapter 9 institutions have been critical in enforcing the South African Constitution. However, in spite of the relative success of CSOs and the Chapter 9 institutions, the authors draw attention to several challenges that need to be addressed to enhance their effectiveness in putting pressure on the government to implement the Constitution.

In Chapter 8, “Women’s Rights and Gender Equality in the New Zimbabwean Constitution: The Role of Civil Society in Implementation and Compliance”, Makanatsa Makonese argues that the constitution Zimbabwe adopted on 22 May 2013 provides a much broader and stronger legal framework for the protection of women’s rights and the promotion of gender equality than the 1980 Independence (Lancaster House) Constitution. She points out that this legal framework tackles gender and women’s rights issues largely ignored since independence, in particular the subordination of customary law to constitutional imperatives.

Makonese’s chapter assesses the extent to which these progressive women’s rights and gender equality provisions in the new Constitution are being implemented. The chapter also considers the role CSOs, individuals and other non-state actors have played during the short life of this new Constitution in advocating for the implementation of the women’s rights and gender equality provisions. She concludes that although it is too early to draw any firm conclusions, the government seems to be selective in enforcing the rights recognised and protected in the Constitution. This means that CSOs, ordinary citizens and other non-state actors must be vigilant and continue to bring pressure to bear on the government to ensure that it does not use easy excuses to escape from having to comply with its constitutional obligations.

Part 4 of the book examines the use of specialised constitutional commissions for implementing constitutions. This part is devoted to an examination of Kenya’s unique experiment in the adoption of a specialised constitutional implementation commission. The two authors, one a former member of the Kenyan CIC and the other a member of a CSO, critically review this Kenyan experience.

In Chapter 9, “The Use of Specialised Commissions for Constitutional Implementation: An Insider View of the Kenyan CIC”, Kamotho

Waiganjo, a former member of the CIC, discusses how it operated. On 27 August 2010, Kenya adopted a new constitutional framework that changed the nature of governance in the country. With such a radical shift, measures had to be incorporated in the Constitution to ensure that it was duly implemented in both letter and spirit. This, Waiganjo points out, was why the CIC, as an entity entrusted with the legal responsibility of overseeing the process of implementing the Constitution, was established.

But although the CIC's mandate was legally defined and the commission recorded successes, Waiganjo describes the implementation process as one fraught with challenges, ranging from uncertainties about the state's transition into new and unknown territory, to instances of clear obstruction by anti-reformists. Uncertainties arose from the fact that the Constitution had upset the previous political order, introduced a new legal and institutional framework, prescribed enhanced levels of accountability and transparency, and required public consultation and participation in affairs of governance. This was, he maintains, contrary to the interests of a ruling elite that had hitherto governed the country with little or no constitutional constraints.

Nonetheless, the CIC had a legal mandate to carry out, and on the strength of its institutional structure, its composition and its commitment to key values and expectations of the law, its mandate was fully discharged. Waiganjo concludes that despite the numerous problems the CIC encountered, the concept underlying it was a good one and laid a solid foundation for the full and effective implementation of the Kenyan Constitution.

In Chapter 10, "The Use of Specialised Commissions for Constitutional Implementation: An Outsider View of the Kenyan CIC", Jane Serwanga looks at the CIC from another perspective. She starts by pointing out that close to two decades of clamouring and agitation for a new constitutional order paved the way for the promulgation of the current Constitution in August 2010. This constitution introduced a raft of changes to administrative procedures, reformed the policy and legislative framework, and established governance structures designed to entrench a stable constitutional democracy.

In her view, this was a welcome change from a system that supported state repression and autocracy. Serwanga traces the key issues that informed the constitutional review process and highlights its key successes. From her perspective as a civil society actor, she interrogates the mandate of the CIC and assesses its performance, noting too some of the challenges it faced. The chapter concludes by considering the prospects for using similar institutions to facilitate the implementation of constitutions in other African countries.

The book ends in Part 5 with Charles Fombad's chapter, "Constitutional Implementation in Perspective: Developing a Sustainable Normative Constitutional Implementation Framework". Fombad observes that the book's chapters confirm that the challenges of implementing African constitutions continued beyond the essentially imposed independence constitutions to affect even the more indigenous revised or new constitutions that emerged post-1990.

Fombad notes, moreover, that implementation challenges are evident not only in fairly liberal constitutions, such as those of Kenya of 2010 and Zimbabwe of 2013, but also in illiberal ones such as that of Cameroon of 1996. The reasons for non-implementation of constitutions are varied, ranging from ignorance, carelessness or indifference, to bad faith, mischief or deliberate inaction. He points out, too, that the consequences of non-implementation differ, depending on the provisions that have not been enforced. He argues that the challenges of non-implementation will continue to have an adverse effect on the standard and quality of constitutionalism, rule of law and good governance espoused by African constitutions unless serious thought is given to this issue, ideally at the constitution-making stage.

The main lesson Fombad draws from the study is that adequate measures and mechanisms must be put in place to guard against the non-implementation of constitutions. He believes that the constitutional entrenchment of a permanent commission for the implementation of the constitution is the best way to limit and control this problem. However, for such a commission to be successful, he advises that it must be given a broad mandate and sufficient resources and be protected from external influence and manipulation by opportunistic politicians. He adds that this will need to be reinforced by measures to raise the level of constitutional literacy to enable people to know their rights and how to vindicate acts of constitutional infidelity.

# CHAPTER 2

## PROBLEMATISING THE ISSUE OF CONSTITUTIONAL IMPLEMENTATION IN AFRICA

*Charles M. Fombad*

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### 1 Introduction<sup>1</sup>

Without its full and effective implementation, a constitution, regardless of how prodigious it may be or purport to be, will be nothing more than a piece of “printed futility”.<sup>2</sup> There is no gainsaying that post-independence constitutions were quickly reduced to pieces of printed futility by the ease with which African leaders regularly and casually ignored or altered them to perpetuate their stay in power. It is therefore surprising that the issue of constitutional disobedience and infidelity has not been given the prominence it deserves in the epidemic of constitutional revision that has gripped the continent since the early 1990s.

Constitutional implementation is crucial not only for political stability but sustaining constitutionalism, good governance and respect for the rule of law. The establishment of a specialised institution to deal with the implementation of the constitution under the Kenyan 2010 Constitution has underscored the significance of this issue as well as opened new vistas on how to engage critically with the challenges posed by the non-implementation of African constitutions.

It may be riposted that the problem of constitutional infidelity and non-implementation is not unique to Africa. For example, the United States’ constitutional provision guaranteeing “equal protection of the law” was conveniently ignored for more than a hundred years while blacks and women were discriminated against and denied the right to vote. It is a fact, nevertheless, that the non-implementation of constitutions has a

1 This chapter is based largely on the article “Designing institutions and mechanisms for the implementation and enforcement of the constitution: Changing perspectives in Africa,” 25.1 *African Journal of International and Comparative Law* (2017), pp. 66-90.

2 See VKR Iyer, *Justice at the Crossroads*, Deep and Deep Publications, New Delhi (1992), p. 59.

particularly deleterious effect on Africa's faltering attempts to entrench a culture of constitutionalism and respect for the rule of law.

In problematising this issue, section 2 below interrogates the concept of constitutional implementation. Section 3 examines the link between constitutional implementation, on the one hand, and constitutional stability and constitutionalism, on the other. The different approaches to, and possible actors in, the process of constitutional implementation are discussed in section 4. The chapter ends with a few concluding remarks that highlight the importance which the issue of constitutional implementation has for constitutional design.

## **2 Conceptualising constitutional implementation**

In a broad sense, constitutional implementation can be defined as a process designed to ensure the full, effective and continuous working of a constitution by promoting, enforcing and safeguarding it. It is and should be an integral part of constitution-building and -making, neither of which is a "once-off" event that starts and ends with the adoption of a new constitution.

Seen as a process, constitutional implementation can be divided into at least three distinct (but closely linked and possibly overlapping) phases. The first is the implementation stage. Implementation in this narrow sense normally occurs immediately after the constitution enters into force and involves setting up the institutions provided for under the constitution and appointing the officials who are required to run them. An important part of this phase includes enacting the legislation that is necessary to implement specific constitutional provisions. It also entails repealing all old laws from the statute book and replacing all institutions which are no longer compatible with the new constitution. This process may take years and be subject to timelines which the constitution itself prescribes for certain activities.<sup>3</sup>

The second phase involves the promotion of the constitution. "Promotion" goes beyond mere implementation and seeks to ensure that the new laws and institutions which have been put in place do actually work. It entails facilitating the operation of the constitution by providing the institutions tasked with implementation with the means to discharge their mission.

3 For examples of provisions in constitutions setting timelines within which certain obligations must be accomplished, see Part IV, miscellaneous, section 9 of the 1992 Constitution of Ghana; Fifth Schedule [Article 261(1)] of the 2010 Constitution of Kenya; and Schedule 6, section 23 of the 1996 Constitution of South Africa.

In turn, the third phase entails safeguarding the integrity of the constitution so that its operation reflects the intentions, hopes and concerns of the people. During this phase, certain bodies and institutions play a special supervisory role to ensure that all persons and institutions entrusted with obligations and duties under the constitution discharge them in conformity with that constitution. The integrity of the constitution needs to be protected by, for example, preventing arbitrary and illegal amendments, abuse of emergency powers, or military coups d'états.

Generally, the ideal is to build in measures, mechanisms and institutions aimed at ensuring that the constitution will effectively be enforced at the design stage. Yet this leaves a prior question unanswered: Why is constitutional implementation such an issue?

### 3 Constitutional implementation, stability and constitutionalism

The arguments against constitutional disobedience and its consequences go to the core of constitutionalism. If the fundamental objective of a constitution is to prevent the twin evils of anarchy and tyranny due to governmental arbitrariness and so promote constitutionalism, respect for the rule of law, good governance and democracy; and if constitutionalism depends on entrenching core provisions such as for the recognition and protection of fundamental human rights, the separation of powers, the independence of the judiciary, mechanisms to check arbitrary changes to the constitution, judicial review and institutions to promote constitutional democracy;<sup>4</sup> then it is clear that these will all be jeopardised if the constitution is not fully and effectively implemented. A number of points can hence be made to sustain the argument that a mechanism to ensure the implementation of the constitution should now be considered an integral part of constitutional design.

Firstly, as noted above, the constitution-making process is not something that begins and ends with the drafting and adoption of a new constitution. Nor is the legitimacy of the process, once it has been earned, a guarantee that it will be sustained throughout the life of the constitution. Constitutions are never perfect documents that will satisfy everybody. Rather, they are delicate and carefully negotiated compromises, arrived at after hard and often protracted bargaining, that try to take account of and

4 For a discussion of constitutionalism and its core elements, see CM Fombad, "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa", 55 *American Journal of Comparative Law* (2007), pp. 1-46 and CM Fombad, "Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism", in Nhema and Zeleza, *The Resolution of African Conflicts*, Oxford, OSSREA & James Currey (2008), pp. 179-199.

accommodate the diverse and often conflicting interests, fears, hopes and desires of all citizens.

As such, some of these compromises are couched in vague and confusing language in order to accommodate as many stakeholders as possible. It is therefore inevitable that they could be distorted if the constitution is not, or only partially, enforced and implemented. Similarly, the explicit or implicit recognition of the constitution as the supreme law of the land, the effect of which is that any law or action inconsistent with it is invalid, will be undermined if the constitution itself is not fully enforced.<sup>5</sup> In other words, non-implementation, or only selective implementation, may call into question the continued validity of the constitution as the supreme law that expresses the will of the people.

Secondly, a constitution, however elaborate and comprehensive it may seem to be, cannot provide all the laws, rules, regulations and other measures that are needed to ensure that society functions properly. Because a constitution is not a self-enforcing piece of legislation and (as above) is usually couched in broad terms, it leaves details concerning institutions and the laws regulating these institutions and other matters for subsequent regulation. If there is no mechanism for ensuring that these institutions are duly established and the necessary laws enacted, the constitution will have only limited effect.<sup>6</sup>

This, then, is an intrinsic deficiency that leaves the constitution exposed to an extrinsic risk, namely the perennial danger that individuals or sections of the community may, for selfish, partisan or sectarian interest, block the process of implementing the constitution. It is a well-noted fact that many of the laws and institutions contemplated in African constitutions pre-1990 hardly saw the light of day. This has improved only marginally under the new democratic dispensation.

An excellent example of political manipulation and sabotage frustrating the implementation process is the case of Cameroon's 1996 Constitution. Most of the new institutions that the government was pressurised into including in the constitution were implemented only several years later, and some not at all. Until fairly recently, 24 of its 69 Articles (that is, about 35 per cent of all the provisions in the Constitution),

5 For examples of provisions recognising the supremacy of the constitution, see Article 2 of the 2010 Constitution of Kenya, section 1(1) of the 1999 Constitution of Nigeria and section 2 of the 1996 Constitution of South Africa.

6 For example, chapter 9 of the 1996 Constitution of South Africa provided for the establishment of a number of state institutions to strengthen its constitutional democracy. This chapter provided only a broad framework; the detailed legislation regulating the functioning and powers of these institutions was later enacted by Parliament.



had been not implemented.<sup>7</sup> The Cameroonian experience may be extreme but is typical of African constitutions.<sup>8</sup>

The third, and perhaps most serious, problem with constitutional implementation in Africa is the issue of frequent and abusive changes to the constitution. In the 1990s, constitutional designers tried to entrench provisions that would limit arbitrary changes to constitutions.<sup>9</sup> Recent studies show that this has had a limited impact in shielding constitutions from changes designed to ensure that incumbents or their parties stay in power.<sup>10</sup> Among the most significant innovations developed to facilitate alternation of power and to check against dictatorship and prolonged stays in power are the provisions on two-term limits. These provisions, however, were the first to be repealed in what appears to be another wave of constitution-changing fever in Africa; raising fears of an insidious revival of the pre-1990 authoritarian practices.<sup>11</sup>

It is becoming clearer that the reasons for the mounting threats to Africa's transition to genuine competitive liberal democracy and constitutionalism have little to do with the content of these constitutions but almost everything with the arbitrary manner in which they are implemented. When governments feel free to pick and choose which constitutional provision to honour and which to ignore and when, the *raison d'être* of a constitution, and constitutionalism in general, is called seriously into question. By contrast, the certainty that agreed commitments, duties and obligations contained in the fundamental law of the land will be scrupulously respected and enforced is critical to political stability and the confidence needed to attract investment in the polity. In the absence of such certainty, trust in the government, the main agent of constitutional implementation, will be in jeopardy and peace put at risk.

7 For example, Articles 46-52, which provide for a Constitutional Council, have hardly been implemented effectively and the Supreme Court under Article 67(4) continues to discharge its functions. The Senate provided for in Articles 20-24 was only established in 2013 (17 years later!) and some degree of limited decentralisation provided in part X was partially implemented between 2004 and 2008.

8 For example, although Articles 157-179 of the 2006 Constitution of Democratic Republic of the Congo elaborately provide for a Constitutional Court, the members of this court were only appointed in 2014 and the court itself was only formally inaugurated in March 2015 (almost 10 years later). Another example is the Togolese Constitution of 1992 (as subsequently amended). A 2002 amendment provided for a senate in Articles 51-57, but this institution has never been established. Similarly, its Articles 141-142, which provide for decentralisation, have been implemented very slowly and ineffectively because of lack of political will. It was only in 2007 that Law No. 2007-011 was adopted to recognise the principle of decentralisation.

9 See CM Fombad, "Some Perspectives on Durability and Change under Modern African Constitutions", 11(2) *International Journal of Constitutional Law* (2013), pp. 382-413.

10 See CM Fombad, "Constitution-Building in Africa: The Never-Ending Story of the Making, Unmaking and Remaking of Constitutions", 13(4) *African and Asian Studies* (2014), pp. 429-451.

11 See CM Fombad and N Inegbedion, "Presidential Term Limits and their Impact on Constitutionalism in Africa", in Fombad and Murray (eds), *Fostering Constitutionalism in Africa*, Pretoria, PULP, pp. 1-29.

Although the importance of addressing issues of constitutional implementation was being recognised already in the early 2000s, it is only fairly recently that it has been taken to heart by African constitutional designers. It is now necessary to consider the different approaches that can be taken to constitutional implementation and the actors who are involved in this process.

## **4 Approaches to advancing constitutional implementation**

Constitutions have generally addressed issues relating to implementation in a wide variety of ways. A review of recent developments and practice suggests that one can classify the different approaches in the formal and informal mechanisms for implementing African constitutions into four, as follows:

- constitutions containing time-limit provisions for implementing certain obligations;
- constitutions which provide special institutions for implementing its provisions;
- actors and institutions which play some role in the protection, interpretation and enforcement of the constitution; and
- actual and potential role of citizens and civil society organisations (CSOs).

### **4.1 Setting time limits for constitutional implementation**

To facilitate the process of implementation, some constitutions specify that certain laws must be adopted, or institutions set up, within specified time limits.<sup>12</sup> For example, in sections 21 and 23 the South African 1996 Constitution provides time limits in which some implementation laws on issues such as the right to information (section 32) and the right to just administration (section 33) must be adopted. It goes further to include provisions enabling the enforcement of these rights in the case of delays in adopting the implementing laws.

Sometimes, the manner of, and actors responsible for, implementation are clearly specified. An example is found in the Ugandan Constitution of

12 For example, Article 38(2) of the 1992 Constitution of Ghana stated: "The Government shall, within two years after Parliament first meets after the coming into force of this Constitution, draw up a programme for implementation within the following ten years, for the provision of free, compulsory and universal basic education." There are similar deadlines for some of the matters specified in the First Schedule to the Constitution. It also specified that the laws needed to establish nine of the independent constitutional institutions provided for (including the national commission for civil education) must be passed within six months of the first meeting of the parliament after the Constitution came into operation.

1995 in its list of non-justiciable “national objectives and directive principles of state policy”. Section 1(1) requires that the President must “report to Parliament and the nation at least once a year, [on] all steps taken to ensure the realisation of these policy objectives and principles” with respect to the implementation of the constitution.

The critical question, of course, is about what happens if the obligation to enact laws or set up certain institutions within specified time limits is not complied with. Most constitutions gloss over this issue. Could section 324 of the 2013 Zimbabwe Constitution, which states that “all constitutional obligations must be performed diligently and without delay”, make a difference? Since this, like other constitutional provisions, is not a self-enforcing provision, it depends, as shall be seen, on the willingness of the citizens to take appropriate action. Nevertheless, this is significant in that it creates a legally enforceable obligation to implement the Constitution “without delay”, imposing a duty on all stakeholders to enforce it and a duty on the courts to determine whether in any given circumstances there was a violation of this duty due to delay.

## **4.2 Creating special institutions for implementation**

Specially created institutions with the responsibility to supervise the implementation of the constitution are a novelty. The best and most far-reaching African example is the Commission for the Implementation of the Constitution (CIC) which was provided for under section 5 of the sixth schedule of the 2010 Kenyan Constitution. The only other African example is the Review and Implementation Commission provided for under the dysfunctional provisional Constitution of the Federal Republic of Somalia, 2012. The experiences of the CIC and the lessons that can be drawn from it are discussed in Chapters 8 and 9 of this book.

## **4.3 Actors and institutions which play a role in protecting, interpreting and enforcing constitutions**

Although only certain specified officials take an oath to respect and enforce the constitution, constitutional enforcement is an obligation that applies not only to these officials or, more widely, to government officials appointed directly or indirectly under the constitution: it applies to all citizens. Nevertheless, it can be said that the primary responsibility for implementing the constitution rests with the executive, particularly the president. It various roles can be described as active, proactive and reactive. The other two branches of government – the legislature and judiciary – also play an important part, although the role of the judiciary is essentially reactive. The roles of the three branches are usually reinforced and complemented by those of other actors, such as citizens, CSOs and

specialised constitutional institutions, roles which are considered separately below.

It is usually the executive, under the direction of the president or head of government (in parliamentary systems such as that in Lesotho), that develops the policy and draws up the agenda for implementing the constitution. In doing so, members of the executive are advised by civil servants, especially government lawyers, who guide them on what needs to be done and how it should be done.<sup>13</sup> Government lawyers may be required to review government policy regularly to ensure that it conforms to the imperatives of the constitution. As professionals, government lawyers are assumed to be committed to ensuring respect for the rule of law and the fundamental principles of constitutionalism. However, civil servants, including lawyers, can only but offer advice and attempt to persuade the executive to develop a policy and agenda sensitive to the imperatives of constitutional implementation; the final decision is a political one, and has to be taken by politicians.

Insofar as the judiciary is concerned, they serve, at least in Anglophone Africa and increasingly too in the civilian jurisdictions in Africa, as a bedrock for the protection, interpretation and application of the constitution. The judiciary as a whole can be described as the promoters, guardians, impartial enforcers and defenders of the constitution and constitutionalism. The full details of the judicial role are beyond the scope of this chapter. Nevertheless, it must be pointed out that the possibility of judicial review of legislation or governmental action to determine its conformity with the constitution became a common feature in African civil law jurisdictions influenced by the 1958 French constitutional tradition only after the constitutional reforms of the last two decades.<sup>14</sup>

The effectiveness of the courts' interventions in constitutional matters depends on a range of factors, such as the courts' ability to decide matters impartially and independently without any external pressure or influence, the scope of the powers they have been given to deal with such matters, and the provision of adequate resources and infrastructure. Here it will suffice to say that courts, as the definitive interpreters of exactly what the constitution means, can play a significant role when it comes to enforcing vaguely worded provisions.

One of the main areas where the courts in some countries, especially South Africa, have played a decisive role through judicial activism in

13 See generally V MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights", 13(2) *International Journal of Constitutional Law* (2015), pp. 383-406.

14 See CM Fombad, "The Expansion of Judicial Power in Africa and Democratic Consolidation: Opportunities, Challenges and Future Prospects", in Ndulo and Gazibo (eds), *Growing Democracy in Africa: Elections, Accountable Governance and Political Economy*, London, James Currey Publishers (2015) (forthcoming).

interpreting and enforcing vague constitutional provisions is in dealing with socio-economic rights.<sup>15</sup> For example, the South African Constitution, while recognising the right to have access to adequate housing, provides in section 26(2) that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”. Indeed, Hugh Corder is correct when he opines that

the formulation of socio-economic rights [in the South African Constitution] clearly anticipates a relatively extensive but nuanced judicial role for their appropriate realization, and the judges have generally not disappointed.<sup>16</sup>

As regards housing, in *Government of the Republic of South Africa v Grootboom*,<sup>17</sup> the High Court – when faced with the plight of 900 women and children living in an informal settlement in cold and wet conditions – cited the suffering of the children and the “immediacy” of the language in which children’s rights is couched in the Constitution (“Every child has the right ... to basic... shelter”) to order emergency shelter to be provided to the children and their parents. The State appealed to the Constitutional Court, arguing that it had a plan to provide housing in an orderly and systematic manner and that the effect of the High Court order would disrupt the plans by privileging certain groups over those waiting patiently on a housing list, in addition to which it entail expenditure of scarce resources.

However, the Constitutional Court, while acknowledging the difficulties of the situation, pointed to the absence of mechanisms for dealing with the emergency needs of those in dire straits as a flaw to the plans and confirmed the order. In reaching this conclusion, it was clearly going out of its way to look at the enormous need for public housing in South Africa and was willing to hold the executive accountable for the way it was dealing with the problem. This was an approach taken further in a series of cases, one of which is *President of the Republic of South Africa v Modderskip Boerdery (Pty) Ltd (Agri SA and Others, amici curiae)*.<sup>18</sup>

Due to acute overcrowding in an informal settlement in Johannesburg, thousands of people moved over to neighbouring farmland and erected basic shelters in which to live. The landowner failed through various lawful means to evict the squatters and went to the High Court seeking

15 See generally C Scott and P Alston, “Adjudicating Constitutional Priorities in a Transitional Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise”, 16 *South African Journal on Human Rights* (2000), p. 200; D Davis, “Socio-Economic Rights in South Africa: The Record after Ten Years”, 2 *New Zealand Journal of Public and International Law* (2004), p. 47; and, what is perhaps the most comprehensive account of this, H Corder, “Judicial Activism of a Special Type: South Africa’s Top Courts Since 1994”, in B Dickson (ed), *Judicial Activism in Common Law Supreme Courts*, Oxford, OUP (2007), pp. 323-362.

16 In H Corder, “Judicial Activism of a Special Type: South Africa’s Top Courts Since 1994”, *op. cit.* p. 341.

17 2001 (1) SA 46 (CC).

18 2005 (5) SA 3 (CC).

confirmation of his property rights and an acknowledgment that the state had an obligation to resolve the issue. The Constitutional Court, in confirming the novel remedy of constitutional damages that had been awarded by the High Court, held that the state was obliged to provide effective dispute-resolution mechanisms for its citizens and had failed to do so in this case. Though recognising the gravity of a social problem, the Court once again made it clear that the state was under a duty to take action.

Furthermore, in *Minister of Health v Treatment Action Group (TAC) (No.2)*,<sup>19</sup> the Constitutional Court was faced with a highly sensitive political case in which the applicants contested the state's policy of selecting test sites for the provision of antiretroviral drugs to HIV-positive mothers and their newborn children, and sought the right to secure these services for every child. The Minister resisted the application, questioning the constitutional obligation of the government to provide an "effective, comprehensive and progressive programme" such as that argued for by TAC. The Court, while acknowledging that "courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences", refused to be swayed by the state's argument that it should confine itself to a declaratory judgment. It decided that the state was duty-bound to grant effective remedies in all cases which included, in this case, an order for *mandamus* and the exercise of supervisory jurisdiction.

Turning to a further role-player, the legislature, in principle it should, as the institution charged with making laws, play a major role in making the new laws that are needed to give effect to a new constitution. However, its role is often fairly limited in practice. There are two main factors that have combined to limit the ability of parliaments to play a more active and effective role in constitutional implementation. The first is that, in most systems, it is the executive that takes the initiative to make laws. Quite often, the policy-making process during which the executive consults and drafts bills will have been concluded already by the time the bill is introduced in parliament. Because the parliamentary agenda is usually crowded, there is then little time to get into serious debates over bills.

A second, more serious, factor is that the spread of dominant parties in Africa – which use party discipline to ensure that the government's view always prevails – has been compounded by the weak, fractious and divisive nature of opposition politics, resulting in weak and ineffective legislatures. Hence, if the government's constitutional implementation agenda is lethargic, it is unlikely that it could be spurred into action by the legislature.

19 2002 (5) SA 721 (CC).

Since the 1990s, there has been a remarkable increase in the number and powers of independent constitutional institutions that in one way or another could enhance the possibilities of enforcing the constitution.<sup>20</sup> Although this trend coincides with a global explosion of similar institutions,<sup>21</sup> it may be argued that the South African Constitution of 1996 was the first on the continent to give these institutions the special constitutional status that has now been replicated in some recent constitutions, particularly the Kenyan Constitution of 2010 and the Zimbabwean Constitution of 2013. These bodies include ombudsman institutions, anti-corruption commissions, human rights commissions, the auditor-general and independent electoral commissions.<sup>22</sup>

This steady rise of institutions playing a watchdog role in constitutional implementation raises interesting issues. Nevertheless, for these institutions to succeed, more efforts have to be made in their design to prevent them from being captured and rendered ineffective by the other branches of government, especially the executive.

#### 4.4 Strengthening citizens and civil society organisations

The effectiveness of a constitution depends as much on its success in reflecting the desires and hopes of the people as it does on their manifest will to protest and defend it against any actual, threatened, active or passive violation of its provisions. A robust citizenry and an activist civil society are of critical importance to the implementation of a constitution.

CSOs, consisting of professional or business groups and activist groups composed of urban and middle-class people, especially the media and legal profession, must be ready and willing to challenge any action that threaten the proper implementation of the constitution. The legal profession in

20 See generally CM Fombad, "The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa", in Fombad, CM (ed), *Separation of Powers in African Constitutionalism*, Oxford, Oxford University Press (2016), pp. 325-344.

21 For example, Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers*, Cambridge, Cambridge University Press (2007), points out that there are about 250 of such institutions in the United Kingdom and 200 in the United State. Also see A Schedler, L Diamond, et al., *The Self-Restraining State: Power and Accountability in New Democracies*, Boulder, Colorado, Lynne Rienner (1999); C Kenney, "Reflections on Horizontal Accountability: Democratic Legitimacy, Majority Parties and Democratic Stability in Latin America", Paper prepared for the conference on Institutions, Accountability, and Democratic Governance in Latin America, Kellogg Institute for International Studies, University of Notre Dame, 8-9 May 2000; J Ackerman, "Independent Accountability Agencies and Democracy: A New Separation of Powers?" Paper presented at "Workshop on Comparative Administrative Law", Yale University, 8-9 May 2009; and A Przeworski, S Stokes, et al., *Democracy, Accountability, and Representation*, Cambridge, Cambridge University Press (1999).

22 See further CM Fombad, "The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa", in Fombad (ed), *Separation of Powers in African Constitutionalism*, Oxford, Oxford University Press (2016), pp. 325-344.

particular is the watchdog for the respect of the rule of law and must be ready to speak up for and defend the weak, poor and voiceless in society through *amicus curiae* representation in courts. The media must also be ready to investigate and report all incidents of violations or other actions that interfere with the implementation of the constitution.

However, civil society can only counter the threats posed by active or passive violation of the constitution if it has knowledge of the constitution. One of the hindrances to constitutional implementation is the extensive lack of knowledge of the constitution, and consequently the rights and obligations it imposes, especially among ruling elites. It is incumbent on CSOs to increase public awareness, especially in rural areas, about the constitution, its contents and the rights and obligations it imposes on all persons and institutions, both public and private.

In this regard, the Kenyan Constitution underscores the role of the people in the overall process of constitutional implementation. The starting-point is Article 1(1), which states that “all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with th[e] Constitution”. It then adds in Article 1(3) that the sovereign power is merely delegated to the three branches of government, namely the executive, legislature and judiciary, and must be exercised in accordance with the Constitution. This is reinforced in Articles 10, 129 and 232, which provide for the participation of the people in all facets of law execution, including policy-making. The shift of emphasis from the sovereignty of the state under the 1969 Constitution to the sovereignty of the people in the 2010 Constitution is deliberate, and underlines the importance of active involvement of the people in the effective implementation of the constitution. This is why Article 3(1) states, “Every person has an obligation to respect, uphold and defend th[e] Constitution”.

A similar approach is adopted by the Ugandan 1995 Constitution. Articles 3(3) and (4) state that “all citizens of Uganda shall have the right and duty at all times” to defend the constitution and resist any action by any person or group who try to suspend, overthrow, abrogate or amend the constitution contrary to its provisions. It considers such conduct treason. Article 4 provides for the promotion of public awareness of the Constitution.<sup>23</sup>

In spite of the similarity in approach between Kenya and Uganda, one can argue that the Kenyan Constitution has gone further than the Ugandan

23 It declares: “The State shall promote public awareness of this Constitution by – (a) translating it into Ugandan languages and disseminating it as widely as possible; and (b) providing for the teaching of the Constitution in all educational institutions and armed forces training institutions and regularly transmitting and publishing programmes through the media generally.”



Constitution by providing the special implementation regime mentioned earlier.

## 5 Conclusion

The entrenchment of constitutionalism in Africa continues to be retarded by self-seeking elites who wish to use constitutionalism and democracy as a smokescreen behind which to perpetuate the repressive and autocratic practices of the past. It is thus no surprise that despite the many liberal provisions in post-1990 African constitutions and the progress that has been made, the quality of constitutional governance, the respect for human rights and the rule of law, and the other indicators of good governance show that African countries continue to be vexed by the challenges of constitutional implementation.

Constitutional implementation therefore must be made a priority issue in any constitution-making process. Designing a constitutional framework today that will stand a good chance of being implemented tomorrow in a transformative way that can improve the lives of the people must incorporate an implementation process and the necessary institutions to make this work. Such a design must include at least three fundamental elements: firstly, a special constitutional implementation institution, like Kenya's CIC, to complement and strengthen the role of the constitutional courts or bodies exercising constitutional review, which act as guardians and custodians of the constitution and its implementation; secondly, a number of independent constitutional institutions to promote good governance and accountability; and thirdly, the constitutionalisation of certain operational principles that will guarantee the independence of these institutions and shield them from political capture and manipulation.

Ultimately, it has to be recognised that a constitution will achieve its purpose of promoting constitutionalism, good governance and respect for the rule of law only if its implementation and enforcement can be guaranteed and put beyond the goodwill of any individual, group of individuals or institution. One of the main lessons of the last six decades of constitutional development in Africa is that incorporating constitutional mechanisms and institutions to supervise and monitor the implementation of the constitution is now an essential aspect of constitutionalism.

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# CHAPTER 3

## CONSTITUTIONAL IMPLEMENTATION: THE NIGERIAN EXPERIENCE

*Nathaniel A. Inegbedion*

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### 1 Introduction

The Constitution of the Federal Republic of Nigeria 1999 came into effect on 29 May 1999. Since then, it has been amended three times<sup>1</sup> and attempts have been made to produce a new constitution.<sup>2</sup> In addition, two separate constitutional conferences have been held with a view to producing a more acceptable constitutional design.

These various “assaults” on the Constitution are symptomatic of a legitimacy crisis, one which impacts on its implementation. A link can be drawn between how the constitutional document has been implemented, how it resonates with the values, aspirations and socio-cultural life of the Nigerian people, and how participatory or inclusive the process was that led to its adoption. This combination of factors clearly determines its

1 Called the Constitution (First Alteration) Act, the Constitution (Second Alteration) Act and Constitution (Third Alteration) Act, respectively.

2 The last attempt was by the 7<sup>th</sup> National Assembly in 2015, when it sought to amend several provisions of the Constitution so substantially as practically to rewrite it. The amendments included the provisions on citizenship; the removal of the power of the President to assent to future constitutional amendments; a mandatory provision that the President deliver a “state of the nation” address; expanding provisions on fundamental rights, among these the rights to basic education and health; giving the Federal High Court jurisdiction to try electoral offences; creating the office of the Accountant General of the Federal Government, distinct from the office of the Accountant General of the Federation; creating the independent office of the Attorney-General separate from that of the Minister of, or Commissioner for, Justice; and expanding the legislative powers of the Federal Government and the federating units under Part II of the Second Schedule to the Constitution. The President refused to sign the amendment bill on the basis of objections he raised about the procedure for the amendments, and subsequently filed an action at the Supreme Court challenging the amendments. The matter could not be resolved before the end of the tenure of the President and that of the 7<sup>th</sup> National Assembly. The proposal to amend the provisions on local government so as to accord them financial autonomy did not receive simple majority support of the subnational legislatures, as required by the Constitution. It was therefore not part of the amendment bill submitted to the President for his assent.

“constitutional irreverence”.<sup>3</sup> Given all the contending forces that attend it, constitutional implementation may well be as complex as Peleg and Winter suggest in their mathematical formulation of the subject.<sup>4</sup>

The aim of this chapter is to assess the performance of the Constitution in terms of its implementation. The chapter examines the constitution-making process and the extent to which it was inclusive or participatory, the purpose being to ascertain a connection between the Constitution’s autochthony and the depth of its implementation. The chapter profiles some of the Constitution’s salient provisions and considers the national institutions set up to oversee the implementation of certain provisions and how far these institutions have fulfilled their roles.

The chapter then examines certain provisions of the Constitution that are fraught with problems of implementation. These include provisions on local government, fiscal federalism, the secularity of the country, party financing, the recalling of a member of the National Assembly, and the fundamental objectives and directive principles of state policy. The chapter identifies the challenges bedeviling the Constitution’s implementation and assesses how the courts have dealt with them. It concludes with recommendations on the way forward.

## 2 The evolution of the 1999 Constitution

Unlike its predecessor, the 1979 Constitution, the Constitution of the Federal Republic of Nigeria 1999 is not the result of a well thought-out and elaborate constitution-making process. Rather, it is a creation of the military, which designed it and decreed it into existence. It is a product of necessity, hurriedly put together as a consequence of the “12 June crisis” in 1993.

Given the nature of its inception, its implementation was bound to be problematic. As part of the military regime’s transition programme, presidential elections were held in Nigeria on 12 June 1993. They were generally considered free and fair, and seemed to have been won by Chief Moshood Abiola, but for no apparent reason, the head of the military regime, General Ibrahim Babangida, annulled the election. The subsequent public outcry compelled him to hand over power to an interim civilian government, which lasted for only 82 days before it was overthrown by General Sanni Abacha.<sup>5</sup>

3 See H Baxter, “Critical Reflections on Seidman’s *On Constitutional Disobedience*” 93 B.U.L. (2013), p. 1373.

4 See B Peleg & E Winter, “Constitutional Implementation”, 7 *Review of Economic Design* (2002), pp. 187-204.

5 Decree No. 61 of 1993.

The General eventually died in office on 8 June 1998. His autocratic rule, and the clamour for the annulled election to be validated, had a negative impact on the administration. The unintended consequence was that, unprecedentedly, citizens held their military in contempt.<sup>6</sup> The death of General Abacha paved the way for General Abdulsalami Abubakar to assume the mantle of leadership. However, given the credibility crisis the military was facing due to Abacha's dictatorship and the annulment of the 12 June presidential election, the new military junta immediately began a programme to return the country to a democratically elected government by setting up a Constitution Debate Coordinating Committee.

Within its two-month mandate, the Committee produced the draft 1999 Constitution, which was then decreed into existence by the military government. Thus, there was virtually no public participation in its creation. In fact, only 450 people, largely from the political class, submitted memoranda to the Committee.<sup>7</sup> The document was never submitted to a constituent assembly for a robust debate on its provisions, thereby denying it the "constituent power" and "inclusiveness"<sup>8</sup> necessary for the Constitution to hold legitimacy.<sup>9</sup>

Constituent power derives from a combination of three factors: (1) the consent of the governed; (2) the momentum of a collectively imagined project which no single person fully owns, and (3) something that serves as a basis for the constitution's authority.<sup>10</sup> The 1999 Constitution – arguably with the exception of the three amendments made to it – lacks the three qualities noted above. Thus, the Presidential Committee on the Review of the 1999 Constitution observed that the Constitution tells "a lie about itself".<sup>11</sup> This is because the people were never really involved in bringing it into existence.

6 E Onwudiwe, "The Unintended Consequences of June 12", Speech in honour of Moshood Abiola (1937-1998) organised by the Board of African Studies Association, at the Hyatt Hotel, Chicago, 31 October 1998.

7 FT Abioye, "Constitution-making, Legitimacy and Rule of Law; A Comparative Analysis", 44(1) *The Comparative and International Law Journal of Southern Africa* (2011), pp. 59-79.

8 M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Cheltenham, Edward Elgar Publishing (2014), pp. 10-24.

9 Fallon propounds three concepts of legitimacy – legal, sociological and moral legitimacy – and posits that legal legitimacy may not necessarily satisfy the criterion of moral legitimacy. He argues, however, that the sociological legitimacy of the Constitution (acceptance of the document as authoritative) validates its legal legitimacy. See RH Fallon Jr., "Legitimacy and the Constitution," 118(6) *Harvard Law Review* (2005), pp. 1789-1853. In the context of this chapter, it is accepted that the Constitution of the Federal Republic of Nigeria enjoys legal legitimacy; its sociological legitimacy, though, is far from settled. The argument is that it was not produced by the people in a constituent assembly and this questions its sociological and thus legal legitimacy. Even so, there is no doubt that the Constitution has been accepted as authoritative, because, as Fallon asserts, sociological legitimacy is never premised on unanimous consent.

10 M. Tushnet, *op cit* p. 13.

11 Report of the Presidential Committee on the Review of the 1999 Constitution, volume 1, Main Report, February 2001, p. 3.

### 3 An overview of the 1999 Constitution

The Constitution is a document of 320 sections and seven schedules. Its provisions can be grouped thematically according to which aspect of the state they concern primarily: its political structure, economic structure and administrative structure.

#### 3.1 Political structure

The Constitution creates a presidential system of government with an executive president,<sup>12</sup> a National Assembly<sup>13</sup> and an independent judiciary,<sup>14</sup> thus firmly enshrining the doctrine of separation of powers. The Constitution is described as supreme,<sup>15</sup> with a 36-state structure and a Federal Capital Territory.<sup>16</sup> To this end, the Constitution establishes two legislative lists: exclusive and concurrent. There is no residual list, but all other matters are considered residual and are therefore within the exclusive legislative competence of the states.<sup>17</sup>

While the National Assembly has exclusive legislative competence in respect of the first list, both levels of government have concurrent powers over the second. There are provisions in Chapter II on fundamental objectives and directive principles of state policy. The Constitution guarantees a democratically elected local government system, and mandates states to ensure the existence of local governments by a law which provides for their establishment, structure, composition, finances and functions.<sup>18</sup>

#### 3.2 Economic structure

The Nigerian state's economic structure is predicated on revenue allocation. To this end, the Constitution creates a Federation Account and, inter alia, requires that 13 per cent of the revenue accruing to that account from natural resources be distributed according to the principle of derivation.<sup>19</sup> Other revenues paid into that account are to be distributed according to a formula determined by the National Assembly on the basis of the equality of states, internal revenue generation, land mass, terrain and population density.

12 See sections 5 and Chapter IV.

13 See section 4 and Chapter V.

14 Section 6 and Chapter VII.

15 Section 1.

16 Section 3.

17 See *Attorney-General of Lagos State v Attorney-General of the Federation & Anor.* [2003] 35 WRN 1 (SC).

18 Section 7.

19 Section 162(2).

It is, however, 17 years after the Constitution came into effect, and the National Assembly has yet to enact the legislation stipulated by the Constitution. The current formula came into existence by executive fiat under the administration of President Olusegun Obasanjo, which modified the formula as follows: Federal Government – 52.68 per cent; states – 26.72 per cent; and local government – 20.60 per cent.<sup>20</sup> An acceptable formula that satisfies competing interests still needs to be created.<sup>21</sup>

### **3.3 Administrative structure**

To facilitate the implementation of its provisions, the Constitution establishes certain federal commissions and councils.<sup>22</sup> These are: the Code of Conduct Bureau; Council of State; Federal Character Commission; Federal Civil Service Commission; Federal Judicial Service Commission; Independent National Electoral Commission; National Defence Council; National Economic Council; National Judicial Council; National Population Commission; National Security Council; Nigeria Police Council; Police Service Commission; and Revenue Mobilisation Allocation and Fiscal Commission.

The Constitution imposes a responsibility on all organs of government, and all authorities and persons exercising legislative, executive and judicial powers, to conform to, observe and apply the provisions of Chapter II of the Constitution.<sup>23</sup> As mentioned above, it provides for a democratically elected local government system<sup>24</sup> and prescribes the procedure for the creation of additional local governments. It prohibits the adoption of any religion as a state religion,<sup>25</sup> provides for how citizenship may be acquired<sup>26</sup> and protects fundamental rights.<sup>27</sup> It stipulates the procedure for the creation of political parties<sup>28</sup> and the modification of existing laws by the President.<sup>29</sup> The Constitution also details the procedure for its amendment.<sup>30</sup>

20 See VI Lukpata, "Revenue Allocation Formulae in Nigeria: A Continuous Search", 2(1) *International Journal of Public Administration and Management Research (IJPAMR)* (2014), pp. 32-38.

21 *Op cit* p. 37.

22 Section 153.

23 Section 13.

24 Section 7.

25 Section 10.

26 Chapter III.

27 Chapter IV.

28 Section 221-229.

29 Section 315.

30 Section 9.



## **4 Selected aspects of constitutional implementation**

### **4.1 Election management**

In addition to providing for a federal election management body,<sup>31</sup> the Constitution mandates the states to set up their own election management bodies.<sup>32</sup> These are called State Independent Electoral Commissions and have the mandate to organise and supervise all elections to local government councils within the state. The credibility of the elections conducted by these election management bodies remains a moot point and represents a major challenge to the full implementation of the Constitution in the light of the provisions of section 7(1) dealing with local governments.

### **4.2 Federal Character Commission**

Pursuant to section 153 of the Constitution, the Federal Character Commission has been established and is composed of a Chairman and one person representing each state of the Federation and the Federal Capital Territory. The Commission was established to fulfil section 14(3), which provides that the composition of the government and its agencies and the conduct of its affairs must reflect the “federal character” of Nigeria and promote national unity and national loyalty, which involves ensuring that there is no predominance of persons from a few states or ethnic or other sectional groups in that government or in any of its agencies.

In line with this provision, the Commission is mandated to promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government. The Commission monitors recruitments to all ministries, departments and agencies (MDAs). The overarching constitutional objective of the Commission is to accommodate the diversity of the more than 250 ethnic groups in the Federation. For example, the President is required, in choosing ministers, to ensure that a minister is chosen from every state of the federation to fulfil the “federal character” principle.<sup>33</sup>

### **4.3 National Judicial Council**

The National Judicial Council (NJC) is composed of 21 members representing diverse interests in the legal profession. It has the mandate of making recommendations to the appropriate authorities on persons to be appointed or removed as judges of the various superior courts of record at

31 The Independent National Electoral Commission set up under section 153(1)(f) of the Constitution.

32 Section 197(1)(b).

33 See section 135(3) of the Constitution.

the subnational and federal levels.<sup>34</sup> It is headed by the Chief Justice of Nigeria.

The Council also has the responsibility to collect, control and disburse all monies, capital and recurrent, for the judiciary. This is crucial, because any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of courts established for the federation and the states under section 6 of the Constitution.<sup>35</sup> The rationale is to safeguard the judiciary from political interference or control by the other two arms of government through the power of the purse, thus enhancing its independence by ensuring that it is financially autonomous. There was no such council in the previous Nigerian constitutions.

The Council has succeeded in fulfilling its roles. It has developed a template to guide its recommendations for the appointment of judges to subnational governments and the federal government.<sup>36</sup> Although giving the Council a national mandate might not conform to a strict federal design, it has succeeded in insulating the judiciary from manipulation by the state governments and guaranteeing it a measure of the independence which everywhere in the world is critical for consolidating democracy.<sup>37</sup>

The Council has faced challenges, however. One example is non-compliance with sections 81(3) or 121(3) of the Constitution, which provide for direct funding of the judiciary from the Consolidated Revenue Fund. Limited financial means have restricted the ability of state judiciaries to perform their functions.<sup>38</sup>

34 Paragraph 21 of the Third Schedule to the Constitution.

35 Section 81(3).

36 See *Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judicial Officers of all Superior Courts of Record in Nigeria*, 3 November 2014.

37 The Supreme Court validated the absence of an ideal federal design in the case of *Olafisoye v Federal Republic of Nigeria* [2004] 4 NWLR (Part 864) 580 at 592 when it opined, *per* Niki Tobi (JSC) that “there are ideals of federalism propounded and developed by constitutional law scholars and political scientists, the world over. These ideals and ideas are goals set up to achieve true federalism. No constitution can really achieve such goals, which are largely Utopia [sic]. Such goals are ideals but by and large, and at the end of the day; judges must interpret the provisions of the constitution and not the ideals.” The jurist had posited earlier in the same case that “a federal government will mean what the Constitution writers say it means. And this can be procured within the four walls of the constitution. Therefore, a general definition of federalism or federal government may not be the answer to the peculiar provisions of a nation’s Constitution which is the *fons et origo* of its legal system. Thus, the word federalism conveys different meanings in different constitutions as the constitutional arrangements show particularly in the legislative lists.”

38 The non-compliance led the Judiciary Staff Union to embark on a national strike. It was called off piecemeal from state to state, depending on the willingness of the state government to implement the constitutional requirement. See for instance, “Judiciary Workers’ Strike: FG/states/JUSUN meeting deadlocked,” available at [www.daar-group.com/daar-group/latest-news/vanguardngr-judiciary-workers-strike-fgstatesjus-un-meeting-deadlocked](http://www.daar-group.com/daar-group/latest-news/vanguardngr-judiciary-workers-strike-fgstatesjus-un-meeting-deadlocked).

#### 4.4 Code of Conduct Bureau

The Constitution also creates a Code of Conduct Bureau as an implementing agency of the Code of Conduct for Public Officers contained in the Fifth Schedule to the Constitution. The Constitution requires every person in the public service to observe the Code of Conduct.<sup>39</sup> The aims of the Code are to maintain a high standard of public morality in the conduct of government business and to ensure that the actions of public officers conform to the highest standards of public morality and accountability.<sup>40</sup> For instance, the Code prohibits conflict of interest by a public officer in the discharge of his or her duties,<sup>41</sup> and mandates every public officer – on assuming office, at the end of every four years and at the end of his or her tenure – to submit to the Bureau a declaration of his or her assets.

Furthermore, the Code prohibits certain categories of public officers from maintaining bank accounts outside the country.<sup>42</sup> It provides for a tribunal to try cases where its provisions have been violated. Except for the trial of a few politically exposed persons,<sup>43</sup> little is known about the activities of the Tribunal. Ekpu attributes this to two factors: firstly, the low level of public awareness about the Code of Conduct Bureau and of the civic obligation to provide it with information, and secondly, limited access to information.<sup>44</sup>

The need for establishing two further agencies, the Economic and Financial Crimes Commission<sup>45</sup> and the Independent Corrupt Practices and Other Related Offences Commission,<sup>46</sup> to perform similar but wider functions, testifies to the low success rate of the Bureau as an anti-corruption body.

#### 4.5 Revenue Mobilisation, Allocation and Fiscal Commission

There is also the Revenue Mobilisation, Allocation and Fiscal Commission, set up to monitor the accruals to and disbursements of

39 See sections 172 and 209 of the Constitution.

40 AO Ekpu, "Curbing Corruption in Nigeria: The Role of the Code of Conduct Bureau", 2(1) *Benin Journal of Public Law* (2004) 67.

41 Paragraph 1 of the Fifth Schedule.

42 Paragraph 3 of the Code.

43 The Tribunal is currently trying the President of the Senate for have made a false declaration of assets when he was governor of one of the federating states, Kwara State, 11 years earlier and a minister under the previous administration.

44 AO Ekpu, *op cit* pp. 72-73. At the time the author made the comment, there was no legislation in Nigeria regarding freedom of information. With the enactment of the Freedom of Information Act 2011, it is doubtful if lack of access to information is still a major reason for the low level of awareness of the work of the Tribunal.

45 Created under the Economic and Financial Crimes Commission (Establishment etc.) Act Cap E1, Laws of the Federation of Nigeria.

46 Created under the Corrupt Practices and other Related Offences Act, Cap C31 Laws of the Federation of Nigeria 2004.

revenue from the Federation Account and to review from time to time the revenue allocation formula and principles in operation to ensure conformity with changing realities. It is mandated to advise the federal and state governments on fiscal efficiency and methods by which their revenue can be increased. It also is tasked with determining the appropriate remuneration for certain categories of public officers.

## 5 Assessing the implementation of the Constitution

### 5.1 Local government system

The system of democratically elected local government in Nigeria can be traced back to 1976 in the Local Government Reform that was initiated by the military regime. Unlike the local government system that emerged from the 1976 reform and which was not constitutionally guaranteed because it had been created by a military dictatorship, the 1999 local government system had constitutional status. This, at least in theory, ensured its existence.

The central role played by the local government in grassroots development has to be understood in the context of the definition of “local government” contained in the 1976 reform. It defined “local government” as

[g]overnment at the local level exercised through representative Council established by law to exercise specific powers within defined areas. These powers should give the council substantial control over local affairs; as well as the staff and institutional and financial powers to initiate and direct the provision of services, and to determine and implement projects, so as to complement the activities of the states and federal government in their areas, and to ensure through devolution of these functions to these councils and through active participation of the people and their traditional institutions, that local initiative and response to local needs and conditions are maximized.<sup>47</sup>

Some of the objectives of the reform were to make appropriate services and development activities responsive to local needs by delegating them to local representative bodies so as to facilitate democratic self-government at the grassroots of the society and encourage initiative and leadership.<sup>48</sup> In their assessment of the local government system as a way of fostering local participation in governance, Olasupo and Fayomi observed that

47 Cited from G Wilson, “The Politics of Local Government Reforms and Democratic Governance in Nigerian Local Governments”, 3(1) *Developing Country Studies* (2013), p. 140. See also the introductory chapter in H Maddick, *Democracy, Decentralisation & Development*, Bombay, Asia Publishing House (1963).

48 O Igbuzor, “Local Government Reform and Constitutional Review in Nigeria.” available at [www.nigeria-local-government.blogspot.com.ng/2009/01/local-government-reform-and.html](http://www.nigeria-local-government.blogspot.com.ng/2009/01/local-government-reform-and.html) (accessed 8 December 2016).

no other body, save [the] current local government system, can adequately decide the needs and priorities of the local community. This is because that decision of the representatives of the people regarding the needs and priorities of the local community [is] apt to be more accurate and, at any rate, legitimate because it is of the community, rather than if [it] were made by agents of the central government.<sup>49</sup>

It was clear that one of the aims of the reform was to create a centre of development at the local level in addition to the states and the federal government. The effect was such that local government “became a truly devolved body, able to generate, fund, initiate and implement policies under the military regime in 1976”.<sup>50</sup> This is what was adopted by subsequent constitutions, including the 1999 Constitution.

However, it is unclear what the intention of the 1999 Constitution was in terms of local government autonomy. While the Constitution provided for their existence<sup>51</sup> and enumerated their functions,<sup>52</sup> it empowered states to enact a law providing for their establishment, structure, composition, finance and functions.<sup>53</sup> It is unclear whether the intention was to create a third tier of government in addition to the state and federal government or to subsume the local governments under the states as appendages in a two-tier system.

There are ample provisions in the Constitution that lend support to either side of the argument. Section 7(6) mandates the National Assembly to make provisions for statutory allocation of public revenue to local government councils in the Federation; it also empowers the House of Assembly of a state to make statutory allocation of public revenue to local government councils within that state. Furthermore, any amount standing to the credit of the Federation Account is to be distributed among the federal and state governments and the local government councils in each state on terms and in a manner prescribed by the National Assembly.<sup>54</sup>

The amount standing to the credit of local government councils in the Federation Account is also to be allocated to the states for the benefit of their local government councils, as prescribed by the National Assembly.<sup>55</sup> The Constitution requires that each state maintain a special account, called the State Joint Local Government Account, into which should be paid all allocations to the local government councils of the state from the

49 FA Olasupo & IO Fayomi, “Historical Epochs of Local Government Administration in Nigeria: Women and the Poor” 12 *Global Journal of Human Social Science* (2012), pp. 13-29.

50 *Supra*, p. 28.

51 See section 3(6), which recognised 768 local government areas in Nigeria and six area councils in the Federal Capital Territory, making a total of 774.

52 See the Fourth Schedule to the Constitution.

53 Section 7(1).

54 Section 162(3).

55 Section 162(5).

Federation Account and from the government of the state.<sup>56</sup> Each state must pay to local government councils in its area of jurisdiction the proportion of its total revenue prescribed by the National Assembly.<sup>57</sup>

While these provisions are designed to achieve some measure of financial independence for the local government councils, in reality this has not been the case. The manipulation of the State Joint Local Government Account by state governments has ensured that the councils are denied the required funds from the Federation Account, a situation which seriously restricts their ability to perform their statutory duties, including the payment of wages.

Strictly speaking, the local governments do not exercise the powers of an autonomous third tier of government but are actually under the control and supervision of the states. They are anything but democratic because the tenure of the elected officials is often prematurely terminated by the state governments and the caretaker committees that are installed, notwithstanding that the officials have a definite tenure as specified by the various local government laws of the states<sup>58</sup> established in accordance with the Constitution.<sup>59</sup> This apparent contradiction between the constitutional text and practice is a legacy of the 1976 local government reforms.

Commenting on the contradiction, Wilson argued in another context that

[t]here was a contradiction to democratic development and stability in the reforms by providing for local government as a third tier of government on one hand, and providing for local government service commission (LGSC) as an agent of the state to regulate local government personnel services on the other hand. The challenge is that the local government staff, who are charged with responsibilities of enforcing the local government policies, could be manipulated or frustrated by the LGSC in event of policy disagreement between the state and local governments, thereby depriving the local government [of] the opportunity of achieving effective implementation of democratic policies in the area.<sup>60</sup>

The contradictions pertaining to the system of local government attracted legislative intervention by the National Assembly in its failed attempt to amend the Constitution for the fourth time. A bill to amend some provisions of the Constitution, including the ones that will give financial autonomy to the local government councils and guarantee further that they are democratically elected, was submitted to the states' Houses of

56 Section 162(6).

57 Section 162(7).

58 See for instance, section 10(1) of the Local Government Law of Edo State 2000, which fixed a tenure of three years for elected local government council officials.

59 This is discussed in more detail later in the chapter.

60 G Wilson, *op cit* p. 140.

Assembly for their ratification, as constitutionally required. However, the local government amendments failed to secure the two-thirds majority of the states needed for them to pass.<sup>61</sup> In any case, the entire constitutional amendment collapsed after it failed to gain presidential assent before the end of the seventh National Assembly.

The failure of the amendments is attributable to the overbearing influence of the governors of the states, who intimidate members of State Assemblies into voting against the measures. Allowing the measures to pass would have ended the manipulation of the Joint Accounts by the governors and consequently restricted their “control” over the councils.

The provisions on the creation of new local governments have also been difficult to implement,<sup>62</sup> in spite of previous attempts to do so. The case of Lagos State, one of the subnational units and the most populous state in the Federation,<sup>63</sup> illustrates this difficulty. It activated the provision of section 8(3) on the creation of new local governments by establishing additional local government councils. Given its massive population and reputation as the most populous city in Africa, there was justification to create additional local governments so that government services could reach all parts of the state.<sup>64</sup> However, the federal government simply refused to recognise the additional local governments and stopped the remittance of local government funds from the Federation Account to Lagos State. It argued that the additional local governments were not listed in the Constitution and as such could not benefit from allocations from the Federation Account.

The decision of the federal government was challenged by the Lagos State Government at the Supreme Court.<sup>65</sup> The Court held that local government creation was a joint exercise between the state and the federal government and declared the exercise as inchoate without the involvement of the National Assembly. In the time since that judgment was delivered,

61 While 16 states voted in favour of the amendment proposals, 20 states voted against them. Giving reasons for this, Gbadebo accuses the governors of having influenced the Assemblies to reject local government autonomy. Gbadebo maintains that the overbearing influence of the governors, the systemic corruption brought about by the use of joint accounts, and the political patronage rife in local government have combined to make the system fall short of what Constitution envisages. Governors in particular are known to be opponents of local government autonomy, not in the interests of any state but for personal interest in expanding their spheres of influence financially and politically. This has led to situation in which many of the governors have a grip on the jugular of their respective states. See B Gbadebo, “Nigeria: Constitutional Amendment: States’ Executive/Legislature’s Conspiracy over LG Autonomy,” *Constitutionnet*, 29 Dec 2014.

62 Section 8.

63 Lagos State is reported to have a population of more than 21 million people as at 2014. See *World Population Review* available at <http://www.worldpopulationreview.com/world-cities/lagos-population/>.

64 Other less populated states like Akwa Ibom, Kano, Delta, Imo, Borno, and Katsina have more local governments than Lagos State.

65 *Attorney-General of Lagos State v Attorney-General of the Federation* [2005]2 WRN 1(SC).

no other attempt has been made by any other subnational government to create a local government, thus rendering those constitutional provisions virtually useless.<sup>66</sup>

## 5.2 Fiscal provisions in the Constitution

Nigeria has more than 250 ethnic groups<sup>67</sup> and a population of 140,431,790 people, as at the 2006 official census.<sup>68</sup> In 2015 the population was estimated to be 181,562,056.<sup>69</sup> The country covers an area of 570,000 square kilometres. The coastline stretches 800 kilometres from Badagry in the west to Calabar in the east, and includes the Bights of Benin and Bonny.<sup>70</sup> Given Nigeria's ethnic composition, cultural diversity and land mass, it is unsurprising that the country is made up of 36 states as federating units, and a federal capital territory.

One major source of conflict between the federal government and the states is the revenue allocation formula for the distribution of federally collected revenue from the distributable pool account. Section 162(1) creates a "Federation account" and section 162(2) requires the National Assembly to determine the formula for revenue allocation based on the recommendation of the Revenue Mobilisation, Allocation and Fiscal Commission. In doing so, the Assembly is enjoined to take into account population size and density, equality of states, internal revenue generation, land mass and terrain. As mentioned previously, the National Assembly has yet to come up with any such formula.

The current formula has been in use since 2000 when it was put in place not by legislation but presidential executive order. It prescribes 52.68 per cent for the federal government, 26.72 per cent for the states and 20.60 per cent for the local government.<sup>71</sup> The states have found the existing formula unsatisfactory and called for it to be reviewed.<sup>72</sup> The clamour for a new formula has been exacerbated by the general non-provision for federal grants which under the Constitution are required to be made to

66 The reason for the failure to attempt to create additional councils is discussed in section 6 of this chapter.

67 <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>.

68 See the National Population Commission website at <http://www.population.gov.ng/>.

69 World's 50 most populous countries: 2015 available at [www.infoplease.com/world/statistics/most-populous-countries.html](http://www.infoplease.com/world/statistics/most-populous-countries.html) (accessed 9 September 2016).

70 M Crowder, *The Story of Nigeria*, 4<sup>th</sup> ed., London, Faber & Faber (1978), p. 10.

71 VI Lukpata, "Revenue Allocation Formulae in Nigeria: A Continuous Search", *op cit*, p. 36.

72 NO Anyadike, "New Revenue Sharing Formula Clamour by the Nigerian State Governors: Propelling Factors and Matters Arising", 3(2) *Public Policy and Administration Research* (2013), pp. 27-36. "Governors meet in Abuja over Dwindling Allocation, Propose New Revenue Sharing Formula", *Information Nigeria*, available at [www.informationng.com](http://www.informationng.com) (accessed 6 April 2016); H Umoru, "Existing revenue formula archaic", *Vanguard*, 17 Aug 2015.



states in distress.<sup>73</sup> Given their constitutional responsibilities outlined in the Second Schedule, the states have good reason to call for a greater share of the revenue allocation if the country is to derive substantial benefits from decentralisation. As noted by Wehner,

The challenge remains to implement the system fully and properly, identify areas of concern, and manage teething problems and transitional difficulties proactively. While the center should seek to assist the provinces to develop into effective units of government in order to exploit the full benefits of decentralized government, this should be done without unnecessarily constraining the action space for provinces to work for reconstruction and development.<sup>74</sup>

However, the inability to develop an acceptable formula is not surprising, because “the division of financial sovereignty of a Federal polity does indeed constitute an intricate and complex problem”.<sup>75</sup> This has been traceable to “ambivalence of the systems of measurement, the politicization of the bases and the mistrust in the application of the formulae agreed upon”.<sup>76</sup> Nwabueze justifies the subnational units’ contestations for an acceptable formula on the ground that it is dependent on

the ability of the state governments to maintain their services – to pay their staff, pay for essential services and execute their capital projects. Their financial viability and credibility as autonomous governmental units hang upon it. As far as they are concerned, the motivation for its sharing is understandably one of self-survival. For them, the sharing is almost like a matter of life and death, exciting their deepest concern and their strongest emotions. Hence the intensity of the question concerning it<sup>77</sup>

Nigeria’s federalism is vertical in nature, in the sense that the states were created by the federal government rather than, as in the classical case, through a situation in which federating units aggregated together to create a federation and donate some of their powers to the centre in a horizontal manner. In view of this, the states have few independent sources of revenue generation and rely on the centre for revenue allocation to enable them perform their responsibilities. From such a perspective, it is unsurprising that the contestation for acceptable revenue allocation

73 IA Ayua, “Nigerian Constitutional Scheme on the Sharing of Revenue Resources and its Implementation: An Assessment” in Azinge, E (ed.), *Nigeria: A Century of Constitutional Evolution, 1914-2014*, Abuja, Nigerian Institute of Advanced Legal Studies (2013), pp. 727-777.

74 J Wehner, “Fiscal Federalism in South Africa”, 30(3) *Publius* (2000), p. 72.

75 IA Ayua, *op cit*, p. 771.

76 P Okigbo, “Notes on Revenue generation and Distribution in a Federation” (unpublished manuscript) cited in IA Ayua, “Nigerian Constitutional Scheme on the Sharing of Revenue Resources and its Implementation: An Assessment”, p. 738.

77 BO Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, London, Sweet & Maxwell (1983), p. 181.

legislation has been intense, protracted, divisive and volatile, discouraging the National Assembly from embarking on such an exercise.

The Constitution also mandates the Federation to make grants to a state to supplement its revenue, subject to terms and conditions prescribed by the National Assembly.<sup>78</sup> So far, no enabling legislation has been developed by the National Assembly to activate this provision. However, the federal government recently bailed out states in deep financial crisis that could not pay salaries as a result of revenue shortfalls caused by a drastic drop in oil prices,<sup>79</sup> doing so even though this is not one of the situations for such intervention provided for in the Constitution. Whereas the Constitution envisages an outright grant to supplement revenue shortfall when approved by the National Assembly, the bailouts made to the subnational governments were actually loans repayable within ten to 20 years.<sup>80</sup> Unless the necessary legislation is enacted, any outright financial bailout to states will lack a legal basis.

### 5.3 Chapter II of the Constitution

Chapter II of the Constitution contains the fundamental objectives and directive principles of state policy. Section 13 of the chapter clearly states that it shall be the duty and responsibility of all organs of government, and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of the chapter. The chapter encapsulates provisions on “federal character,”<sup>81</sup> political objectives,<sup>82</sup> economic objectives,<sup>83</sup> social objectives,<sup>84</sup> educational objectives,<sup>85</sup> foreign policy objectives<sup>86</sup> and environmental objectives,<sup>87</sup> as well as a directive on Nigerian cultures.<sup>88</sup> As Akande notes, “The provisions concern not only the philosophical or ideological justification of the Nigerian state but also the direction and sources of control of the Nigerian economy.”<sup>89</sup>

There is no unanimity of opinion on the correct interpretation of section 13 *vis-à-vis* the implementation of the chapter. Nwabueze posits

78 See section 164(1).

79 See “24 States in Nigeria receive N311 billion bailout fund”, available at [www.voiceofnigeria.org.ng/24-states-in-nigeria-n311billion-bailout-fund/](http://www.voiceofnigeria.org.ng/24-states-in-nigeria-n311billion-bailout-fund/).

80 See “CBN reveals states given bailout, amounts”, available at [www.dailypost.ng/2015/09/19/cbn-reveals-states-given-bailout-amounts-full-list/](http://www.dailypost.ng/2015/09/19/cbn-reveals-states-given-bailout-amounts-full-list/).

81 Section 14(3).

82 Section 15.

83 Section 16.

84 Section 17.

85 Section 18.

86 Section 19.

87 Section 20.

88 Section 21.

89 J. Akande, *Introduction to the Nigerian Constitution*, London, Sweet & Maxwell (1982).

that these provisions are “political questions” and that even though they are legal,

the duty they impose is peculiarly political in nature, and their observance depends upon ‘the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights’.<sup>90</sup> There is no inconsistency in a command being legal and yet not judicially enforceable. Judicial enforcement is not an inexorable criterion of ‘lawness’.<sup>91</sup>

Justice Nasir<sup>92</sup> agrees with Nwabueze’s views, arguing that, in relation to Chapter 13, the obligation of the organs of government, including the judiciary, to observe its provisions is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the chapter are observed, but that this is subject to the express provisions of the Constitution. Yet it is difficult to understand Justice Nasir’s position. How does one interpret the general provisions of the Constitution without giving legal effect to its justiciability?

Azinge<sup>93</sup> takes a contrary view. He asserts that Nigerian judges have shown little imagination in the interpretation and application of the concept of justiciability, and contends that Indian judges have been more imaginative in their application of this concept in the Indian Constitution, which is similarly worded to the Nigerian Constitution with respect to the concept of justiciability. He argues further that the so-called non-justiciability provision in the 1999 Constitution is nothing more than an ouster clause.<sup>94</sup> That being the case, Nigerian judges in the past have been able to circumvent some of these ouster clauses that littered military decrees during military rule.<sup>95</sup> Azinge therefore wonders why the same judicial courage is lacking in tackling the non-justiciability provisions in the CFRN 1999 by seeing the provision as a mere ouster clause which

90 Justice Frankfurter in *Colgrove v Green*, 328 U.S., p. 556.

91 BO Nwabueze, *The Presidential Constitution of Nigeria*, London, C. Hurst & Co. (1982), p. 11.

92 *Archbishop Okogie v Attorney-General of Lagos State* [1980] F.N.R. 445.

93 E Azinge, “Living Oracles of the Law and the Fallacy of Human Divination”, Paper delivered at the 6<sup>th</sup> Justice Idigbe Memorial Lecture on 20 June 2008 at Akin Deko Auditorium, University of Benin, Benin City, Nigeria.

94 E Azinge, *ibid* p. 15.

95 See O Agbakoba & T Fagbohunlu, “Nigeria’s State Security (Detention of Persons) Decree No. 2 of 1984: Exploding the Myth of Judicial Impotence”, 1(1) *Journal of Human Rights Law and Practice* (1991), p. 45, where it was strongly argued that some of these ouster clauses could be circumvented. See also the case of *Mike Ozekehoma & Ors. v President of the Federal Republic of Nigeria*, cited in *Cases and Materials on Human Rights JHRLP*, vol 4, Nos. 1, 2, 3. In this case, Justice Segun of the Lagos High Court (as he then was) held that Decree No. 2, which ousted the jurisdiction of the courts to inquire into the legality or otherwise for the detention of persons that are threats to state security, does not cover or protect crimes committed under the Criminal Code. Judicial inactiveness in circumventing ouster provisions in military decrees is not limited to military regimes; even in constitutional rule, such judicial ingenuity has been demonstrated in constitutional provisions which sought to oust the jurisdiction of the courts to determine the legality or otherwise for the impeachment of the Governor or

could be circumvented in appropriate cases.<sup>96</sup> Elsewhere, judicial courage has been anchored on the ground that,

[o]nce the courts hand down their judgments, it is the headache of the executive arm to decide what to do with them. The courts should not, like a dog which, when faced with an intimidating situation, pulls in its tail between the two hind legs in surrender!<sup>97</sup>

There is support for Azinge's contention. Kachikwu and Ozekhome<sup>98</sup> had argued previously that it is a moot point to justify the clause on the ground that attempts by the judiciary to enforce fundamental objectives will lead to conflict between the various arms of government. There is nothing to suggest this will happen, and so the reasons are altogether *non-sequitur*.

The clause referred to here, one often cited as a legal justification for non-implementation of the provisions of Chapter II, is section 6(6)(c) of the Constitution. It states:

The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

It is not clear what was intended by this provision when juxtaposed with section 13 cited above. Section 13 clearly imposes a "duty and responsibility" on all governmental organs to conform to, observe and apply the provisions of the Chapter. It is therefore a contradiction in terms to take away, in another breath, the right to enforce the duty and responsibility in terms of section 6(6)(c). This will amount to absurdity, which the courts have always condemned.<sup>99</sup>

The result is that the organs and agencies of government have not taken any steps, as a matter of constitutional responsibility, towards

president. In the case of *Honourable Muyiwa Inakoju & 17 Ors. v Honourable Abraham Adeolu Adeleke & 3 Ors* [2007]4 NWLR (Part 1025) 423, the Supreme Court held that for the ouster clause to apply under section 188(10) of the CFRN 1999, the procedure prescribed in the Constitution for the impeachment of a Governor must be followed strictly. Having found that the procedure was not followed in this case, the Court disregarded the ouster clause and assumed jurisdiction.

96 There is judicial support for Azinge's view. In the case of *Morebishe & 2 Ors. v Lagos State House of Assembly* [2000] 3 WRN 134, the High Court of Lagos State held that although it may be contended that the fundamental objectives and directive principles of state policy are not justiciable, they remain pillars nevertheless for guiding and focusing the attention of all tiers of government.

97 See A Emiola & NA Inegbedion "Are Military Decrees Really Sacrosanct?" *Nigerian Current Law Review* (1996) pp 289- 311.

98 EI Kachikwu & MAA Ozekhome, "Extending the Frontiers of Constitutionalism. Should a Constitution Contain only Legal Rules" 3 *NJLR* (1998) 100.

99 *Attorney General of Ekiti State & Ors. v Adewunmi & Anor.* (2002) 1 S.C 47; *Bronik Motors Ltd. & Anor. v Wema Bank Ltd.* (1983) All NLR 272.

fulfilling the provisions of Chapter II of the Constitution, despite the injunction to do so under section 13. This has been exacerbated by court decisions that sanction the non-implementation of the chapter on the ground that it is not justiciable.<sup>100</sup>

#### 5.4 Section 16(3) of the Constitution

Section 16(3) requires the National Assembly to enact legislation setting up a body to review from time to time the ownership and control of business enterprises operating in Nigeria and to make recommendations to the President. Obviously, this is to ensure that the operation of the economy is in line with the economic objectives of the country as laid down in section 16. It is one provision, though, which apparently has been forgotten, and no attempt whatsoever has been made to activate or implement it. This is aside from the failure to implement the provisions of Chapter II generally by reason of the judicial pronouncements holding the chapter to be non-justiciable.

#### 5.5 Finances of political parties

Another area of the Constitution which has not been implemented is the power conferred on the Independent National Electoral Commission (INEC) to audit the finances of political parties and submit a report to the National Assembly.<sup>101</sup> Since the commencement of the 1999 Constitution, no such report has been submitted to the Assembly, so the section is, in effect, dormant.

Clearly, its aim is to monitor the finances of political parties with a view to ensuring that their funds are not being applied to less noble goals than the ones defined in section 229 of the Constitution. Non-implementation of this provision has left the finances of political parties shrouded in secrecy, making it difficult to determine the parties' sources of funding. The omission is all the more significant in view of section 225(2), which prohibits a political party from having funds or other assets outside Nigeria or retaining any funds or assets sent to it from outside the country.

<sup>100</sup> *Archbishop Okojie v Attorney-General of Lagos State* (supra).

<sup>101</sup> Section 226. Solanke argued that the Constitution, that is, section 6(6)(c), is in open conflict with its own declaration in section 13 making it mandatory for all government and all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of Chapter II. See F Solanke, *The 1999 Constitution and the Dilemmas of a Nation in Search of Restoration*, Lagos, Nigerian Institute of Advanced Legal Studies (2010), p. 41.

## 5.5 Recall of National Assembly members

Section 69 of the Constitution permits the recall of a member of the Senate or of the House of Representatives if the Chairman of the INEC is presented with a petition, signed by more than one-half of the persons registered to vote in that member's constituency, that alleges loss of confidence in that member. The petition must then be approved by simple majority of persons registered to vote in that member's constituency, in a referendum within 90 days of the date of receipt of the petition.

However, since the adoption of the Constitution there has been no known case where the provision was applied successfully. In the light of the huge expenses and logistics involved in such an exercise, one reason for this may be the difficulty in mobilising the constituents to go through the process. It is doubtful whether the INEC currently has the capacity to do this; the difficulty of implementing the section has been called a "monumental dilemma".<sup>102</sup>

There is justification for this view. In 2005, a failed attempt was made to recall a senator when constituents submitted a petition for his recall in reaction to his questionable role in the futile effort to amend the 1999 Constitution to enable the then President, Olusegun Obasanjo, to prolong his tenure by another four years.<sup>103</sup> After much prevarication, however, the INEC announced in April 2006 that it had discontinued the exercise on the grounds that the 90-day period prescribed for the exercise by the Constitution had expired.<sup>104</sup>

## 6 Impact of the courts on constitutional implementation

Even though there is no specialised constitutional court in Nigeria, the judiciary has been rightly described as the custodian of the Constitution.<sup>105</sup> In the absence of such a court, constitutional interpretation has rested with the regular courts, though only the Supreme Court is vested with original jurisdiction where the suit is between any of the federating units and the federal government or one involving the federating units.<sup>106</sup> Invariably, some of these suits pertain to constitutional implementation or the lack thereof. The decisions of the courts have yielded mixed results, an

102 F Solanke, *The 1999 Constitution and the Dilemmas of a Nation in Search of Restoration*, *op cit* p. 11.

103 See E Aziken & H Yakooob, "Nigeria: INEC gets Recall Petition against Mantu", *AllAfrica*, 15 Dec 2005; A Ogbu, "Nigeria: Mantu: Pro-Recall Group Petitions Inec Chairman", *AllAfrica*, 20 Dec 2005.

104 Pindiga, HI, "Nigeria: INEC Drops Mantu Recall", *AllAfrica*, 20 April 2006.

105 *Chief D.S.P. Alamiyeseigha v Chief Judge of Bayelsa State & 10 Ors.* [2007] 7 NWLR (Part 1034) 524 at 577.

106 See section 232 of the Constitution.

outcome which can be understood better by considering some of these cases.

In the case of *Attorney General of Lagos State v Attorney General of the Federation*<sup>107</sup> the attempt made by the plaintiff, one of the federating units, to create additional local government councils in purported fulfilment of the requirements of section 8(3) failed because the Supreme Court held that the process was “inchoate”, seeing as the National Assembly had failed to make “consequential provisions” with respect to the names and headquarters of the new local government council areas in accordance with section 8(5).

Yet the plaintiff had done all that was constitutionally required of it in the exercise. It was the duty of the National Assembly to make the consequential provisions, which it failed to do. Given the contestation by federating units for resources from the centre, the National Assembly’s failure is not surprising. The constitutional recognition of the additional local governments would have entailed that the new local governments are funded from the federation account, thus reducing the share of funding available to the existing local government councils. This apparently was not acceptable to the members of the National Assembly, whose constituencies are located in the existing ones.

The failure of the National Assembly to perform its duty may be attributable to political undercurrents and may have shaped the decision of the Supreme Court on the matter. It is what, in another context, has been termed “judicialisation of politics and the politicisation of the judiciary in Nigeria”.<sup>108</sup> In the light of this scenario, creating additional local governments within the present constitutional framework is a Herculean task, and this explains why, 17 years after the birth of the Constitution, no additional local government has been inserted in the Constitution in terms of section 8(5) – and why it is unlikely one will be inserted anytime soon.

The Supreme Court inadvertently may have contributed to this state of affairs. Section 8(5) appears to be a mere formality once a state has complied with the preceding provisions and has made adequate returns to the National Assembly as required by section 8(6). All that the National Assembly is required to do is to pass an act making “consequential provisions with respect to the names and headquarters” of the new local governments. It is a mandatory requirement that ought to be invoked automatically once the National Assembly receives the returns from the House of Assembly of the State.

107 [2004] 18 NWLR (Part 904) 1 (SC); [2005] 2 WRN 1 (SC).

108 NS Okogbule, “Judicialisation of Politics and the Politicisation of the Judiciary in Nigeria: Taming the Festering Leviathan”, *4 Rivers State University of Science and Technology Journal of Public Law* (2013), pp. 67-89.

That is the purpose of the provision,<sup>109</sup> and that is the approach the Supreme Court ought to have adopted in its interpretation of section 8. Accordingly, the Court should have compelled the National Assembly to make the necessary consequential provisions as per the mandatory wording of section 8(5). By failing to do so, the decision of the Court has impacted negatively on the implementation of the constitutional provisions on the creation of local governments.

While the decision of the Supreme Court in the local government creation case (the *Attorney General of Lagos State* discussed above) has had a negative impact on the implementation of section 8(3) of the Constitution, the decision of the Court of Appeal has had a positive impact in ensuring the existence of democratically elected local government councils as required by section 7 of the Constitution. In *Atoshi & Ors. v Attorney General of Taraba State & Ors.*,<sup>110</sup> the Court of Appeal affirmed the sanctity of section 7(1) and stated that any legislation which derogates from the section by providing for the dissolution of local government councils is inconsistent with the section and has to be struck out.<sup>111</sup>

The decision of the Supreme Court in *Attorney-General of the Federation v Attorney General of Abia State & 35 Ors.*<sup>112</sup> was instrumental in the calculation of 13 per cent derivation for the purpose of revenue allocation from the Federation Account as stipulated by the proviso to section 162(2) of the Constitution. Prior to that decision, there had been serious contention between the federal government and the littoral states about the basis on which to calculate the 13 per cent derivation. The contention arose from the question of how to define the seaward boundary of a littoral state in order to determine the revenue accruing to it from the exploitation of natural resources within that boundary.

The Supreme Court held that the seaward boundary of a littoral state was its low water mark or the seaward limit of their internal waters. The decision resolved the ambiguity inherent in the proviso to section 162(2), and impacted on the implementation of the provision by specifying the parameters to be used in the determination of the 13 per cent of the revenue due to the littoral states on the basis of derivation. Consequently, beyond the low water mark or on the high sea, any revenue derived from the exploitation of natural resources belonged to the Federal Government and not the littoral state.

109 This is often called the “purposive approach” in constitutional interpretation, and has been applied by the Nigerian courts. It is the approach which is usually adopted unless it happens that something in the Constitution indicates that a narrower interpretation would better serve its objects and purposes – *Timubu v IMB Securities* (2001) 16 NWLR 670 (SC); *Nafiu Rabiu v Kano State* (1980) 8-11 S.C. 130 (SC).

110 [2012] All FWLR 352 (CA).

111 See also the earlier case of *Etim A. Akpan & Ors. v Hon. Peter John Umar* [2002] 23 WRN 52.

112 [2002] 16 WRN 1 (SC).



The apex court decision's was not well received by the littoral states, and it took legislative intervention of the National Assembly to abolish the dichotomy between revenue derived from off shore and on shore.<sup>113</sup> The decision only went as far as resolving the basis for the calculation of the 13 per cent derivation principle. It fell short of determining the formula to be used in the allocation of revenue generally from the Federation Account created by section 162(1), since that was not an issue for determination. Yet this is one matter in which the National Assembly has failed to enact the necessary legislation as mandated by section 162(2), notwithstanding that "there is no avoiding the perennial issue of a proper revenue allocation formula which is closely bound up with the federal principle".<sup>114</sup>

In the absence of enabling legislation by the National Assembly, the country instead simply relies on the Allocation of Revenue (Federation Account etc) (Modification) Order 2002, Statutory Instrument (S.I 9 of 2002) made by the President purportedly in the exercise of his powers under section 315(2) of the Constitution. This Order was subsequently challenged in the Supreme Court<sup>115</sup> on the premise that its creation could not be founded legally on section 315(2) of the Constitution. The subsection mandates the President to modify an existing law to bring it into conformity with the Constitution. The apex court held that the modification was consistent with the provision.

The decision of the Court of Appeal in the case of *Oju Local Government & Ors. v Independent National Electoral Commission*<sup>116</sup> was the catalyst needed to compel the INEC to implement the provisions of section 112 of the Constitution. In that case, the court held that the power vested in the respondent to create the minimum number of constituencies as dictated by the Constitution was not a discretionary power but a mandatory one. Consequently, the refusal of the respondent to create the constituencies in one of the federating states was held to be in breach the mandatory provisions of the Constitution.

In a similar vein, the Federal High Court had to intervene by compelling the federal government to implement sections 81(3) and 121(3) of the Constitution.<sup>117</sup> The sections direct that the funds due to the

113 *Revenue Allocation (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, 2004*. In the latter case of *Attorney General of Adamawa State & Ors. v Attorney General of the Federation & Ors* [2006] 23 WRN 1 (SC), a failed attempt was made to declare this Act as unconstitutional on the grounds, inter alia, that it sought to adjust the boundary of the littoral states without complying with the procedure set out in the Constitution on boundary adjustment. The case was dismissed for lacking in merit.

114 A Guobadia, *Nigeria: The Legal Dynamics of her Constitutional Development – An Appraisal*, Lagos, *Nigerian Institute of Advanced Legal Studies*, (1994), p. 27.

115 *Attorney General of Abia State & Ors. v Attorney General of the Federation* (No. 2) [2003] 19 WRN 1 (SC).

116 [2007] 14 NWLR (Part 1054) 242 (CA).

117 *Olisa Agbakoba v Federal Government & Ors.*, suit number FHC/ABJ/CS/2013, delivered on 13 January 2014.

judiciary be deducted directly from the Consolidated Revenue Fund of the Federation and paid to the National Judicial Council to be disbursed to the heads of courts. The federal government failed to implement this provision, which grossly affected the financial autonomy of the judiciary and thus attracted judicial intervention.

Finally, the decision of the Court, established in the case of *Okogie v Attorney General of Lagos State*,<sup>118</sup> regarding the non-justiciability of Chapter II has inhibited the implementation of that chapter, which deals with the fundamental objectives and directive principles of state policy. The inability to hold the government legally accountable for the implementation of the chapter provides a justification for its non-implementation, particularly so in respect of the provisions on free education,<sup>119</sup> environment,<sup>120</sup> suitable and adequate shelter and food security.<sup>121</sup>

The decision of the Lagos State High Court in the *Morebisha* case is welcome, however. It offers guidance on how the courts may rule in the foreseeable future, in that they may be able to compel the organs of government to conform to the provisions of chapter II. In that case, the Lagos State High Court held that, although it may be contended that the fundamental objectives and directive principles of state policy are not justiciable, their function nevertheless remains to guide all tiers of government.

## 7 Challenges and prospects

It has been argued that lack of opposition from interest group can encourage violations of a constitution and consequently render the document a dead letter. In the future, if that same society enacts a new constitution, its chance of success will be lowered by the failure of interest groups to have contested violations of the previous constitution, even if such interest groups have been formed in the meantime.<sup>122</sup> That is, the “relevance of constitutional culture”<sup>123</sup> has an impact on the implementation of constitutions.

This may explain the lack of implementation of certain provisions of the Constitution of Nigeria. The country emerged recently from decades of

118 *Supra*.

119 Section 18(3).

120 Section 20.

121 Section 16(2)(d).

122 S Voigt, “Making Constitutions Work: Conditions for Maintaining the Rule of Law”, 18 *Cato Journal* (1998/1999), pp. 191-208.

123 *Ibid*.

military rule in which military decrees were treated as superior to the unsuspended part of the previous constitutions;<sup>124</sup> as a result, a culture of constitutionalism is only just beginning to develop and cannot be relied upon as an immediate cure-all. Over time, though, as the country acquires the necessary “constitutional culture”, the degree of implementation stands to improve. This is particularly so in the light of ongoing efforts at constitutional amendment – if concluded, they will further remove the vestiges of military influence in the document and improve its autochthony.

In addition, the heterogeneous nature of Nigerian society has made constitutional implementation a difficult, albeit imperative, process. It is in order to accommodate this that “federal character” provisions have been included in the Constitution. These provisions prescribe that governmental appointments or patronage must always reflect the federation’s character, or in the case of the federating units or states, the ethnic composition of the states. The country’s heterogeneity is significant, because for the Constitution to enjoy near-universal acceptance and strong prospects of implementation, the various contending interests must be acknowledged and acted on, otherwise the Constitution is potentially non-implementable no matter how good it looks on paper. In this regard, Butleritchie posits that

[t]he sense seems to be that if a formal constitution that incorporates liberal concepts is instituted, the rest will take care of itself in time. On its face this seems an unwarranted and faulty conclusion. Yet this is precisely what passes for most constitutionalist discourse today.<sup>125</sup>

However, the heterogeneous nature of the Nigerian Constitution, in spite of the “federal character” provisions, has compounded the implementation of some of its provisions. For example, the renewed agitation for the sovereignty of the state of Biafra is not unconnected with perceived marginalisation of the eastern part of the country, populated largely by Igbos, in the spatial distribution of federal appointments by the current regime.<sup>126</sup> Consequently, no matter how liberal the Constitution may be, if it fails to accommodate the divergent interests in the polity, it will encourage divergent conflicts and make its implementation unsatisfactory.

There is also the problem of the secularity of the Constitution, which under section 10 prohibits the adoption of any religion as a state religion

124 *Military Governor of Ondo State v Adewummi & Ors.* [1985] 1 NWLR (Part 5) 621. See also *Labiya v Anretiola* [1992] 8 NWLR (Part 258) 139.

125 DT Butleritchie, “The Confines of Modern Constitutionalism”, 3 *Pierce Law Review* (2004/2005), pp. 1-32.

126 See C Kimolu, “Igbo Marginalisation Unacceptable: Ebitu Ukiwe, Ben Nwabueze, ABC Nwosu, Others,” *Vanguard*, 20 Dec 2015; M Ndimele, “New Acting DG Appointment – Buhari Accused of Ethnic Bias”; E Udom, “Behind the agitation for Biafra,” *The Guardian*, 9 Dec 2015.

even when it is obvious that the people are deeply religious. Thus, the provision is not reflective of the religious sentiments of the people and fails to connect with the values of specific but significant sections of the society. As Seidman notes in another context, “[P]ressures for constitutional change have come from groups whose value acceptances are different from those expressed in any specific constitution.”<sup>127</sup>

It follows that where those value preferences do not coincide with constitutional provisions, such provisions may not be implemented by the political class. For instance, in spite of the constitutional prohibition against the adoption of a state religion, the various governments sponsor religious pilgrimages. It also explains why some federating or subnational units have enacted laws on the *Sharia* legal system.<sup>128</sup>

Finally, another challenge is the exclusion of the people in the making of the Constitution, which results in document lacking “ontological connection with the people”.<sup>129</sup> This disjunction is reflected in the myriad problems plaguing the country, such as breakdown of law and order, high poverty levels, political instability, corruption and underdevelopment.<sup>130</sup> The combined effect is the absence of enthusiasm to implement its provisions. Constitutional implementation can be enhanced to a satisfactory degree if the people have a connection with it. Thus, as Mbao suggests,

The formulation of a new Constitution should be more inclusive, broad-based, gender representative and encourage the participation of citizens in order to give the constitution-making process legitimacy.<sup>131</sup>

The prospects for better implementation may be improved by the wholesale adoption of a new Constitution midwived in a constituent assembly comprised of the ethnic nationalities in the country and approved in a referendum. Thereafter a mechanism for the monitoring of the implementation of the entire Constitution must be in place, rather than the current fragmented, uncoordinated approach. In the alternative, the national institutions can be made to file reports of their activities annually to the National Assembly. This will afford the Assembly a complete view of how the constitution is being implemented and what measures it should take to enhance implementation. If this approach is adopted, then it could have a positive impact on the overall implementation of the Constitution.

127 RB Seidman, “Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy” *Wisconsin Law Review* 83 (1969), p. 94.

128 These states are Zamfara, Kano, Sokoto, Katsina, Bauchi, Borno, Jigawa, Kebbi, Yobe, Kaduna, Niger and Gombe. See “Some Demographic Data: Nigeria’s Sharia States”, [www.sharia-in-africa.net](http://www.sharia-in-africa.net) (accessed 16 September 2016).

129 FT Abioye, *op cit*.

130 *Ibid*.

131 MLM Mbao, “The Politics of Constitution-Making in Zambia: Where does the Constituent Power Lie?” in Fombad & Murray (eds), *Fostering Constitutionalism in Africa*, Pretoria, Pretoria University Press (2010), p. 103.

## 8 Conclusion

It cannot be concluded here that the Constitution of the Federal Republic of Nigeria 1999 has been fully implemented. On the other hand, it cannot be said that the Constitution has not been implemented. The success story has been mixed. For instance, all the section 153 institutions have been established and are fully operational, with the required legislation being in place to ensure that they function properly. The same can be said of the fundamental rights provisions. In other instances, it has taken the intervention of the courts to facilitate the implementation of the Constitution, for example, with regard to delineation of constituencies, the implementation of the 13 per cent derivation principle, and the direct allocation of funds to the National Judicial Institute for disbursement to federal courts.

But in other cases the document still needs to be implemented. This is evident, for example, in the need for enacting a law specifying the revenue allocation formula for the disbursement of funds from the Federation Account between the federal, state and local governments as stipulated by section 162(2); in the lack of respect for section 10, which provides for the secularity of the country; and in the National Assembly's failure to enact legislation to set up a body to review the ownership and control of business enterprises operating in Nigeria and make recommendations to the President in line with section 16(3).

This chapter has sought to assess the implementation of the Nigerian Constitution and the problems associated with this process. In doing so, the chapter discussed the theoretical or normative framework of constitutional implementation and how it resonates with the implementation of the Nigerian Constitution. It dwelt on different aspects of the Constitution which have been partially or fully implemented or not implemented, and provided reasons for this state of affairs. It also offered some suggestions on how implementation can be enhanced.

Given how young the Nigerian Constitution is compared to longer-established democracies, it is understandable that there have been problems with its implementation. With more time and some tinkering, the factors impeding its full implementation may be overcome. For instance, amendment of some of the areas discussed above may make them consonant with the values and aspirations of the people, thereby giving the later a connection with it and consequently eliminating its "constitutional irreverence".

However, the same cannot be said of the power conferred on the Independent Electoral Commission to delineate and create new constituencies as prescribed by section 112 of the Constitution. Here, the

Court clearly held that the respondent had failed to implement the provisions of section 112.<sup>132</sup>

132 See *Oju Local Government & Ors. v Independent National Electoral Commission* (supra).

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### United States

*Colgrove v Green*, 328 U.S. p 549 at 556.

*Thulani Rudolf Maseko and Lukman Abdulrauf*

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## 1 Introduction

The Kingdom of Swaziland is a tiny country located on the southern tip of Africa. The smallest country in the southern hemisphere,<sup>1</sup> it is bordered by the Republic of South Africa to the north, west, south and south-east, and by the Republic of Mozambique to the north-east.<sup>2</sup> It is a landlocked country and has a population of about 1.2 million people.<sup>3</sup> A former British Protectorate, it obtained independence in September 1968 under the leadership of King Sobhuza II<sup>4</sup> and with the introduction of the Westminster Independence Constitution.<sup>5</sup> The people of Swaziland speak one common native language, SiSwati, with English being the second official language. The people belong to one ethnic group, known as the Swazi.<sup>6</sup>

Swaziland is Africa's only remaining absolute monarchy. In April 1973<sup>7</sup> King Sobhuza unlawfully<sup>8</sup> repealed the Constitution, arrogating all powers of government to himself.<sup>9</sup> His Majesty King Mswati III, who ascended the throne on 25 April 1986, is the current head of state.<sup>10</sup> Swaziland is governed by a dual political and legal system based on British

1 International Bar Association (IBA), *Swaziland Law, Custom and Politics: Constitutional Crisis and the Rule of Law* An International Bar Association Human Rights Institute Report (2003), p. 11.

2 United Nations Development Programme (UNDP), "About Swaziland".

3 UN data, "Country profile Swaziland".

4 *Supra* note 2.

5 Order No. 50 of 1968.

6 *Ibid.*

7 Proclamation by His Majesty King Sobhuza II to the Nation, 12 April 1963.

8 Section 134 of the 1968 Constitution.

9 Paragraph 3 of the Proclamation.

10 [http://www.gov.sz/index.php?option=com\\_content&view=article&id=170&Itemid=209](http://www.gov.sz/index.php?option=com_content&view=article&id=170&Itemid=209).

and Roman Dutch common law as well as unwritten traditional and customary practices enforced by chiefs and traditional structures.<sup>11</sup> Under traditional law the King is commonly known as the *iNgunyama* (the lion). The monarch is the embodiment of the Royal Dlamini, who commands authority over the country through the chiefs. The monarch is meant to be the symbol of unity for the Swazi nation.

The Constitution of Swaziland came into force in July 2005 and purports to be the supreme law of the land. It provides for an executive, bicameral legislature and a judiciary.<sup>12</sup> The country has a unique system of governance in which power is devolved from the central government to the *Tinkhundla* (constituencies) but “individual merit is the basis for election and appointment into public office”.<sup>13</sup> The system is said to be democratic and participatory, but this is highly questionable. The King holds supreme executive, legislative and judicial powers,<sup>14</sup> even though there is a written constitution with a bill of rights.

This chapter examines Swaziland’s experience of constitutional implementation. Its second section below considers how the current 2005 Swaziland Constitution was drafted and what impact this process had on the current constitutional implementation crises. The third section examines the main actors engaged in the process of constitutional implementation. The fourth section briefly considers key provisions which are not being implemented. The fifth discusses the general challenges to constitutional implementation. The chapter concludes by considering the prospects for constitutional implementation and the major lessons other African countries can learn from Swaziland’s example.

## 2 An overview of the drafting of the 2005 Constitution

Swaziland adopted a written constitution in 2005<sup>15</sup> following an acrimonious review and constitution-making process.<sup>16</sup> However, the drafting process started long before that, after King Sobhuza II repealed the 1968 Constitution. It is recorded that in 1973 the King appointed the Royal Constitutional Commission (RCC) to visit all corners of Swaziland to solicit the people’s views on the kind of constitution they wanted.<sup>17</sup> All the

11 *Supra* note 1, pp. 13-14.

12 [http://www.gov.sz/index.php?option=com\\_content&view=article&id=170&Itemid=209](http://www.gov.sz/index.php?option=com_content&view=article&id=170&Itemid=209).

13 This is based on section 79 of the Swaziland Constitution.

14 *Ibid.*

15 Act 001, 2005.

16 TR Maseko, “The Drafting of the Swaziland Constitution, 2005” 8 *African Human Rights Law Journal* (2008), p. 323.

17 Matsebula, JSM, *A History of Swaziland*, 3<sup>rd</sup> ed., Cape Town, Longman Penguin Southern Africa (1988), p 265.

members of the RCC were appointed by the King and were not representative of Swazi society. It should be noted that this was at a time when political parties and similar bodies as well as trade union activity were crushed by the King's Proclamation.<sup>18</sup> The RCC recommended that Swaziland remain a no-party state and that the Swazi National Council (SNC) continue as the country's highest policy-making body.

On assuming power in 1986, King Mswati III was under pressure to initiate reforms as the banned political parties,<sup>19</sup> working with the trade union movement, demanded democratic transformation. For example, in a list of 27 demands, the Swaziland Federation of Trade Unions (STFU) included a demand for a written constitution.<sup>20</sup> Ensuing labour strikes led to unrest in the country. Former presidents Nelson Mandela of South Africa, Ketumile Masire of Botswana and Robert Mugabe of Zimbabwe held meetings with King Mswati III on the question of political reforms in the country.<sup>21</sup>

In 1996, the King convened a meeting at the traditional headquarters at Ludzidzini, where he announced the appointment of the Constitutional Review Commission (CRC).<sup>22</sup> All its members were appointed by him.<sup>23</sup> Three other commissions had preceded the CRC: the Prince Guduza Economic Commission, the Prince Masitsela *Vusela* Commission (neither of which were gazetted) and the Prince Mahlalengangi *Tinkhundla*

18 Decree Nos. 11, 12 and 13 of the 1973 Proclamation provide respectively:

11. All political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the Nations are hereby dissolved and prohibited.

12. No meetings of a political nature and no procession or demonstration shall be held or take place in any public place unless with the prior written consent of the Commissioner of Police: and consent shall not be given if the Commissioner of Police has reason to believe that such meeting, procession or demonstration, is directly or indirectly related to political movements or other riotous assemblies which may disturb the peace or otherwise disturb the maintenance of law and order.

13. Any person who forms or attempts or conspires to form a political party or organizes or participates in any way in any meeting, procession or demonstration in contravention of this decree shall be guilty of an offence and liable, on conviction to imprisonment not exceeding six months

19 These included the People's United Democratic Movement (PUDEMO) and its youth league, the Swaziland Youth Congress (SWAYOCO); the Swaziland Federation of Trade Unions (SFTU); the Swaziland National Association of Teachers (SNAT); and churches, in particular the Council of Swaziland Churches (CSC).

20 The 27 Popular Demands, Demand No. 21. Attached as annexure "NCA18" in Civil Appeal No. 50 of 2008.

21 J Baloro, "Democracy and Human Rights in the Kingdom of Swaziland: A Study of the Law and Practice Regarding Free Association and Assembly" in C Okpaluba *et al* (eds), *Human Rights in Swaziland: The Legal Response*, Manzini, Inter Agencies (1997), p. 57.

22 Decree No. 2 of 1996.

23 It was composed of 30 members. Its head or chairman was the late Prince Mangaliso Dlamini.

Commission (TRC) (which was gazetted).<sup>24</sup> Among the CRC's responsibilities was to "draft a new Constitution suitable for Swaziland".<sup>25</sup>

The establishment of these commissions was met with mixed feelings, particularly by pro-democracy groups, which were not consulted about either the appointment of commission members or the terms of reference of these bodies. There were concerns about the CRC as the King included members of the so-called progressives<sup>26</sup> in its membership. They were appointed in their individual and personal capacities, and therefore did not represent the interests of their organisations. In its report, the CRC stated that the commissioners were from a cross-section of Swaziland that made them representative of all members of the society.<sup>27</sup>

In addition, Mario Masuku and Jerry Gule, along with two lecturers appointed from the progressives, subsequently resigned, while four others passed away. None of these members was replaced. In total, as the CRC mentioned in its report, ten commissioners could not take part in the body's mandated work.<sup>28</sup> There was hence controversy surrounding not only the appointment process but the fact that members who resigned<sup>29</sup> or passed away were never replaced.

Another concern arose from section 12 of the law establishing the CRC, the Constitutional Review Commission Decree No. 2 of 1996, which states:

(1) No person may insult, disparage or belittle any member of the Commission, or obstruct, interrupt, hinder or prejudice an officer, member of the Commission or the Commission in the performance of its functions.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding E5,000.00 (five thousand Emalangeni) or to imprisonment for a period not exceeding 5 years (five years) or both such fine and imprisonment.

24 Decree No. 1 of 1992.

25 Section 3(1) of Decree No. 2 of 1996.

26 These were Mario Masuku, the President of the PUDEMO, and Themba Msibi, who was the second Deputy President of the SFTU (later appointed by the King as a Senator and Speaker of the House of Assembly). He defied his organisation, which resolved that he should withdraw and not participate in the Commission. Others were Mhawu Maziya, a senior lecturer at the University of Swaziland; Zombodze Magagula, a founding member of the *Sibahle Sinje* Cultural Movement (which later transformed itself into a political movement); and Jerry Gule, who at the time was a member of the Institute for Democracy and Leadership (IDEAL). Nkonzo Hlatshwayo, who was the head of department of the Department of Law at the University of Swaziland, was appointed secretary to the Commission.

27 International Bar Association, *Striving for Democratic Governance: An Analysis of the Draft Swaziland Constitution* A report by the International Bar Association (August 2003), at p. 21.

28 *Ibid.*

29 Those who resigned included Marion Masuku, Dr. Jeremiah Gule, Mhawu Maziya, Zombodze Magagula, and later Nkonzo Hlatshwayo.

A related problem was that the law prohibited group participation in favour of individual involvement. Section 4 provided that “[a]ny member of the public who desires to make a submission to the Commission may do so in person or in writing and may not represent any or be represented in any capacity whilst making such submission to the Commission”. A person making a submission had to appear before the Commission alone and have his or her statement recorded in audio and video in a special tent. No member of the public was allowed to listen to another’s submissions.

In a way, it could be said that the collection of submissions was done *in camera*. This section, along with section 12, was understood as preventing meaningful, democratic participation by the Swazi people: there was no reason why an open, transparent, accountable and democratic process should limit participation and subject its critics to criminal liability. The process seems to have been set up to fail.

In an analysis of the draft Swaziland Constitution before its enactment into law, the International Bar Association (IBA) observed:

It has been said that in order to satisfy the test of legitimacy a constitutional review and drafting process must meet four tests. These are that the process must be as inclusive as possible, as transparent as possible, as participatory as possible and it must be accountable to the people.<sup>30</sup>

The meaning and effect of section 4 of the 1996 Decree was tested in court, where various groups objected to the exclusion. Both the High Court<sup>31</sup> and Court of Appeal<sup>32</sup> ruled against them. The High Court found that both under the King’s Proclamation of 1973 as well as Decree No. 2 of 1996, political parties had no *locus standi* to sue, let alone to participate in the constitutional review process. The Court affirmed that participation was the preserve of individual members of the Swazi nation, not groups. Writing for the full bench of the High Court, Banda CJ (as he then was) remarked in relation to section 4: “These provisions of the two decrees are very explicit and precise and we find it difficult to understand how their import and meaning would have escaped the applicants’ attention.”<sup>33</sup>

The decision of the High Court was upheld on appeal. The Court of Appeal stated:

Two factors in my view militate against this. In the first place when Decree No. 2 of 1996 establishing the CRC was proclaimed, the King’s Proclamation of 1973 was still the supreme law of Swaziland. It was the ‘grundnorm’; the supreme law of the country. As far as two of the appellants are concerned VIZ

30 International Bar Association, *Striving for Democratic Governance: An Analysis of the Draft Swaziland Constitution* (August 2003), p. 5.

31 Civil Case No. 2792/ 2006.

32 Civil Appeal No. 35/ 2007.

33 Civil Case No. 2792/ 2006, paragraph 5.

Pudemo and NNLC, they were political parties which were banned by the 1973 King's Proclamation. They could, therefore, not have had any legitimate expectation that they would participate in the constitution-making process. And as far as all the appellants were concerned, the 1996 Decree in clear and unambiguous terms set out that any person desiring to make a submission or representations to the CRC could not be represented by anyone else or any body or represent such person in making his or her submissions. They could thus not have had any legitimate expectations that they would be heard by the Commission.<sup>34</sup>

The Court went on to say that the wording of the 1996 Decree provided no basis for holding that the CRC, in not permitting group representation, misinterpreted its function or failed properly to perform it.<sup>35</sup> Earlier in the judgment the Court maintained that the Commission had adhered strictly to the law.<sup>36</sup> As Arthur Chaskalson CJ (as he then was) has observed:<sup>37</sup>

Paying lip service to the rule of law, courts followed the laws and held government officials to account when they failed to comply with them. Apartheid laws, upheld by the judiciary, were clear, published and stable. The apartheid government, its officers and agents were accountable in accordance with the laws. But the laws were unjust. They failed to protect fundamental rights such as freedom of assembly and freedom of speech; instead, they denied the franchise to blacks, institutionalised discrimination, denied equal education and job opportunities to black persons, made provision for forced removal of black communities from land that they owned and occupied, curtailed freedom of political activity, and vested broad discretionary powers in the executive to enforce these policies.<sup>38</sup>

To a large extent, this mirrors the situation in Swaziland today. The courts have been used to institutionalise abuse and violate basic human rights and freedoms; yet, it has been said, constitution-making is a grave responsibility demanding patience, thoroughness, integrity, dedication and broad civic participation.<sup>39</sup> Referring to the Ugandan experience, Odoki<sup>40</sup> (who sits in the Supreme Court of Swaziland) noted:

It is important to involve the people in the process of making their constitution because a constitution should reflect their ideals, values, interest and aspirations. Unless the people embrace the constitution as their own brainchild, they are unlikely to respect and safeguard it. In order for the constitution to command their loyalty, respect, obedience and confidence, the

34 Civil Appeal No. 35/ 2007, paragraph 50.

35 *Ibid*, paragraph 58.

36 *Ibid*, paragraph 16.

37 A Chaskalson, "How About a Bill of Rights? Inaugural Tony Fitzgerald Lecture" 18(3) *Griffith Law Review* (2009), pp. 544-558.

38 *Ibid*, p. 547.

39 J Mwanakatwe, "Constitution-making process".

40 BJ Odoki, "Writing of Democratic Constitution" 1(2) *East African Journal of Human Rights* (1993), pp. 195-223.

people must identify themselves with it through involvement and a sense of attachment.<sup>41</sup>

In effect, ownership comes from authorship. It is doubtful that the Swaziland Constitution enjoys such ownership, let alone legitimacy, given the lack of citizen involvement in the process not only of formulating but adopting it. No wonder, then, that many years after the Constitution's operationalisation, Swaziland still seems to be a polarised society.

### 3 Implementation of the Constitution

The implementation of the Constitution is the obligation of all organs and agencies of state, as well as natural and legal persons. In terms of paragraph 10 of the Preamble, the Constitution was accepted by the *iNgwenyama*-in-Council as the supreme law of the land. This was reaffirmed in section 2(1).<sup>42</sup> In accordance with that sub-section, the "King and *iNgwenyama* and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution". However, upholding and defending the Constitution includes implementing it.

Section 14(2) provides that the Bill of Rights shall be respected and upheld by the three arms of government – the executive, legislature and judiciary – and by other organs or agencies of government as well as, where applicable, all natural and legal persons in Swaziland. The courts are given the onerous duty of enforcing the fundamental rights and freedoms enshrined therein. In discussing the implementation of the constitution, a good place to start is with the judiciary.

#### 3.1 The appointment of judges

The appointment of judges is regulated by Chapter VIII of the Constitution – the Judicature. Section 138 provides that justice shall be administered in the name of the Crown by the judiciary, which shall be independent and subject only to the Constitution. The independence of the judiciary is guaranteed under sections 140<sup>43</sup> and 141.<sup>44</sup> Judicial appointments are

41 *Ibid* 199.

42 The section reads: "2(1) This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

43 The section vests judicial power in the judiciary as follows:

(1) The judicial power of Swaziland vests in the Judiciary. Accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power. (2) In the exercise of the judicial power under this Constitution or any other law, the superior courts may, in relation to any matter within their jurisdiction, issue such orders or directions as may be necessary to ensure the enforcement of any judgments, decree or order of those courts.

44 The section guarantees and protects the independence of the judiciary. It provides:  
(1) In the exercise of the judicial power of Swaziland, the Judiciary, in both its



made by the King on the advice<sup>45</sup> of the Judicial Service Commission (JSC).<sup>46</sup> However, this is where the problem begins: the six members of the JSC are themselves appointed by the King. The IBA noted this anomaly during the drafting stage of the process:

Section 60(2) of the draft Constitution, however, provides that the composition will be the Chief Justice, the Chairman of the Civil Service Commission, two legal practitioners appointed by the King, and two lay persons appointed by the King. This is a significant change, altering the composition strongly towards royal appointments. There is no requirement for the King to take advice from the Chief Justice or any other independent person on the matter. Remarkably, the King is not even required to consult the President of the Law Society when deciding on the two Legal Practitioners to be appointed members. The Expert Panel considers this to be unsatisfactory and at odds with similar provisions in other democratic constitutions ... The Panel strongly recommends the amendment of this provision.<sup>47</sup>

As we now know, the section was never amended. The composition of the JSC has a serious bearing on the appointment of judges and, by extension, the independence of the judiciary. For instance, section 173(4) suggests that appointments to service commissions shall be done “in a competitive, transparent and open manner on the basis of suitable qualifications, competence and relevant experience”. But, ironically, members of the JSC have never been appointed in a manner consistent with the provisions of this section. Accordingly, there has been a failure to respect and implement the constitutional provisions on the part of members of the JSC and other service commissions.

judicial and administrative functions, including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority.

(2) Neither the Crown nor Parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with Judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions.

(3) All organs or agencies of the Crown shall give to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts under this Constitution.

(4) A judge of a superior court or any person exercising judicial power, is not liable to any action or suit for any act or omission by that judge or person in the exercise of the judicial power.

(5) The administrative expenses of the Judiciary, including all salaries, allowances, gratuities and pensions payable to, or in respect of persons serving in the Judiciary, shall be charged on the Consolidated Fund.

(6) The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Judge of a superior court or any judicial officer or other person exercising judicial power, shall not be varied to the disadvantage of that Judge or judicial officer or other person.

(7) The Judiciary shall keep its own finances and administer its own affairs, and may deal directly with the Ministry responsible for finance or any other person in relation to its finances or affairs.

45 Section 153(1) of the Constitution.

46 The JSC is established in terms of section 159 of the Constitution.

47 International Bar Association, *Striving for Democratic Governance: An Analysis of the Draft Swaziland Constitution* (August 2003), p. 21.

Arguably, the requirement that members of the service commissions be appointed in a “competitive, transparent and open manner” applies with equal force to the appointment of members of the judiciary itself, but rarely have judges been appointed in such a manner. The appointment of the Chief Justice was just as problematic. When the former Chief Justice Michael Ramodibedi fell from grace, he locked himself in his house at the judges’ complex for more than 30 days to avoid arrest.<sup>48</sup> He was subsequently arrested and removed as Chief Justice of Swaziland.<sup>49</sup> It was reported that

[a] legal notice, citing section 158 (2) of the 2005 Constitution, [read] thus: ‘In exercise of the powers vested in me ... I King Mswati III, King and Ingwenyama of Swaziland, hereby remove Chief Justice Michael Mathealira Ramodibedi from office of Chief Justice of the High Court of Swaziland for serious misbehaviour with effect from the date of the signature of this Notice.’<sup>50</sup>

This process of removal was irregular: once the Chief Justice had been removed the JSC ought to have called for applications and conducted interviews in a manner dictated by section 173(4) of the Constitution. This never happened. Instead the King appointed Judge MCB Maphalala as the acting Chief Justice. However, Judge Maphalala had been elevated to the Supreme Court by Chief Justice Ramodibedi: he was appointed to both the High Court and Supreme Court without going through the process provided for in section 173(4).

In terms of section 153(2), when the office of the Chief Justice is vacant for some reason, as it was when Chief Justice Ramodibedi was suspended and subsequently removed from office, “those functions shall be performed by the most senior of the Justices of the Supreme Court”.<sup>51</sup> As noted in the International Commission of Jurists (ICJ) report, “Justice Ebrahim is more senior than Justice Maphalala and, although he has surpassed the constitutionally prescribed age of retirement, he continues to serve on the Supreme Court.”<sup>52</sup>

The unlawful appointment of the head of the judiciary would seem to call into question the independence and accountability of the judiciary in Swaziland. Several other judges have been appointed likewise without a call for applications and without going through a competitive, transparent

48 International Commission of Jurists (ICJ), *Justice Locked Out: Swaziland’s Rule of Law Crisis* International Fact-finding Mission Report (2016), p. 7.

49 B Khoza, “Chief Justice Ramodibedi fired”, *Swazi Observer*, 19 June 2015. See also M Ndzimandze, “Ramodibedi fired”, *Times of Swaziland*, 19 June 2016.

50 B. Khoza, *Ibid.*

51 Section 153(2)(b).

52 International Commission of Jurists (ICJ), *Justice Locked Out: Swaziland’s Rule of Law Crisis* International Fact-finding Mission Report (2016), p. 22.

and open process.<sup>53</sup> This applies equally to the appointment of members of the Supreme Court.<sup>54</sup>

However, flouting the Constitution when making judicial appointments is not limited to the Chief Justice and High Court judges. At the Supreme Court, matters are, arguably, worse. None of the judges of the Supreme Court was appointed according to the provisions of section 173(4). These are both former<sup>55</sup> and current<sup>56</sup> judges. Since the removal of Chief Justice Ramodibedi, justices of the Supreme Court have been appointed on a temporary basis.<sup>57</sup> Initially the judges of the High Court were appointed to sit as acting Supreme Court justices, but now it is practising lawyers appointed as acting judges who sit on appeal to determine the correctness or otherwise of decisions made by permanent High Court judges. Such a situation undermines constitutional implementation, the rule of law and the independence of the judiciary. The ICJ noted in its report:

Several interviewees confirmed to the FFM-SZ [Fact-finding Mission] that the advisory function of the JSC has in practical terms been interpreted to mean that the King may freely reject the advice received from the JSC, a power he has exercised on occasion. Moreover, the process appears to be very opaque: vacancies are not advertised; there are no public interviews; and the shortlist of candidates that is referred to the King for his consideration is not publicly disclosed. The Law Society has complained that its opinion is often not solicited in the process, particularly in the selection of the two legal practitioners to be appointed to the JSC in line with section 159 (1)(b) of the Constitution of Swaziland. Such lack of transparency and consultation in the judicial appointment process has, according to information provided to the FFM-SZ, created an environment of favouritism and corruption. Several stakeholders cited the lack of safeguards and the Crown's control over the appointment process as an important contributing factor to the lack of judicial independence.<sup>58</sup>

The ICJ found that the interpretation and implementation of constitutional provisions on judicial appointments does not comply with international law and standards.<sup>59</sup> It noted that the appointment of judges who do not meet the prescribed qualifications of the Constitution violates the rule of law, thereby undermining judicial independence and the public's confidence in the judicial system. The practice of appointing judges in a

53 These include the appointment of Hlophe (NJ) and Dlamini (M).

54 These members were Ebrahim, Twum, Levinson, Odoki, Otta, and Moore JJ.

55 Chief Justice Michael Ramodibedi, Ebrahim, Twum, Moore, Levinson and Odoki JJ.  
56 Current judges in the Supreme Court all have an acting capacity, and are practising lawyers: Magagula, Maphanga, Manzini, Langwenya, Magagula, Cloete, and Nxumalo JJ.

57 International Commission of Jurists (ICJ), *Justice Locked Out: Swaziland's Rule of Law Crisis* International Fact-finding Mission Report (2016), p. 23.

58 *Ibid*, p. 22.

59 *Ibid*, p. 23.

temporary capacity in order to influence the outcome of proceedings similarly violates due process and the rule of law.<sup>60</sup>

Cases in point are the appointment of Simelane J as a judge of the High Court and the appointment of Prince Chief Sensangakhona Dlamini JA<sup>61</sup> as a permanent justice of the Supreme Court. Firstly, neither went through any formal process as envisaged by section 173(4). Secondly, neither was qualified to be appointed a justice as they had not practised for the number of years stipulated in the Constitution.<sup>62</sup>

The Law Society of Swaziland challenged the appointment of Simelane on the basis of the provisions of section 154.<sup>63</sup> Citing the immunity section of the Constitution,<sup>64</sup> the full bench of the High Court dismissed the application:

On the one hand, the statute places an imperative and mandatory duty on the King, and on him alone, of course on the advice of the JSC, to be the only one with the constitutional authority and power on the appointment of the head of the judiciary, the Chief Justice, and other Justices of the Superior Courts. On the other hand, and constitutionally, the use of the word in Section 11(a) encapsulates that His Majesty the King is exempted from any suit or legal process flowing from all things done by him. And this includes the appointment of the Chief Justice and all Justices of the superior courts of this country. Under no circumstances therefore should any litigant, attempt, directly or indirectly, to challenge the authority of His Majesty the King in any cause in respect of all things done or omitted to be done by him! Once the King has spoken it is the end of the matter. It is final. And as a Swazi Nation that is where our old adage of 'Umlomo longacali manga' [the Mouth that tells no lies] comes from.<sup>65</sup>

Dube and Nhlabatsi argue that this judgment has significant consequences for constitutionalism and the principle of legality in Swaziland.<sup>66</sup> While the Constitution commits to an independent judiciary, it seems that this is so only on paper. In practice, the independence of the judiciary is systematically undermined. There is obvious failure on the part not only of the executive to uphold judicial independence, but also of the judiciary to protect and defend its independence. It appears that the judiciary is happy being the appendage of the executive and, in particular, the King.

60 *Ibid.*

61 Government Gazette No. of 2016.

62 Section 154(1)(a)(i) stipulates a bare minimum of ten years of continuous practice for one to qualify for appointment as judge of the High Court. Paragraph (b)(i) of the subsection stipulates a bare minimum of 15 years to qualify for appointment to the Supreme Court.

63 *The Law Society of Swaziland v Mpendulo Simelane N.O. and Others* Civil Case No. 527/2014.

64 Section 11(a).

65 Paragraph 2 of the judgment.

66 A Dube and S Nhlabatsi, "The King Can Do No Wrong: The Impact of the *Law Society of Swaziland v Mpendulo Simelane NO and Others* on Constitutionalism" 16 *African Human Rights Law Journal* (2016), pp. 265-282.

### 3.2 The legislature

The legislature is provided for under Chapter VII of the Constitution. In terms of section 106 the supreme power to make law vests in the King-in-Parliament. In terms of section 1, Swaziland is a democratic Kingdom, and, under section 79,<sup>67</sup> *Tinkhundla* is its system of government. According to section 84(1), “the people of Swaziland have a right to be heard through and represented by their freely chosen representatives in the government of the country”.

The legislature consists of the Senate and House of Assembly.<sup>68</sup> Because political parties are banned from participating in elections and the management of public affairs, the Parliament of Swaziland lacks autonomy and cannot be considered to represent the real will of the people. There are at least two areas where the legislature has failed in constitutional implementation. The first concerns the appointment of the Prime Minister. In terms of section 67(1) of the Constitution, the Prime Minister is to be appointed “from among members of the House”.<sup>69</sup> The current Prime Minister, Dr. Sibusiso Barnabas Dlamini, was not a member of the House at the time of his appointment in 2008. As Rooney observes:

King Mswati III has illegally appointed Sibusiso Barnabas Dlamini as Prime Minister of Swaziland. The King has disregarded the constitution he signed in 2005 that clearly states that the Prime Minister must be a member of the House of Assembly. Dlamini has not been elected by anybody to anything in Swaziland.<sup>70</sup>

It can be argued that the spirit of section 67(1) was for the King to appoint a Prime Minister from among the elected members of the House of Assembly. Section 67(1) read with section 84(1) would result in an interpretation and implementation of section 1 of the Constitution on the promotion of democracy. But in this case the King failed to implement his own Constitution.

As Rooney notes, the consequence of this was that

Swaziland was roundly condemned [...] for running national elections but keeping a ban on political parties that dates back to 1973. Dlamini’s illegal

67 The section provides: “The system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system which emphasizes devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office.”

68 Section 93 of the Constitution.

69 The subsection reads: “The King shall appoint the Prime Minister from among members of the House acting on the advice of the King’s advisory Council.”

70 R. Rooney, “Swazi King appoints illegal Prime Minister”, Swazi Media Commentary, 17 October 2008.

appointment yesterday (16 October 2008) will be seen as sending a direct threat to the democrats.<sup>71</sup>

That the King continues to appoint the Prime Minister is a major challenge to the democratic aspirations of the people of Swaziland. It was reported that at a meeting in 2012 convened at his traditional headquarters, “King Mswati III [...] closed a forum where his subjects called for democratic reforms, promising ‘expert’ reviews but making no commitments ... Mswati made no comment on calls to lift the ban on political parties.”<sup>72</sup> At this meeting, the majority of those who spoke seem to have made a clear call for Swaziland to return to a multi-party dispensation, where the Prime Minister and government are a product of the will of the people expressed through free and fair democratic elections.

The second area where there has been a failure of implementation is in the election of women to the House of Assembly. Section 95(1)(c) provides for the election of four female members specially elected from the four regions.<sup>73</sup> However, the Chairman of the Elections and Boundaries Commission and the members of the House failed to implement this section. The rationale for this section may have been to encourage more participation by women in parliament, but the section has not been taken advantage of. According to Gender Links, “[o]ut of 55 parliamentary candidates, the electorate voted in only one woman. Esther Dlamini was re-elected for the third time”.<sup>74</sup>

At a time when the Southern African Development Community (SADC) and African Union (AU) have encouraged 50 per cent representation of women, the Swaziland authorities have failed to implement not only regional, continental and international standards but their supreme law on this subject. Gender Links noted in 2013 that “there is no hope that Swaziland will reach the SADC Gender Protocol target of 50% women in all areas of decision-making by 2015”. This has been shown to be true. At the time of this writing, the term of office of the current

71 *Ibid.*

72 As above. “King Mswati ends reform talks with no commitment”, *Mail & Guardian*, 12 August 2012.

73 Subsection 3 reads as follows:

The members elected on a regional basis, under section (1)(c), shall continue to be so elected, whenever the provisions of section 86 (1) are true, in terms of the following paragraphs –

(a) at the instance of the Chairman of the Elections and Boundaries Commission, the elected members from each Region shall on the first meeting nominate not less than three and not more than five women from each Region qualified to be members of Parliament;

(b) the list of nominated candidates shall be published in at least two local newspapers and the electronic media on at least three consecutive days, and;

(c) after ten days from the date of last publication the House shall meet to vote for one woman from each of the Regions, taking into account any relevant input in terms of paragraph (b).

74 Gender Links for Equality and Justice, “Southern Africa: Swaziland has the lowest number of women in parliament”, 15 November 2013.

parliament was coming to an end, but no attempt had been made to implement the provisions of section 95(1)(c) read together with subsection (3).

### 3.3 Bill of Rights

Chapter II of the Constitution contains the Bill of Rights. It provides for many of the internationally recognised basic human rights and freedoms. These include the right to life; right to personal liberty; right to protection from forced labour; right to dignity; right to property; right to equality before and under the law; right to a fair hearing; right to protection against arbitrary search or entry; freedom of conscience and religion; freedom of expression; freedom of assembly and association; freedom of movement; the protection of the family; rights and freedoms of women; rights of the child; rights of persons with disabilities; abolition of illegitimacy; the rights of workers; the right to administrative justice; and property rights of spouses.<sup>75</sup> Under section 14(2), these

fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, the legislature and the judiciary and other organs or agencies of Government and where applicable to them, by all natural and legal persons in Swaziland, and shall be enforced by the courts as provided for in this Constitution.

It is significant that in Swaziland the most contested of these rights are the right to freedom of expression, freedom of assembly and association and the associated rights of freedom of conscience and movement. It is generally accepted that these basic human rights and freedoms are indivisible. In this regard, it has been noted that “[f]reedom of expression, together with freedom of assembly and association, is integral to human dignity and is also vital to the valid exercise of electoral rights and democratic participation”.<sup>76</sup> There has been a general failure to implement the Bill of Rights by all organs of the government in Swaziland, including the courts, which are the ultimate enforcers in terms of section 14(2) of the Constitution. This is illustrated more fully in the examples below.

#### 3.1.1 Freedom of assembly and association

The first attempt at implementing and enforcing the rights to assembly and association took place before the Constitution came into force. This was in the case of the *Swaziland Federation of Trade Unions (SFTU) and Others v Chairman of the Constitutional Review Commission and Others*.<sup>77</sup> The

75 Sections 15-34.

76 A Conte and R Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, 2<sup>nd</sup> ed., Aldershot, Ashgate (2009), p. 85.

77 High Court Civil Case No. 336/2004.

applicants sought to interdict parliament from debating and adopting the then Draft Constitution pending the conclusion of a matter in which they sought to be allowed to participate in the constitutional review and constitution-making process.<sup>78</sup>

However, the application was dismissed on the grounds, inter alia, that the applicants had not satisfied the requirements of an interdict;<sup>79</sup> that the applicants failed to show that the court had jurisdiction over the matter on the basis of parliamentary privilege;<sup>80</sup> that on the basis of Decree No. 11 of the 1973 proclamation, the applicants had no *locus standi*;<sup>81</sup> and that the labour unions failed to show entitlement to participate in the making or drafting of the new constitution.<sup>82</sup>

Once the Constitution had come into force, attempts were made to give effect to the right to freedom of assembly and association as provided for under section 25. In *Jan Sithole N.O. and Others v The Prime Minister and Others*<sup>83</sup> the applicants asked the court to declare that political parties have a right to be recognised, registered and freely engage in political activity in Swaziland, including participation in free and genuine democratic elections without hindrance, intimidation and/or harassment by the government or its agencies. Furthermore, they wanted to be part of the election management body.

In its judgment the full bench of the High Court<sup>84</sup> noted that “the stance adopted by the Swaziland government is that the present political system of government under the ‘*Tinkhundla*’ is an autochthonous institution rooted on the soil and has all the attributes of a democratic system”.<sup>85</sup> The application was dismissed on the basis that, as the government had contended, the matter was not ripe for determination.<sup>86</sup> The Court thus adopted a narrow interpretation of the provisions of section 35(1) in stating that, in order for the application to succeed, the applicants had to establish rights higher than those of others. This, it is submitted, is not what a liberal, rights-based and purposive interpretation of section 35(1) warrants.

On appeal, the Supreme Court<sup>87</sup> adopted a similar approach. It held that in terms of the provisions of section 79, political parties cannot

78 This refers to civil Case No. 1671/2004, which was never concluded.

79 Paragraph 42 of the judgment in Case No. 336/2004.

80 *Ibid*, paragraph 56.

81 *Ibid*, paragraph 65 and 73.

82 *Ibid*, paragraph 78.

83 High Court Civil Case No. 2792/2006.

84 Per S.B. Maphalala, PJ Annandale and Mamba JJ.

85 At paragraph 7 of the judgment.

86 At paragraphs 32 and 33 of the judgment.

87 Civil Appeal No. 50 of 2008.



participate in elections, although their individual members can. It declared that “[l]ike beauty, democracy is to be found in the eyes of the beholder”.<sup>88</sup> Arguably, the Supreme Court did not recognise that democracy and the rule of law have certain minimum standards, one of which is the respect for all human rights, including the rights of the people to associate freely and form political parties. Thus, despite a Bill of Rights that guarantees the freedom of assembly and association, Swaziland maintains a ban on free political activity and political parties.

### 3.1.2 Freedom of expression

Together with freedom of expression, the rights to freedom of assembly and association are at the heart of democracy and democratic governance. In Swaziland, not only are there challenges with regard to freedom of assembly and association, but the right to freedom of speech has not been respected and implemented in spite of its entrenchment in section 24 of the Constitution.

In relation to this right, the High Court handed down what was seen as a harsh sentence on the *Nation Magazine* for having criticised the judiciary.<sup>89</sup> On appeal, part of the conviction was confirmed though the fine was substantially reduced.<sup>90</sup> Freedom of expression was violated again when the editor of the *Nation Magazine* and his columnist were arrested on allegations of contempt of court. After the two had spent some 15 months in jail, the Supreme Court saw the injustice of the prosecution, conviction and sentence. In quashing the conviction and sentence, the judge in the lead judgment said:<sup>91</sup>

[I]t remains for me to observe that what happened in this case was a travesty of justice. Whatever issues that arose with regard to the need to balance freedom of expression or of the press with the protection of fair hearing and authority of the courts, those issues were not properly handled. The importance of freedom of expression in promoting democracy and good governance cannot be over-emphasized. Equally important is the need to strengthen and promote the independence and accountability of the judiciary.<sup>92</sup>

88 *Ibid*, paragraph 26.

89 *The King v Swaziland Independent publishers (Pty Ltd) and Others* Criminal Case No. 53/2010 (the matter was heard by MCB Maphalala J, who is now the Chief Justice).

90 *Swaziland Independent Publishers (Pty) Ltd and Another v The King* Criminal Appeal Case No. 08/2013.

91 *Maseko and Others v Rex* Criminal Appeal No. 18/2014.

92 Paragraph 14 of the judgment.

The ICJ subjected this case to a detailed critique in two reports dealing with the independence of the judiciary in Swaziland.<sup>93</sup>

Another problem has been the failure to respect and implement a further right also set out in the Constitution's Bill of Rights, that to property. A classic case is the one which resulted in the removal of Justice Thomas Masuku as judge of the High Court.<sup>94</sup> Many Swazis have been deprived of their property, in the form of cattle or land, by people acting or purporting to be acting as the King's emissaries. The right to property is enshrined in section 20 of the Constitution and is often in conflict with customary practices under indigenous law.

#### 4 Key actors in the implementation process

It has been shown above that all three arms of government have been responsible for failing to implement the Constitution, including the courts as its ultimate guardians. Moreover, civil society, which is required to play a watchdog role, has been slow to use the courts to test the courts' capacity to live up to their constitutional obligations. For example, the unlawful appointment of the Prime Minister and judges of the High and Supreme Courts could have been tested in the courts. As Rooney observes,<sup>95</sup>

It remains to be seen whether anyone will challenge the appointment in the Swazi High Court. The High Court has been known to overturn government decisions that contravene the constitution.<sup>96</sup>

This chapter has shown how in many instances the courts failed to interpret the Constitution, in particular the Bill of Rights, in a manner that would give meaning and effect to basic rights as opposed to unreasonably restricting them. The courts seem to have failed to exercise their constitutional powers and obligations in line with section 152.

That being said, in *Attorney General v Aphane*<sup>97</sup> the Supreme Court upheld the equality clause with regard to women in Swaziland. Furthermore, in *Prime Minister v MPD Marketing and Supplies (Pty) Ltd*<sup>98</sup> it found that all government officials, including the Prime Minister, are bound to act within the confines of the Constitution. It concluded that

93 International Commission of Jurists, *The Failure of Justice: Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland* ICJ Trial Observation Report 2005 (July 2005) and *Justice Locked Out: Swaziland's Rule of Law Crisis* International Fact-finding Mission Report (2016).

94 *Commissioner of Police and Another v Mkhondvo Maseko* Civil Appeal No. 03/2011.

95 R Rooney, "Swazi King appoints illegal Prime Minister", Swazi Media Commentary, 17 October 2008.

96 *Ibid.*

97 Civil Appeal No. 12/2009.

98 Civil Appeal Case No. 18/2007.

Swaziland is a constitutional state, having incorporated the rule of law and doctrine of legality:

Such incorporation comprehends the principle of legality. It is central to the concept of a constitutional state that the law-giver and the Executive 'in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law'.<sup>99</sup>

Nevertheless, most of the cases discussed above show that Swaziland's courts are anything but consistent in how strictly they apply the Constitution. As this chapter has argued, there has been a failure to adhere to the Constitution in the critical areas of judicial appointment and the composition of parliament. Constitutional implementation, in short, is handled very selectively.

This failure to implement key provisions of the Constitution could be attributed to the absence of separation of powers, the consequence of which is that the main state organs as well as constitutional bodies lack autonomy. More generally, Fombad has clearly shown how absolutism is inconsistent with constitutionalism, and therefore there is no surprise in what obtains in Swaziland today.<sup>100</sup> Similarly, as Gumede argued in 2005, Swaziland's adoption of a written constitution does not translate into rule of law, because the King remains an absolute ruler.<sup>101</sup>

## 5 Lessons from the Swaziland experience

The main lesson to be learnt from the Swaziland case study is that a constitution-making process which lacks credibility cannot give rise to a legitimate constitution. The fundamental problem with the Swaziland Constitution is that it emerged from a process that had no meaningful and effective participation by the people of the country and therefore does not enjoy popular support. As a result, it merely entrenched a pre-existing autocratic traditional system of government that has no place in modern Africa. Consequently, it cannot be said that the content of such a constitution represents the real aspirations of the people. As the Constitutional Court of South Africa observed in *S v Makwanyane and Another*.

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic

99 *Fedsure Life Assurance v Greater Johannesburg TMC* 1999(1) SA 374 (CC) 400 at p. 399-400. At paragraphs 17.1 and 17.2. of the judgment.

100 CM Fombad, "The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?" 23 *South African Journal of Human Rights* (2007), pp. 93-115.

101 S Gumede, "Human Rights and the Rule of Law in Swaziland" 5 *African Human Rights Law Journal* (2005), p. 271.

premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future.<sup>102</sup>

Mahomed J went on say that

[i]n some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>103</sup>

We contend that this is where the Swaziland Constitution failed: it is a written constitution that does not break with the past but formalises a draconian and outdated system. It has been said that there can be constitutions without any constitutionalism.<sup>104</sup> Swaziland's one epitomises this truism.

## 6 Conclusion

Following the 2013 parliamentary elections, there has been consensus that Swaziland has to re-engage in a constitutional review process. This is evidence that the 2005 Constitution had failed. Those who conceived the constitution-making process and crafted and adopted the document may not accept this reality; but for the country to emerge from its political quagmire it will need to review its constitution entirely to make it compliant with the basic principles of constitutionalism and the rule of law. A Commonwealth Secretariat Report on the 2013 elections in Swaziland made the following observations:

A nation's constitution is the expression of the distilled rights, freedoms, privileges and aspirations of its people. The nation's political system is enshrined in it, which determines much of the nation's social life. In Swaziland, however, the social order is complex. Whereas the Constitution

102 (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), available at <http://www.saflii.org/za/cases/ZACC/1995/3.html> (accessed 14 June 2016), paragraph 261.

103 *Ibid.*

104 CM Fombad, "The Swaziland Constitution of 2005: Can Absolution be Reconciled with Modern Constitutionalism?" *Op cit*, pp. 103, 112. See also T Maseko, Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa, Nairobi, April 2007.

declares that people are endowed with individual and collective rights and freedoms that are enjoyed by most of the people of Southern Africa and much of the rest of the world, two of its most important sections (Ch. III, s.25 and Ch. VII, s.79) seem to contradict each other. [...] On one hand, section 25 provides for freedom of assembly and association, while on the other, section 79 requires that individual merit shall be the basis of election and elevation to public office. This effectively prohibits the registration and operation of political parties as the basis for election and access to public office.<sup>105</sup>

The Mission recommended that measures be adopted to ensure that the principle of the separation of powers is upheld to enable Swaziland to comply with its international commitments, including adherence to the Commonwealth (Latimer House) Principles on the three branches of government:

While cognisant of the respect due to the institution of the monarchy, which in itself should be safeguarded and accommodated, we recommend that the Constitution be revisited. This should ideally be carried out through a fully inclusive, consultative process with all Swazi political organisations and civil society (if needed, with the help of constitutional experts), to harmonise conflicting provisions. It is vital, and in Swaziland's long-term national interest, that these contradictions are resolved and that enabling legislation be put in place to allow for political parties. This would give full effect to the letter and spirit of Section 25 of the Constitution, and in accordance with Swaziland's commitment to its regional and international commitments. The aim is to ensure that Swaziland's commitment to political pluralism is unequivocal.<sup>106</sup>

It is significant that the AU,<sup>107</sup> SADC Lawyers' Association,<sup>108</sup> and European Union<sup>109</sup> made similar observations, particularly about the prohibition of free political activity and political parties and the lack of separation of powers. Whereas most African countries have adopted reasonably credible constitutions but encounter problems in implementing them, Swaziland is two steps behind. Firstly, it has what is at best a symbolic constitution that violates all the fundamental principles of constitutionalism; secondly, its few progressive provisions are not being strictly enforced. The country thus needs a new constitution that incorporates provisions which will facilitate its implementation.

105 The Commonwealth Secretariat, *Swaziland National Elections 20 September 2013: Report of the Commonwealth Observer Mission*, p. 4-5.

106 *Ibid*, 5.

107 African Union, *Preliminary Statement by African Union Election Observer Mission to the 20th September 2013 National Elections in the Kingdom of Swaziland*.

108 Southern Africa Lawyers' Association *Report of the Election Observation Mission to the Kingdom of Swaziland*.

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# CHAPTER 5

## THREE YEARS INTO THE IMPLEMENTATION OF THE ZIMBABWEAN CONSTITUTION OF 2013: PROGRESS, CHALLENGES, PROSPECTS AND LESSONS

*Tinashe Carlton Chigwata*

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### 1 Introduction

When Zimbabwe gained independence in 1980, the majority black population was optimistic that the democratic government led by the Zimbabwe African National Union Patriotic Front (ZANU PF) would deliver a better life than the one they had under a century-long colonial regime. As in many other parts of Africa, those hopes faded merely a decade after independence.

In the next two decades, constitutional reform was seen as critical to resolving several of the country's challenges. The reform agenda culminated in the adoption of a new Constitution<sup>1</sup> that seeks to advance the country's social and economic welfare in addition to fulfilling a constitution's "traditional" role, that of organising the state and imposing limitations on government power.<sup>2</sup> Among other things, the Constitution guarantees its supremacy, the rule of law, and separation of powers, and enshrines a range of political, economic, social and cultural rights and freedoms. Militating against centralisation, it requires the decentralisation of powers, responsibilities and resources to provincial and local levels in a multilevel system of government.

In general, the Constitution provides the necessary foundation for constitutionalism in Zimbabwe. Yet constitutionalism cannot be measured only on the basis of a progressive, technically sound constitutional

<sup>1</sup> Constitution of Zimbabwe Amendment Number 20 of 2013.

<sup>2</sup> See M Brandt, J Cottrell, Y Ghai & A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), p. 15; M Allen, "Women and Constitution-building in 2013" in S Bisarya (ed) *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 24.

framework; a constitution must also be a “living” document, implemented and respected in practice and promoted and safeguarded by all.<sup>3</sup> More than three years after Zimbabwe adopted its 2013 Constitution, major questions surround its implementation.

This chapter argues that despite the significant strides that have been made, much remains to be done to bring about the Constitution’s full implementation. The chapter begins by briefly discussing the constitutional reform agenda in the independence era. It considers the role of various actors involved in constitutional implementation, and evaluates the status of the Constitution’s implementation. This is followed by a discussion of major obstacles to effective implementation. The last section deals with the prospects for, and lessons that can be drawn from, the Zimbabwean experience of constitutional implementation.

## 2 Overview of the constitutional review process

The 1979 agreement at the Lancaster House Conference between the British and Rhodesian governments and the liberation movements<sup>4</sup> paved the way for Zimbabwe’s independence under the negotiated Lancaster House Constitution. This constitution, which provided the “power map” for an independent Zimbabwe, was not the product of a process involving ordinary Zimbabweans.<sup>5</sup> Rather, it was established through a British Act of Parliament and imposed on them. Modelled on the Westminster system, the Constitution guaranteed, inter alia, individual rights, multiparty democracy, constitutional supremacy, separation of powers, property rights, the independence of the judiciary and judicial review of legislative and executive action.<sup>6</sup>

Perhaps its biggest weakness was that it was conservative in nature as it preserved white dominance and benefit in matters such as land ownership. For instance, the Constitution outlawed land redistribution for a decade, during which time land could change hands only on a “willing-buyer-willing-seller” basis. Later constitutional reforms would seek to

3 CM Fombad, “Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa”, 55(1) *The American Journal of Comparative Law* (2007), p. 3.

4 The two main liberation movements were the Patriotic Front-Zimbabwe African People’s Unity (PF-ZAPU), led by Joshua Nkomo, and the Zimbabwe African National Unity (ZANU), led by Robert Mugabe.

5 T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 2.

6 J Muzondidya, “From Buoyancy to Crisis, 1980-1987” in B Raftopoulos & A Mlambo (eds) *Becoming Zimbabwe: A History from the Pre-colonial Period to 2008*, Harare, Weaver Press (2009), p. 172.

reverse these imbalances and inequalities in land ownership, access to the economy, and other sectors.<sup>7</sup>

The first attempt at such reform took place in the late 1990s. In 1997, the National Constitutional Assembly (NCA) was formed by a consortium of civic groups<sup>8</sup> with the aim of spearheading a people-driven constitutional reform process to address the country's political, social and economic challenges. The government responded to the NCA's formation by establishing a Constitutional Commission, but the draft constitution the latter produced was rejected by the citizens after a successful no-vote campaign led by the NCA and the Movement for Democratic Change (MDC) political party.<sup>9</sup> Among the reasons for rejecting the draft was that it overcentralised power in the executive and did not adequately entrench either the separation of powers or human rights.

Thus, the first attempt at constitutional reform failed to bring about the desired results. Similarly, a constitutional review in 2001 by the NCA failed to culminate in the adoption of a new constitution as there was a lack of government support for this. The 2007 Kariba Draft Constitution produced by ZANU-PF and MDC political formations<sup>10</sup> suffered the same fate – it lacked the necessary legitimacy, given that the constitution-making process had not been transparent, inclusive and participatory.<sup>11</sup> In many respects it resembled the rejected Constitution Commission Draft Constitution of 2000.

However, a successful attempt at constitutional review began in 2009, under the auspices of the Government of National Unity (GNU). Following the disputed 2008 harmonised elections, ZANU-PF and the MDC entered into a peace agreement known as the Global Political Agreement (GPA). Under the GPA, the three major political parties agreed to share power under a GNU.

Article VI of the GPA provided for a review of the Lancaster House Constitution to allow Zimbabweans “to make a constitution by themselves and for themselves”. This article explicitly endorsed participatory

7 T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 2.

8 These included: trade unions, human rights organisations, churches, business associations and women's and student movements.

9 T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 2. The MDC had been formed a year earlier from various civic groups such as trade unions, the NCA and student organisations.

10 In 2005, the MDC split into a formation led by Morgan Tsvangirai and another by Arthur Mutambara. The split was caused by a disagreement between the leaders of the party on whether to participate in the 2005 Senate elections.

11 T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 2.

constitution-making as a means for developing a constitution reflecting the aspirations of various segments of Zimbabwean society.<sup>12</sup> The constitutional review was led by the Constitution Parliamentary Select Committee (COPAC), which was composed of members of the three major political parties and a traditional chief.<sup>13</sup>

The review, scheduled to take no longer than two years,<sup>14</sup> ended up lasting almost four years because of its participatory nature. In general, participatory processes in constitution-making take longer than non-participatory ones, seeing as it usually takes time to inform, educate, form opinions, conduct dialogue and build agreement.<sup>15</sup> The constitution-making process also stalled at various stages thanks to a lack of financial resources during the global financial recession. Nevertheless, international development partners<sup>16</sup> mobilised resources at crucial junctures, complementing funds that had been raised by the government. The first Draft Constitution, completed in December 2011 and substantially informed by views gathered from the people, was released in February 2012, notwithstanding its contentious issues. The parties comprising COPAC had failed to agree on a number of these, including the death penalty, the role of the Attorney General (AG), citizenship, homosexuality and devolution.<sup>17</sup>

The argument about the death penalty was whether to retain or abolish it, with the MDC formations seeking its abolition and ZANU-PF, its retention. As for the role of the AG,<sup>18</sup> the MDC supported the establishment of an institution separate from the Office of the AG and invested with prosecuting powers and functions. The incumbent AG was alleged to have been selectively prosecuting MDC members by

12 It is premised on the “notion of people’s sovereignty and the fundamental right of the people to participate in public affairs”. Brandt et al. identify four broad principles of “participatory constitution-making namely: public participation, inclusiveness and representation, transparency and national ownership”. M Brandt, J Cottrell, Y Ghai & A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), pp. 9, 15.

13 Global Political Agreement, Article VI. The body was headed by a representatives of each of the three parties and had a total of 25 members, of whom 17 were male and eight, female. According to Bisarya, the composition of such a body is significant, given that “the question of who writes the constitution is the most crucial determinant of what the constitution will say” (S Bisarya (ed), *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), vi). Thus, the concept of participation highlighted above is complemented by that of representativeness – the idea that “those who participate will be representative of the society and its different communities” (N Topperwien, “Participation and Representation in Constitution-making Processes” in Bisarya S (ed) *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 4).

14 Global Political Agreement, Article VI.

15 N Topperwien, “Participation and Representation in Constitution-making Processes” in S Bisarya (ed), *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 4.

16 Some of the major funders were the UNDP, Denmark, Sweden International Development Cooperation Agency and Canadian International Development Agency.

17 COPAC, “The Road to the New Constitution” (2013), p. 55.

18 *Ibid*, 56.

overlooking misdeeds in perceived similar circumstances by individuals aligned to ZANU-PF.<sup>19</sup> On the issue of homosexuality, the preliminary Draft Constitution prior to the 18 of July 2012 Draft contained a clause providing opportunities for rights to gay marriage, something to which ZANU-PF was entirely opposed.<sup>20</sup>

Devolution was equally, if not more, contentious. ZANU-PF was concerned that devolution could be used as an avenue for secession, thus undermining national unity and fragmenting the country. The basis for this fear was that a secessionist movement, Mthwakazi, was agitating for the creation of a separate Ndebele state comprised of provinces where Ndebele was the main spoken language. The MDC formations, on the other hand, supported devolution, because, among other reasons, it was regarded as a potential solution to what were seen as inequitable variations in the levels of development of certain provinces as compared to others.<sup>21</sup>

The differences around these various issues are indicative of the character of constitutional review processes, where political formations and other groups seek to protect their interests in the future dispensation.<sup>22</sup> More often than not, these differences take time to resolve and, at worst, may cause the review process to break down.

COPAC managed to resolve the differences among the three political parties on the contested areas and produced a Draft Constitution which was put to a referendum in March 2013, as required by the GPA.<sup>23</sup> This was not the actual Draft Constitution developed through public participation, but a remodelled one reviewed by the major political parties. Madebwe argues that this version can hardly be said to have reflected the will of the ordinary citizens.<sup>24</sup> His argument is supported by certain civic groups which argue that the constitutional reform process served party-political interests at the expense of those of the general populace. The NCA, for instance, boycotted COPAC processes as a result of this. In general, experience shows that when participatory processes do not lead to the results that ruling elites want, there is often a shift to (informal) non-participatory processes that cause frustration and adversely affect “ownership” of the constitutional document.<sup>25</sup>

Nonetheless, the citizens voted overwhelmingly in favour of this remodelled Draft Constitution, after which it was put before Parliament

19 *Ibid*, 57.

20 *Ibid*.

21 *Ibid*.

22 See S Bisarya (ed), *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), vi.

23 Global Political Agreement, Article 6(1)(c)(viii).

24 T Madebwe, “Constitutionalism and the New Zimbabwean Constitution”, 1 *Midlands State University Law Review* (2014), p. 10.

25 N Topperwien, “Participation and Representation in Constitution-making Processes’ in S Bisarya (ed) *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 10.

and smoothly approved. The President assented to the constitutional bill, legitimising it – the Constitution of Zimbabwe – as the supreme law of the land and setting the scene for its implementation.

### **3 Key actors in constitutional implementation**

As in most countries, in Zimbabwe constitutional implementation involves a diverse range of actors at various levels of government, including the Presidency, Parliament, the judiciary, sectoral ministries and civil society. The key question is whether these key actors facilitate or constrain the process. In general, the actions or lack thereof of a certain actor affects the role of other actors.

#### **3.1 The Presidency**

The President is a crucial actor in constitutional implementation, whether in making laws, establishing institutions or allocating resources. The President makes key appointments of officials to constitutional offices. It is the President who sets the legislative agenda of Parliament by prioritising bills. All draft bills and major policies are brought before the Cabinet, chaired by the President, for discussion and approval before these are forwarded to the legislature for scrutiny and enactment. The President also has the important function of assenting to bills from Parliament before they become law.

Since the adoption of the Constitution, the Cabinet, in addition to attending to its other duties, has been preoccupied with considering numerous bills (see, too, the section below). Given that a number of pieces of legislation have since been aligned with the Constitution, the President and Cabinet have largely facilitated constitutional implementation. Of course, speedy drafting and consideration of bills and policies would have increased the pace of constitutional implementation.

#### **3.2 Parliament**

Since the adoption of the Constitution, Parliament has been inundated with bills for scrutiny and enactment. It has conducted public hearings on proposed pieces of legislation, a practice that did not occur under the previous constitutional order. The Parliamentary Legal Committee plays a decisive role in checking the constitutionality of any bill before any House of Parliament can give a final reading of it.<sup>26</sup> It recently issued an adverse report on the National Peace and Reconciliation Commission Bill, which seeks to operationalise the National Peace and Reconciliation

26 Constitution, Fifth Schedule, section 8(1).

Commission. As an adverse report raises doubts about the constitutionality of a proposed piece of legislation,<sup>27</sup> the executive was left with no choice but to withdraw the bill from Parliament.

It is hoped that the executive will not use the adverse report and its subsequent withdrawal of the bill as an excuse for further delaying the passage of the Act and its operationalisation of the work of this important commission.<sup>28</sup>

### 3.3 The judiciary

The judiciary thus far has been one of the most important actors in constitutional implementation.<sup>29</sup> Soon after the new Constitution came into effect, the Constitutional Court heard a matter relating to the timing of harmonised elections in the case of *Mawarire v Mugabe N.O. and Others*.<sup>30</sup> The background to the case is that before the new Constitution became effective, Jealousy Mawarire applied to the Supreme Court to issue an order directing the President to proclaim an election date. When the new Constitution came into effect – one of its innovations was that the Supreme Court judges had to double as judges of the Constitutional Court and all pending cases before the Supreme Court had to be heard by the Constitutional Court which was now the apex court.<sup>31</sup>

In its first judgment, the Constitutional Court directed the President to proclaim an election date for the harmonised elections before or on 31 July 2013.<sup>32</sup> The Court seems to have ventured into the political terrain of setting election dates, a duty normally reserved for the executive. The judgment essentially allowed the President to fix the election date without the consent of the Prime Minister, in violation of Article XX (20) of the GPA,<sup>33</sup> which required such consent.<sup>34</sup> This controversial judgment raised questions as to whether the bench of the Court had the will and capacity to be effective in overseeing the implementation of a transformative constitution.

Following this election case, several cases relating to human rights, citizenship and the appointment of local mayors have been referred to the Constitutional Court for guidance and determination. It made several

27 See Constitution; Fifth Schedule, section 8(4).

28 See Veritas Zimbabwe, “Commissions Watch 5/2016: Government Withdraws National Peace and Reconciliation Commission Bill” (2016).

29 See T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 2.

30 Const. Application No. 146/2013 [2013] ZWCC 1 (31 May 2013).

31 See Constitution, Sixth Schedule.

32 *Mawarire v Mugabe N.O. and Others*, p. 27.

33 As enshrined in Schedule 8 of the Lancaster House Constitution.

34 Veritas Zimbabwe, “Court Watch 7/2013” First Judgment of Constitutional Court” (2013).

landmark decisions, some of which have been surprising, given the court's history and composition.

For instance, the Court confirmed the constitutional requirement to obtain a court order before an eviction or demolition is carried out. Criminal defamation, which was used to restrict media freedom, was declared unconstitutional, as were provisions of the Public Order and Security Act allowing for extended periods of detention without trial. Lower courts have heard a variety of cases since the rights and obligations under the new Constitution began gaining traction. The courts have been particularly firm in protecting these, and as such have set a good example in implementing the Constitution.

### **3.4 Sectoral ministries and agencies**

The Ministry of Justice is the line ministry that has what is perhaps the most prominent role in aligning new pieces of legislation with the Constitution and enacting them. Its Department of Constitutional and Parliamentary Affairs is leading the process of legislative reform through an inter-ministerial task force on legislative alignment (a technical committee) comprising legal advisers from various ministries. Working closely with the Ministry of Justice is the Office of the Attorney-General. It is charged with drafting (mostly entailing fine-tuning) bills in accordance with instructions from sectoral ministries. The AG also advises ministries on the meaning or constitutionality of existing pieces of legislation, proposed bills and statutory instruments.

The AG's responsibilities relating to constitutional implementation include publishing bills, presenting proposed laws to cabinet and forwarding legislation to government printers. However, in the legislative reform process the Ministry of Justice and the AG depend to a large extent on sectoral ministries and agencies of the executive that initiate the law-making process and administer various pieces of legislation. As they have political interests in the legislative process, sectoral ministries and agencies determine whether a bill should be brought before Parliament. They (re)define the policy framework that more often than not guides legislation formulation.

Thus, as mentioned above, the sectoral ministries actually initiate the law-making process. They also provide consultative forums for the public and other stakeholders to review or reform policies and legislation. For instance, the ministry responsible for local government organised a national stakeholders' consultation on the proposed provincial and local government legislation in 2014.

The process of legislative reform is being slowed down by some of these sectoral ministries, which have delayed the formulation of draft bills



for further development by the Ministry of Justice. Some have not even initiated the law reform process. Due to this lack of cooperation, it is likely to take a significant length of time before the legislative regime can be deemed fully consistent with the new constitutional order.

### 3.5 Civil society

Civil society has been active since the late 1990s when constitutional reform was mooted. A number of civic groups and coalitions were involved in the constitution-making process which culminated in the adoption of the 2013 Constitution. The Civil Society Monitoring Mechanism (CSMM) was one such consortium formed to monitor the implementation of the work of the GNU, including the constitution review process. When the term of the GNU ended in 2013, the CSMM continued independently to monitor the Constitution's implementation. Along with many other civic groups, the CSMM facilitates debates, discussions and rural outreach programmes to do with the implementation.<sup>35</sup>

In addition, civil society has provided resources to government institutions to improve their capacity to implement the new Constitution. Some civic groups (and political parties) have also been visible in constitutional litigation, especially around the enforcement of fundamental human rights and freedoms. For instance, Veritas Zimbabwe secured a Constitutional Court judgment in which marriage under 18 years of age was declared unconstitutional.<sup>36</sup>

Thus, civic groups are playing an important role in the implementation of the Constitution. Their biggest challenge, besides limited resources, is that they are considered hostile by the government, which limits the extent to which they can meaningfully engage with it.

## 4 The status of constitutional implementation

The 2013 Constitution has brought about significant reforms and achievements. But, as noted above, it is the task of implementation that will determine whether these achievements trickle down to benefit ordinary citizens or remain aspirations.<sup>37</sup> The rule of law demands that the laws of the land should count, especially the highest law, the

35 DT Hofisi, "Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe", International IDEA (2015), p. 5.

36 See *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others* (Const. Application No. 79/14) [2015] ZWCC 12 (20 January 2016).

37 M Allen, "Women and Constitution-Building in 2013" in S Bisarya (ed) *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 24; T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 20.

Constitution.<sup>38</sup> In general, the “new constitution can take root easily if the country has a commitment to and the infrastructure necessary for the rule of the law”.<sup>39</sup> Its implementation, however, is likely to be challenging in a political system with competing social and political orders of authority.<sup>40</sup>

Perhaps the first significant step after adopting a new constitution is seeing that it is interpreted correctly. It is then important to ensure that this correct interpretation does not “differ from constitutional implementation by way of legislative, policy, institutional and administrative practices that establish ‘constitutional practice’”.<sup>41</sup> The second step is particularly important for constitutions which, like Zimbabwe’s 2013 Constitution, is borne out of negotiation and thus characterised by a range of ambiguities, overlaps and contradictions. This section of the chapter will evaluate the implementation of the 2013 Constitution thus far.

At the time of this writing, it has been just over three years since the Constitution was adopted. This is a short period on which to base such an evaluation, given that constitutional implementation is anything but a one-day process. Nevertheless, in its Sixth Schedule the 2013 Constitution sets a number of targets dealing with, inter alia, transitional mechanisms. Section 2 of the Schedule provides that the Sixth Schedule prevails, in the case of any consistency, over all other provisions of the Constitution.

Thus, the Schedule is significant. Its section 3 provides that the Sixth Schedule – together with Chapter 3, relating to citizenship; Chapter 4, to the Declaration of Rights; Chapter 6, to the election of Parliament; Chapter 8, to the jurisdiction and powers of the Constitutional Court; Section 208, to the conduct of members of the security services; and Chapter 14, to provincial and local government; among other provisions of the Constitution – comes into operation on the “publication day”.<sup>42</sup> By contrast, the rest of the Constitution comes into operation on the “effective day”.<sup>43</sup> Section 324 of the Constitution requires “all” constitutional obligations to be “performed diligently and without delay”.

It is hence possible to take a fair measure of the implementation of the constitutional provisions, especially those which should have come into operation on the publication date. The evaluation will focus primarily on the latter, then.

38 See United Nations Zimbabwe, *Country Analysis Working Document, Final Draft, 3 October 2014*. Harare, Zimbabwe: United Nations in Zimbabwe 2014, p. 22.

39 M Brandt, J Cottrell, Y Ghai & A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), p. 14.

40 *Ibid.*

41 See B Sinanya, *Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects*, Nairobi, Friedrich Ebert Stiftung (2011), p. 3.

42 “Publication day” means the day on which the Constitution, or the statute by which it is enacted, is published in the Gazette.

43 Constitution, Sixth Schedule, section 2. “Effective day” means the day on which the Constitution comes wholly into operation.

## 4.1 Public awareness of the Constitution

Creating public awareness of a new constitution is an important step in implementing it. Without such awareness, the entitlements, obligations and duties provided by a constitution will be known only by the ruling elites rather than the intended beneficiaries – the general public. Recognising this, the 2013 Constitution enjoins the state to promote public awareness of the Constitution in particular by

- (a) translating it into officially recognised languages and disseminating it as widely as possible;
- (b) requiring the Constitution to be taught in schools and as curricula in other government institutions; and
- (c) encouraging all persons and both state and non-state organisations to disseminate awareness and knowledge of the Constitution throughout the Zimbabwean society.<sup>44</sup>

This provision “hinges on an acknowledgement of the need for an empowered populace to lend credence to the letter and spirit of the Constitution”.<sup>45</sup> Thus far, the government has not devoted enough resources and effort to raising public awareness. For instance, it has yet to translate the supreme law of the land into the 16 official languages.<sup>46</sup> While the new curricula being developed by the Ministry of Education, which include constitutional awareness, are a notable example of a government initiative to promote public awareness of the 2013 Constitution, such efforts are insufficient in view of the current low levels of constitutional awareness.

## 4.2 The Bill of Rights

The 2013 Constitution provides one of the most expansive Bill of Rights in the world.<sup>47</sup> It guarantees fundamental human rights and freedoms such as the right to life, right to personal liberty, freedom of conscience, right to privacy and right of access to information. Furthermore, it guarantees political, environmental and economic rights, and also lists what could be considered “second- and third-generation rights”, for example the right to food and water, the right to education, and the rights of women, children, the elderly and persons with disabilities.<sup>48</sup> Every state institution at every level of government, as well as every person, has an obligation to respect,

44 Constitution, section 7.

45 DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, International IDEA (2015), p. 3.

46 See Constitution, section 6(1). The 16 languages are: Chewa, Chibarwe, English, Kalanga, Koisian, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa.

47 See Constitution, chap 4.

48 See Constitution, chap 4.

protect, promote and fulfill the rights and freedoms set out in the Constitution.<sup>49</sup>

In general, the Bill of Rights is indeed being implemented but not in its entirety. Some of its provisions have been implemented with impressive speed, whereas others are yet to be given “life”.<sup>50</sup> For instance, since the adoption of the 2013 Constitution, the constitutional requirement that arrested or detained persons must be brought before a court in not more than 48 hours has been largely complied with even in the absence of enabling legislation. The magistrates’ courts have conducted hearings, even on public holidays and weekends, to protect and promote the rights of arrested or detained persons.<sup>51</sup> This is a significant shift from the previous constitutional order, where arrested persons were detained for long periods before being brought before a court of law.

However, the state has failed so far in the implementation of other rights such as the right to safe, clean and potable water and the right to health care. Local authorities, which are responsible for water supply, often fail to provide clean water regularly. Some authorities have disconnected water supplies to non-paying residents, thereby constraining the realisation of the right to water. Health-care facilities regularly turn away citizens in need of emergency care if they do not have the required funds. This is in contradiction to the Constitution, which states that “no person may be refused emergency medical treatment in any health care institution”.<sup>52</sup>

The weakest thus far has been the implementation of political rights and freedoms. The state has tended to constrain the exercise of political rights and freedoms – especially the right to demonstrate and petition, and freedoms of expression, of the media, of assembly and association – in the face of growing political activism by opposition political parties and civic groups. In some instances the police have clamped down heavily on both lawful and unlawful demonstrations, arresting hundreds of people. In September 2016, they published a notice in the gazette prohibiting all processions or public demonstrations in the capital of Harare for a full month (16 September to 15 October). This order essentially violated the constitutionally guaranteed right to demonstrate and petition, and political and civic groups have challenged it in the courts.

Thus, while the state has invested considerable effort and resources in implementation, further legislation and policies are required before citizens can enjoy fully the rights and freedoms provided for by the Constitution.

49 Constitution, section 44.

50 *Ibid* at 7.

51 *Ibid*.

52 Constitution, section 76(2).

### 4.3 Alignment and enactment of legislation

The 2013 Constitution strives to transform Zimbabwean society constitutionally, economically and politically. Such an objective necessitates not only the alignment of the legislative regime with the new Constitution but the enactment of new pieces of legislation. In carrying this out, it is crucial that legislation respect the letter and spirit of the Constitution.<sup>53</sup> Enabling and supportive legislation is necessary to provide a detailed account of the constitutional text and to operationalise some of its provisions.<sup>54</sup>

Following its election victory in 2013, the ZANU-PF-led government adopted the language of alignment in making existing laws consistent with the Constitution.<sup>55</sup> It reportedly targeted around 200 statutes for alignment out of the 299 pieces of legislation in the government's statute book. As of June 2016, the government is reported to have aligned 159 pieces of legislation. The pace of alignment is reasonable given that it is just over three years since the new Constitution was adopted.

However, more could have been done within this time-frame if the required resources, political will and cooperation had been available. Civil society and other political formations put the number of pieces of legislation requiring alignment or reform at around 400. While there is no consensus on the total number of pieces of legislation that require alignment or reform, the government's language of "alignment" seems not to have taken into account that existing pieces of legislation need to be aligned as well as new legislation enacted.

The debate about alignment is not only about which pieces of legislation need alignment but the substance of such reform process. The General Amendment Act of 2016 amended a total of 126 pieces of legislation. The purpose of this Act, as stated in its preamble, is to ensure that all pieces of legislation enacted under the previous constitutional order are aligned with the new Constitution to the extent of any inconsistency with it. This Act generally makes minor amendments to targeted legislation, such as the Children's Act, Refugee Act and Magistrates Court Act. It also makes substantive amendments to a few pieces of legislation: the Interpretation Act; the Privileges, the Immunities and Powers of Parliament Act; the Electoral Act; Criminal Law (Codification and Reform) Act; and Trade Marks Act.

53 B Sihanya, *Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects*, Nairobi, Friedrich Ebert Stiftung (2011), p. 5.

54 *Ibid.*

55 DT Hofisi, "Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe", International IDEA (2015), p. 4.

While the enactment of the Act is a significant effort towards aligning the legislative regime with the new constitutional order, substantive law reform is still required. Most of the legislation the government claims is now consistent with the Constitution does not fully reflect the requirements, ideals, goals and “spirit” of the 2013 text.

Besides the legislation which purportedly has been aligned with the Constitution, several sectoral pieces of legislation are yet to be reformed. For example, the Urban Councils Act<sup>56</sup> and the Rural District Councils Act,<sup>57</sup> which govern the activities of urban and rural local governments, have yet to be reformed. The same applies to media laws, legislation governing public gatherings, security sector legislation and many other pieces of legislation. In the absence of updated and reformed pieces of legislation, the various government functionaries have continued to exercise powers and functions assigned to them by old pieces of legislation, some of which are inconsistent with the new constitutional order. For instance, the minister responsible for local government continues to be “overly” involved in local affairs even though the new Constitution suggests that the minister should play a minimal role.<sup>58</sup>

Hence, many positive changes brought about by the 2013 Constitution have not materialised in the absence of updated, enabling and new pieces of legislation.<sup>59</sup>

#### 4.4 Provincial and local governments

The 2013 Constitution provides for a multilevel system of government, with the provincial tier comprised of provincial and metropolitan councils and the local tier, of urban and local authorities.<sup>60</sup> The Constitution requires devolution of powers and functions to the provincial and local tiers of government to realise development, deepen democracy and sustain peace, among other objectives.<sup>61</sup> Whereas the national and local governments are fully operational, the provincial tier of government is yet to be established as the relevant legislation has not been enacted.

Soon after the 2013 harmonised elections, the President appointed ten Ministers of State for Provincial Affairs, one for each province. In practice, some of these ministers’ responsibilities are supposed to be discharged by

56 Chapter 29:15.

57 Chapter 29:13.

58 See Constitution, Chapter 14.

59 See T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung, (2015), p. 19; DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, *International IDEA* (2015), p. 3.

60 See Constitution, section 5.

61 See Constitution, preamble of Chapter 14 and section 264(1).

provincial and metropolitan councils. For instance, the ministers are coordinating and implementing government programmes, a responsibility constitutionally assigned to provincial and metropolitan councils.<sup>62</sup> Although the appointment of these ministers is legal, it is contrary to the spirit of devolution set out in the Constitution.<sup>63</sup>

The 2013 Constitution now makes provision for an independent tribunal to exercise the power of removing councillors from office.<sup>64</sup> The purpose of this new provision is to protect local officials from being removed from office arbitrarily, as was common under the previous constitutional order. The Local Government Laws Amendment Act of 2016, providing for the establishment and role of the tribunal, was enacted only after a three-year vacuum. However, the constitutionality of this Amendment Act is questionable, given that it seems to allow the Minister responsible for local government to retain supervisory powers in disciplining locally elected officials – powers which the 2013 text sought to place with an independent body.

One of the objectives of devolution set out in the Constitution is to “ensure the equitable sharing of local and national resources”.<sup>65</sup> It is supported by section 298(1)(b)(ii) of the Constitution, which states that “revenue raised nationally must be shared equitably between the central government and provincial and local tiers of government”. For the first time in Zimbabwe’s history, provincial and local governments are entitled to not less than five per cent of nationally raised revenue in each financial year.<sup>66</sup> However, more than three years after the Constitution’s adoption, the national government is yet to allocate the provincial and local share of nationally raised revenue in each financial year.

The non-implementation of these provisions raises questions about the government’s commitment to a devolved and decentralised system of government as envisaged in the Constitution. This does not amount to diligent performance of constitutional obligations.

#### 4.5 Reform of the judiciary

The 2013 Constitution brought significant reforms to the judiciary both structurally and systematically.<sup>67</sup> It makes provision for a Constitutional

62 See Constitution, section 270(1).

63 Veritas Zimbabwe, “Constitution Watch 37/2013: Giving Effect to the New Constitution: Local Government: Ministers, Mayors and Money” (2013).

64 Constitution, section 272(7).

65 Constitution, section 264(2)(e).

66 Constitution, section 301(3).

67 See T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 15.

Court as the new apex court of the land.<sup>68</sup> The Court is “the highest court in all constitutional matters and its decisions on those matters bind all other courts”.<sup>69</sup> It advises on the constitutionality of any proposed legislation, and makes the final decision on whether the conduct of the President or Parliament is constitutional.<sup>70</sup> Thus, the Court has an important duty to oversee the reform process by playing the role of “guardian angel”.

For the first seven years after the adoption of the new Constitution, the Supreme Court bench, in addition to the Chief Justice and Deputy Chief Justice, will double as judges of the Constitutional Court. This transitional mechanism made it possible for the Constitutional Court to be fully operational on the Constitution’s “publication date”.<sup>71</sup>

The independence of the judiciary is another significant reform in the 2013 Constitution. It is now constitutionally entrenched, with explicit mechanisms and rules to promote and protect it.<sup>72</sup> The Constitution imposes a duty on the judiciary to uphold and apply the Constitution and law impartially, expeditiously and without fear, favour or prejudice.<sup>73</sup> This duty is fundamental, given that a judiciary which is impartial and competent “is indispensable for the enforcement of the constitution and for asserting its supremacy”.<sup>74</sup> The judiciary should be independent from the influence of government institutions and their officials, the business community and any other organised interests.

One of the Constitution’s mechanisms for promoting judicial independence is the procedure it sets out for the appointment of judges. The Constitution requires a transparent, participatory and less political process for appointing them, with an independent body, the Judicial Service Commission (JSC), playing a central role. Section 180(2) states that whenever it is necessary to appoint a judge, the JSC must

- (a) advertise the position;
- (b) invite the President and the public to make nominations;
- (c) conduct public interviews of prospective candidates;
- (d) prepare a list of three qualified persons as nominees for the office; and
- (e) submit the list to the President.

68 Constitution, section 166.

69 Constitution, section 167(1).

70 Constitution, section 167(2)(3).

71 Constitution; Sixth Schedule, section 18(2)

72 Constitution, section 164.

73 Constitution, section 164(1).

74 M Brandt, J Cottrell, Y Ghai & A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), p. 227.



The President must appoint judges from the list of nominees submitted by the JSC.<sup>75</sup> Such a procedure reduces the chances of judges being appointed through a political process not subject to oversight. The appointment of judges thus far has complied with this constitutional procedure. The nomination of judges is one way in which the JSC is playing an important part in implementing the Constitution. For the first time, the JSC is conducting public interviews of prospective candidates and facilitating public participation; under the previous order, judicial appointments often were made with limited oversight and away from the public eye.

The 2013 Constitution also seeks to promote judicial independence by requiring payment of salaries and other benefits of the judiciary to come directly from the Consolidated Revenue Fund.<sup>76</sup> It further requires that such salaries and benefits not be reduced while members of the judiciary hold office.<sup>77</sup> These are commendable measures of promoting the financial autonomy of the judiciary. In practice, though, the payment of salaries and benefits for members of the judiciary is frequently delayed owing to the government's inability to mobilise revenue timeously for meeting its civil servant salary bill. Such delays hold the potential to undermine judicial independence as the exercise of judicial powers may be influenced by considerations of monetary gain, as attested by recorded cases of corruption among judges.

But perhaps the most significant threat to judicial independence in the new constitutional era comes from the executive. Following a series of court orders that authorised demonstrations by political and civic groups against ZANU-PF rule, the President accused the courts of being reckless and allowing the country to descend into anarchy. Arguably, the President sought to influence the exercise of judicial powers – in contravention of the Constitution, which prohibits any form of interference in the functioning of the courts.<sup>78</sup> In the face of such threats, some of the judges nevertheless have shown commendable willingness to uphold the Constitution.

#### **4.6 Independent commissions and institutions**

Implementing a constitution also involves establishing institutions to give it effect, institutions which are either provided for in that constitution or specified in legislation enacted for this purpose. The National Peace and Reconciliation Commission is the only one of the commissions supporting democracy, as provided for under Chapter 12 of the Constitution, which

75 Constitution, section 180(2). If the President considers that none of the persons nominated by the JSC is suitable for appointment to the relevant office, the President must cause the JSC to submit another list of nominees.

76 Constitution, section 188(3).

77 Constitution, section 188(4).

78 See Constitution, section 164(2)(a).

has yet to be established. The following constitutional commissions or independent institutions have been established: the Zimbabwe Electoral Commission; Zimbabwe Human Rights Commission; Zimbabwe Gender Commission; Zimbabwe Media Commission; Zimbabwe Anti-Corruption Commission; the National Prosecuting Authority; Judicial Service Commission; and the Auditor General. Commissioners of the Zimbabwe Land Commission were appointed recently, which was a significant step towards its establishment. The process of appointing commissioners for the various independent commissions supporting democracy has been transparent and participatory thus far, in keeping with the requirements of the Constitution.<sup>79</sup>

However, the ability of these institutions to deliver on their mandates has been inhibited by a number of challenges. Most, if not all, of them lack the necessary financial and technical resources, owing to the limited funding they are receiving from the national treasury. This is inconsistent with the Constitution, which enjoins Parliament to ensure that “sufficient funds are appropriated to the Commissions to enable them to exercise their functions effectively”.<sup>80</sup>

Interference by politicians and bureaucrats is another major hindrance to effective performance. The Constitution and all government institutions have an obligation to protect these institutions’ independence, impartiality, integrity and effectiveness.<sup>81</sup> For instance, the Zimbabwe Anti-Corruption Commission, the mandate of which is to ensure integrity and accountability in public institutions, is often resented by politicians and bureaucrats.<sup>82</sup> In several recorded cases, politicians or bureaucrats have attempted to interfere with the functioning of the independent constitutional bodies.<sup>83</sup> The recent arrest of a sitting Prosecutor-General, Johannes Tomana, has raised concerns about the independence of his office, which is guaranteed in the Constitution.<sup>84</sup>

Thus, while the government is to be commended for having established most of the independent constitutional bodies, much is still required to ensure that these bodies deliver on their mandate.

#### **4.7 The representation of women**

A significant reform in the 2013 Constitution is a set of national objectives designed to guide state institutions in formulating and implementing laws

79 See Constitution, section 237(1).

80 See Constitution, section 322.

81 Constitution, section 235.

82 See M Brandt, J Cottrell, Y Ghai and A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), p. 217.

83 Constitution, section 235(3).

84 Constitution, section 260.

and policies that establish, enhance and promote a sustainable, just, free and democratic society.<sup>85</sup> The promotion of full gender balance in Zimbabwean society is one such objective. The Constitution enjoins the state to promote the “full participation of women in all spheres of society on the basis of equality with men”.<sup>86</sup> It requires the state to take legislative and other measures to ensure that

both genders are equally represented in all institutions and agencies of government at every level; and women constitute at least half of the membership of all Commissions and other elective and appointed government bodies established by or under the Constitution or any legislation.<sup>87</sup>

Section 320(4) of the Constitution requires that where a commission has a chairperson and a deputy chairperson, they must be of different genders. The government is striving to realise the objective of “full gender balance” in society. The Constitution makes provision for a Senate of 80 members, 60 of whom are elected on a system of proportional representation.<sup>88</sup> The party-list system of proportional representation is based on the vote cast for members of the National Assembly in which male and female candidates are listed alternately, with each list headed by a female.<sup>89</sup> Although this formula is unlikely to result in equal representation between men and women in the Senate, given that 18 seats are reserved for chiefs,<sup>90</sup> it is an effective mechanisms for guaranteeing women’s representation.<sup>91</sup>

As for the National Assembly, the Constitution requires this lower house to be composed of 270 members, of whom 210 are directly elected in the first-past-the-post electoral system while the remaining 60 seats are reserved for women.<sup>92</sup> After implementation of the women quotas, women’s representation in Parliament rose from 20 per cent in 2008 to 35 per cent in 2013. In the National Assembly, women’s representation more than doubled from 15 to 32 per cent; in the Senate, it increased from 25 to 48 per cent in the same period.<sup>93</sup> Women’s representation and leadership in independent constitutional bodies has also increased.

85 Constitution, section 8(1)(2).

86 Constitution, section 17(1)(a).

87 Constitution, section 17(1)(b).

88 Constitution, section 120(1).

89 Constitution, section 120(2).

90 Most, if not all, chiefs are men.

91 M Allen, “Women and Constitution-Building in 2013” in S Bisarya (ed) *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 23.

92 Constitution, section 124(1). These reserved seats for the life of the first two Parliaments after the effective date.

93 M Allen, “Women and Constitution-Building in 2013” in S Bisarya (ed) *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 23.

Despite this improvement, there is still a long way to go in achieving equal gender representation in state institutions, with key bodies such as the Cabinet and the Judicial Service Commission yet to reach this goal.<sup>94</sup> After the 2013 harmonised elections, the President appointed a 29-member Cabinet composed of 25 men and only four women. It is difficult to imagine how gender parity in Zimbabwean society can be achieved when women lack adequate representation in key government decision-making structures such as the Cabinet.

#### **4.8 Security sector reforms**

The 2013 Constitution has redefined the relationship between citizens and the state security apparatus. This has meant that a number of security sector reforms are necessary to give effect to the new constitutional dispensation. These reforms are yet to be instituted despite calls made by opposition parties and civic groups. For instance, section 210 of the Constitution directs Parliament to enact legislation providing for “an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct”. This piece of legislation remained to be enacted – and is but one example of many.<sup>95</sup>

The establishment of an independent body for hearing complaints against state security apparatus is not unique to Zimbabwe. For instance, South Africa has its Independent Police Investigative Directorate. The role of such a body is in line with international best practices of ensuring oversight over the activities of security forces in order to protect and promote human rights and freedoms.

Section 208 of the Constitution also enjoins the security forces not to be involved in the activities of political parties or to act in a partisan manner.<sup>96</sup> As stated above, section 208 regulating the conduct of security services is one of the provisions that ought to have become operational on the publication day in view of the importance the constitutional framers attached to it. Nevertheless, the conduct of certain security officials raises questions about their compliance with this constitutional requirement. Some have openly stated their allegiance to the ruling party, while the ZANU-PF-led government has declared that it will not institute any security sector reforms, its argument being that the structure, procedure and conduct of the security apparatus is already in conformity with the

94 See DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, International IDEA (2015), p. 8.

95 See T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung, (2015), p. 18.

96 Constitution, section 208(2).

new Constitution. Thus, security-sector reform is one of the areas in which there is a clear gap between the constitutional framework and actual practice.

In summary, the discussion in this section has shown that some constitutional provisions have been implemented fully and others only partially – or not at all. So, while the government should be commended for the effort and resources it has invested thus far, it also warrants criticism for its selective approach to constitutional implementation. Allowing that there are natural limits to how much can be accomplished in three years, it is nevertheless clear that much greater progress could have been made in even this comparatively brief period if several of the key obstacles impeding constitutional implementation had been tackled with resolution.

## 5 Challenges to constitutional implementation

The process of implementing a new constitution will always be challenging, especially if that constitution is transformative rather than incremental in nature. Those who believe that the implementation of a constitution will undermine their interests are likely to obstruct enactment of legislation, institutional restructuring, administrative (re)formation and related processes. Political manipulation and sabotaging or frustrating the process for personal, partisan, sectarian or self-gain thus tend to be the main obstacles to effective constitutional implementation.<sup>97</sup> Four obstacles are discussed below in relation to the Zimbabwean context.

### 5.1 Differences of interpretation

State and non-state actors involved in the implementation of the Constitution often give differing interpretations to the same constitutional provisions; the meanings they attach to these provisions in turn both reflect and drive their differing agendas and interests. Such “doctored” interpretation has been common in the case of issues, such as devolution and citizenship, that were controversial in the constitutional-making process.<sup>98</sup>

However, effective constitutional implementation requires that provisions be interpreted as they are and not what those implementing them want them to be. While other institutions of government have

97 B Sihanya, *Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects*, Nairobi, Friedrich Ebert Stiftung (2011), p. 22.

98 See COPAC, “The Road to the New Constitution” (2013), p. 55; T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung, (2015), p. 9.

varying mandates to interpret the Constitution, it is ultimately the judiciary that has the final authority to do so. As such, the actors involved should seek the assistance of the courts for guidance whenever problems of interpretation arise. In view of its mandate, the judiciary, in particular the Constitutional Court, should take the opportunity to play a leading role in constitutional interpretation, implementation and development.<sup>99</sup>

## 5.2 Lack of sufficient resources

Implementing a new constitution requires significant financial and technical capacity, something that few developing countries usually have. For instance, reviewing legislation and enacting new laws requires resources and capacity<sup>100</sup> which in Zimbabwe are in scarce supply. The post-2013 election period has seen the country going into deeper economic decline, with the government's national development plan, the Zimbabwe Agenda for Social and Economic Transformation (ZimAsset),<sup>101</sup> having failed so far to stimulate the economy.

Economic underperformance has had adverse effects on the implementation of the Constitution. The national government is struggling even to meet the salary bill of its civil servants, let alone resource its development priorities. A significant number of the institutions established as per the Constitution are heavily underfunded as it is, notwithstanding that others like them are still to be established. The minister responsible for finance suggested there may be need to reduce the number of independent constitutional bodies since the government finds it hard to support their operations. Implementing such a suggestion, however, would mean amending the Constitution, which is not advisable so soon after its adoption.

Constitutional implementation is also slower than it ought to be thanks to a shortage of technical capacity, which cannot be secured due to limited financial resources. Some ministries have insufficient legal personnel to undertake law reviews and development, a situation that slows the pace of legislative reform.

99 B Sihanya, *Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects*, Nairobi, Friedrich Ebert Stiftung (2011), p. 25.

100 M Allen, "Women and Constitution-Building in 2013" in S Bisarya (ed) *Constitution Building: A Global Review 2013*, Stockholm, International Institute for Democracy (2014), p. 24.

101 The plan is for the election period 2013-2018.

### 5.3 The succession matrix and lack of political will

Constitutional implementation is also “a political issue”, a “matter of attitudes and will, as much as of law”.<sup>102</sup> The scope of the 2013 Constitution is wide and there has not been sufficient political will to implement all its provisions.<sup>103</sup> For instance, the current actions or lack thereof of the ZANU-PF-led government suggest there is no political will to implement devolution and security sector reforms. As a case in point, the policy documents of ZANU-PF and government do not “speak” to devolution at all. While the lack of sufficient resources is a contributing factor, the lack of political will may be the primary reason that devolution provisions have not been implemented. Civil society and the populace have a duty to lobby for full implementation of these provisions.<sup>104</sup>

Closely related to the issue of political will is the succession matrix in ZANU-PF. Different factions in the party are battling to succeed the President, who has reached an advanced age. The factional fights permeate government structures, including the Cabinet, Parliament, independent constitutional institutions and the bureaucracy. It remains unclear if the President will seek re-election in the forthcoming 2018 harmonised elections – which is a recipe for instability both in the ruling party and in government.

Aggravating the instability is the fact that the President has not yet openly appointed an heir to his throne, leaving factions with no choice but to position themselves strategically for succession. Under the circumstances, constitutional implementation is not receiving the priority it deserves.

### 5.4 Difficulties in cooperation and coordination

Securing cooperation and coordination among all the actors involved in the implementation of the Constitution has not been easy. As in Kenya, which is also implementing a new constitution, a degree of cooperation has been achieved in some instances. In others, wrangles and limited collaboration among actors are common occurrences.<sup>105</sup> For instance, sometimes it has been difficult to secure cooperation between sectoral ministries and the Office of the AG to ensure speedy alignment of legislation with the Constitution.

102 M Brandt, J Cottrell, Y Ghai and A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), p. 217.

103 *Ibid*, p. 222.

104 DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, International IDEA (2015), p. 11.

105 B Sihanya, *Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects*, Nairobi, Friedrich Ebert Stiftung (2011), p. 28.

This is partly the reason why establishing an independent institution responsible for overseeing constitutional implementation in Zimbabwe might have been a worthwhile idea, that is, to enable better cooperation and coordination between the actors. Indeed, the idea was mooted during the constitutional review process. Paul Mangwana, the former Co-Chairperson of COPAC and a man aligned to ZANU-PF, underlined the importance of establishing a constitutional implementation body once the Constitution was adopted. The idea was never explored further for a number of reasons, one of which was that the ZANU-PF government was reluctant to have anything less than full control over the pace and substance of constitutional implementation.

Further challenges to implementation include an administrative bureaucracy that is resisting change, litigation challenges, and an executive arm of government that still sees itself as “superior” to constitutional bodies and to other arms of government. For instance, members of the Cabinet often fail to attend parliamentary sittings to answer questions from parliamentarians, while the bureaucracy still finds comfort in doing things in the old style. The challenge demonstrates that there are limitations to what law can do when the incumbents become the stumbling block to transformation. In this regard, the fast-approaching 2018 elections have also served to shift focus and priorities away from constitutional implementation and to political interests and mobilisation.

## **6 Prospects and lessons for constitutional implementation**

The previous section showed that although constitutional implementation in Zimbabwe is an ongoing process, it faces a variety of challenges. What, then, are the prospects of constitutional implementation? What lessons can be drawn from the Zimbabwean experience of implementing a new constitution?

The first question requires identifying the drivers of constitutional implementation. The judiciary in its “guardian angel” role is one of them. The judiciary needs to assert the transformation agenda and, whenever desirable, take a lead role. Independent constitutional commissions and institutions embody the principle of separation of powers at the horizontal level and should rise to occupy their rightful constitutional space. Civil society has the capacity to offer much-needed impetus in the form of resources and technical expertise.<sup>106</sup>

106 T Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution-making Process*, Harare, Konrad-Adenauer-Stiftung (2015), p. 20.



Yet while the drivers highlighted above will be important to constitutional implementation, it is citizens themselves who should play the key role. Citizens should claim their constitutional entitlements, rights and freedoms and be willing to exercise various obligations. This is their opportunity to “own” the constitutional implementation process.<sup>107</sup>

The second question is interesting but not new. Three key lessons can be drawn from the Zimbabwean example, as discussed below.

## 6.1 The importance of enforcement mechanisms

The 2013 Constitution seeks to transform the state and society in all its facets. Naturally, there is going to be resistance to its implementation from several quarters, as signified, for instance, by the selective implementation of constitutional provisions.<sup>108</sup> This raises the question of whether there are mechanisms that should have been put in place during the constitution-making process or included in the constitution itself to support its implementation. This question is important given that the process was spearheaded by three major political parties which had different views on its purpose and outcome. The constitutional text largely reflects these differences.<sup>109</sup>

There was a possibility that one or two of the parties leading the process would not be part of the government elected after the adoption of the Constitution. Thus, formal processes for implementing the Constitution and monitoring implementation should have been explored to guarantee full implementation regardless of which parties were entrenched in government.<sup>110</sup> After the 2013 elections, both MDC formations went out of government and have had limited presence in Parliament. This means that they have few channels through which to influence the pace of constitutional implementation. In practice, the ZANU-PF-led government has been generally reluctant to implement those aspects of the Constitution that were advanced by the MDC formations during the constitution-making process. The most notable ones are constitutional provisions on devolution, elections and security-sector reforms.

A prominent feature of the 2013 Constitution is that it provides a framework of broad principles, goals and directions requiring legislative enactment to give them effect. Such a constitution requires an assertive

<sup>107</sup> *Ibid.*

<sup>108</sup> M Brandt, J Cottrell, Y Ghai and A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), p. 222.

<sup>109</sup> DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, International IDEA (2015), p. 9.

<sup>110</sup> M Brandt, J Cottrell, Y Ghai and A Regan, *Constitution-making and Reform: Options for the Process*, Geneva, Interpeace (2011), p. 222.

parliament that enacts the required legislation expeditiously. The challenge in Zimbabwe is that some of the relevant pieces of legislation have not been enacted and might not be enacted for many years, depending on political composition at the national level.<sup>111</sup>

Constitutional implementation would have been more effective had “hard” rules and formal processes for its implementation been enshrined in the Constitution. Such rules and formal processes are provided by the 2010 Constitution of Kenya. As pointed out earlier, the 2013 Constitution was never going to be easy to implement, given that it is a product of long negotiations in which different interests were carefully balanced and that it seeks to make significant changes in the organisation of the state and society.<sup>112</sup> While section 324 of the Constitution requires “diligent performance of constitutional obligations”, that requirement has not led to the intended speedy implementation of the Constitution. There is no doubt that the role of independent institutions charged with an oversight role would have enhanced the implementation of the Constitution.

## **6.2 The need for international assistance**

Countries in protracted transitions, such as Zimbabwe, require specific support for constitutional implementation.<sup>113</sup> Without such support from the international community, including education institutions, promising constitutions might never be implemented fully, posing the risk of the relevant country reverting to a conflict situation. According to Nolutshungu,

although all African states attach some importance to their constitutions, as to their national flags and anthems, only a very few can be said to abide by them with any consistency. None consider themselves much bound by them on matters such as limitation of government power, the rights of citizens, the division and separation of powers, or, above all, the objective enforceability of the provisions of the constitution. Indeed those elements of the constitutions that place limits on executive power are least respected. The failure of constitutional government to develop is not the result of popular needs or demands but of governments seeking to escape the constraints imposed by the constitutions, laws, and rights and expectations of citizens.<sup>114</sup>

Similarly, Fombad argues that “many of the [African] continent’s problems have not been caused by the absence of constitutions per se, but rather by the ease with which constitutional provisions were abrogated,

111 *Ibid.*, p. 225.

112 See DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, International IDEA (2015), p. 9.

113 *Ibid.*, p. 11.

114 SC Nolutshungu, “Constitutionalism in Africa: Some Conclusions” in D Greenberg et al. (eds) *Constitutionalism and Democracy, Transitions in the Contemporary World*, OUP (1993), p. 366.

subverted, suspended or brazenly ignored”.<sup>115</sup> If these observations are correct, then it is high time that the international community give more priority not only to the drafting of progressive democratic constitutions but also to their implementation. Zimbabwe is in dire need of such assistance. The 2013 Constitution is unlikely to be implemented fully in the near future unless politics and economics in the country change drastically. Until such a time, the promise of improved well-being for ordinary citizens in Zimbabwe will remain a pipe dream.<sup>116</sup>

### 6.3 The need for an active citizenry

For the past three years, constitutional implementation in Zimbabwe has been characterised by the lack of participation by ordinary citizens. This is not surprising given that under the previous constitutional order there was growing civic reluctance to hold the government accountable for its actions or lack thereof.<sup>117</sup> In general, citizens prefer to use state and non-state organisations to hold the state accountable for their constitutional entitlements, while they themselves take a “back seat”.<sup>118</sup> There is no firm culture in Zimbabwe of citizen litigation to enforce the full realisation of fundamental human rights and freedoms and accountable governance. Few individuals have enforced their rights by taking the government to court. One of the notable cases is that of *Mawere v Registrar General & Others*,<sup>119</sup> in which Mutumwa Mawere challenged the constitutionality of legislation prohibiting dual citizenship.

As Albert Einstein observed,

[T]he strength of the Constitution lies entirely in the determination of each citizen to defend it. Only if every single citizen feels duty bound to do his share in this defense are the constitutional rights secure.

This explains why the state in Zimbabwe has dragged its feet on the implementation of certain constitutional provisions, including those relating to the Declaration of Rights. A crucial lesson to be drawn from the Zimbabwean experience is that an active citizenry is as vital to successful constitutional implementation as political will and resources.

115 CM Fombad, “Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa”, 55(1) *The American Journal of Comparative Law* (2007), p. 3.

116 See DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, *International IDEA* (2015), p. 8.

117 T Madebwe, “Constitutionalism and the New Zimbabwean Constitution”, 1 *Midlands State University Law Review* (2014), p. 15.

118 *Ibid.*, p. 15.

119 *Mawere v Registrar General & Others* (CCZ 27/13) [2015] ZWCC 04 (25 June 2013). Under the case, the Constitutional Court upheld the right to dual citizenship.

## **7 Conclusion**

After several attempts at constitutional review, a new Constitution was adopted in 2013, replacing the independence Constitution negotiated at Lancaster. The 2013 Constitution changed the structure of government and redefined the relationship between the state and its citizens, and between government institutions and communities in Zimbabwe. The implementation of this Constitution has been confronted by many challenges. A number of constitutional provisions have been implemented, but others are yet to be implemented and might not be implemented any time soon. Different interpretations of constitutional provisions and a lack of resources, political will, and cooperation among different actors have adversely affected constitutional implementation.

Although playing an important role, civic and political groups thus far have not been able to exert significant pressure on the ZANU-PF government and thereby direct the course, and accelerate the pace, of constitutional implementation. Divisions across political and civic movements make it difficult to maintain a united front. However, with improved capacity and unity, these groups can remain important actors in the constitutional implementation process and in governance in general.

One of the key lessons that can be drawn from the Zimbabwean experience is that it is important to enshrine in the Constitution adequate formal mechanisms to ensure its full implementation. This is particularly true for constitutions borne out of long negotiations and which seek to change radically the structure of the state and its relationship with its citizens. Above all, an active citizenry is required to ensure that the rights, promises and obligations enshrined in the Constitution are given life.

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# CHAPTER 6

## CONSTITUTIONAL IMPLEMENTATION 20 YEARS LATER: THE UGANDA REPORT CARD

*Donald Rukare*<sup>1</sup>

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### 1 Introduction

The adoption of the 1995 Constitution of Uganda raised high hopes that, after years of chaos, it would return the country to constitutional order.<sup>2</sup> Uganda had just emerged from a dark period of dictatorship and repression in the 1970s and 1980s,<sup>3</sup> during which time there was little regard for the rule of law. Many people therefore foresaw a new dawn in Uganda with the coming into force of what was regarded as a progressive constitution. In 1988, a highly participatory process had been put in place to enable a diverse cross-section of Ugandans to work together to craft a constitution responsive to their needs, and seven years afterwards that new constitution was born.

Twenty years later, it is time to reflect on how successful the Constitution's implementation has been. This chapter examines whether the 1995 Constitution has delivered on its promise to establish a culture of constitutionalism in Uganda. It will consider whether the principles of unity, peace, equality, democracy, freedom, social justice and progress, as stipulated in the preamble to the Constitution, have become a reality.

The chapter starts by examining how the Constitution was drafted, after which it discusses the record of its implementation by those vested with this mandate. It goes on to explore the challenges faced in the implementation process, and considers the lessons learnt over the last 20 years. The chapter ends with recommendations for enhancing the prospects for full, effective implementation of the Constitution.

1 The author acknowledges Ms. Fiona Okot-Arach's assistance in conducting background research for this chapter.

2 Constitution of the Republic of Uganda 1995 was adopted on 22 September 1995.

3 The preamble of the 1995 Constitution recalls the history of Uganda, which was characterised by political and constitutional instability. Constitution of the Republic of Uganda 1995, p. 21.

## 2 Background and the making of the 1995 Constitution

Before delving into the conceptualisation and eventual adoption of the 1995 Constitution, it is necessary to take stock of the constitutional history of the country.<sup>4</sup> In its 54 years of independence, Uganda has had four constitutions: the Independence Constitution of 1962; the Revolutionary Constitution of 1966, also known as the Pigeon Hole Constitution on account of how it was drafted and came into force; the Republican Constitution of 1967; and the current 1995 Constitution. Odoki observes that the three constitutions preceding the 1995 Constitution did not satisfactorily answer the needs and aspirations of the people,<sup>5</sup> which is why it was necessary to craft a new constitution.

### 2.1 The Constitution of 1962

Uganda became an independent Commonwealth nation on 9 October 1962 under a Constitution much influenced by the British in content and form.<sup>6</sup> The Constitution distributed powers between the centre and the regions, albeit disproportionately. The Buganda Kingdom was given more powers at the expense of the other three kingdoms, namely the Ankole, Toro and Bunyoro, and the other districts.<sup>7</sup> The powers granted to the four kingdoms also handicapped Parliament, which was elected by direct universal suffrage, except for parliamentarians from Buganda, who were elected indirectly through the Council of Buganda.<sup>8</sup>

Apart from the periodically elected Parliament, the Constitution provided for a Cabinet drawn from and responsible to Parliament, and defined the powers of major government organs, the civil service and judiciary. On 9 October 1963, the first anniversary of independence, a ceremonial president replaced the governor general when Kabaka Mutesa became the first elected president of Uganda.<sup>9</sup>

4 The Republic of Uganda gained independence from the United Kingdom on 9 October 1962.

5 BJ Odoki, "The Challenges of Constitution-making and Implementation in Uganda", p. 264, available at [www.constitutionnet.org](http://www.constitutionnet.org) (accessed 26 May 2016).

6 For further details see ConstitutionNet.org. <http://www.constitutionnet.org/country/constitutional-history-uganda> (accessed 11 May 2016).

7 GW Kanyeihamba, *Constitutional and Political History of Uganda: From 1984 to the Present*, Kampala, Centenary Publishing House (2002), p. 74.

8 For further details see <http://www.constitutionnet.org/country/constitutional-history-uganda> (accessed 11 May 2016).

9 GW Kanyeihamba, *Constitutional and Political History of Uganda: From 1984 to the Present*, Kampala, Centenary Publishing House (2002), p. 76



Kanyeihamba observes that the independence Constitution was a tool of divisionism and regionalism rather than a means to unify the country.<sup>10</sup> In many ways, this constitution entrenched the fault lines between the kingdoms, especially Buganda and the subsequent central governments of Uganda – fault lines that continue to manifest themselves today.

## 2.2 The Revolutionary Constitution of 1966

In 1966, Prime Minister Milton Obote, under an Interim Constitution, declared himself President. This constitution is also known as the Pigeon Hole Constitution because copies of it were posted in the pigeonholes of Members of Parliament. Both its Preamble and Article 145 provided that this Constitution would continue in force, pending the establishment of a Constituent Assembly by the National Assembly for the enactment of a new constitution.<sup>11</sup>

## 2.3 The Republican Constitution of 1967

Parliament was constituted into a Constituent Assembly and given a mandate to draft a new constitution for Uganda. On 8 September 1967, the new Constitution came into force after Prime Minister Obote suspended the 1962 Constitution and dismissed the President and Vice-President. The new Constitution extended the life of Parliament and declared the Prime Minister then in office the President of Uganda for a term of five years.<sup>12</sup> Other major changes included the abolition of the kingdoms and the introduction of a more centralised system of government. The election of Members of Parliament remained by direct universal suffrage across the entire country but the President was now elected indirectly by Parliament.

Although the system of government had some semblance of democracy, democratic principles were scarcely observed in practice and Obote basically ruled with army support.<sup>13</sup> Shortly after the Constitution of 1967 came into force, a state of emergency was declared in Buganda in fear of a violent reaction against the deposition of the highly popular King of Buganda (Kabaka), and Uganda slowly drifted towards one-party rule under the Uganda People's Congress.<sup>14</sup>

10 GW Kanyeihamba, *Constitutional Law and Government in Uganda*, East African Literature Bureau (1975), p. 77.

11 GW Kanyeihamba, *Constitutional and Political History of Uganda: From 1984 to the Present*, Kampala, Centenary Publishing House (2002), p. 115.

12 EK Makubuya, "Violence and Conflict Resolution in Uganda" in Rupesinghe and Rubio (eds), *The Culture of Violence*, United Nations University, United Nations University Press (1994), p. 148.

13 *Supra* p. 120.

14 *Supra*.

On 25 January 1971, General Idi Amin Dada staged a military coup d'état and seized power. Amin ruled the country through military decrees and used the army as the main instrument of government. In 1979, he in turn was overthrown by a combination of Ugandan and Tanzanian forces. In the following years, the Ugandan military continued to participate actively in Ugandan political processes. In 1985 Obote was again elected president, only to be deposed a year later by the Museveni-led National Resistance Movement (NRM), a rebel movement which had been fighting the regime for years.

## **2.4 The conception and adoption of the 1995 Constitution**

On 21 December 1988 the National Resistance Council (NRC) enacted Statute No. 5 of 1988 which established the Uganda Constitutional Commission and gave it responsibility to start the process of developing a new Constitution. The mandate of the Commission was to consult the people and make proposals for a democratic permanent constitution based on the people's views.<sup>15</sup> In its final report of December 1992, the Commission stated that the majority of Ugandans preferred a Constituent Assembly that would be directly elected by the people in order to be as representative as possible and confer greater legitimacy on this institution. It proposed that the Constituent Assembly should be composed mainly of directly elected delegates in addition to representatives of certain interest groups. The proposal was accepted by the government, and the Constituent Assembly thereafter consisted of 284 delegates, 214 elected by universal suffrage as representatives of electoral areas and the balance of them made up of representatives of specific stakeholders.<sup>16</sup> Nevertheless, some people feared that the delegates to the Constituent Assembly might tailor the constitution to suit their political ambitions.

The elections to the Constituent Assembly took place in March 1994. Every registered voter who did not have a criminal record and could provide the required nominators as well as financial deposit was eligible to run for office. All the provisions of the draft constitution were reached by consensus, with the exception of decisions regarding national language, land, federalism and the political system.

The land question in Uganda emerged when the British took land away from the communities and gave it to a few privileged individuals. This issue was not resolved by the Constituent Assembly. The debate about the political system, on the other hand, was rooted in Ugandans' negative experience of political parties in the post-independence era. On this basis, a "no-party" politics, also known as "movement politics", was

15 BJ Odoki, *The Search for a National Consensus: The Making of the 1995 Uganda Constitution*, Kampala, Fountain Publishers (2005), pp. 229-230.

16 *Supra*, p. 265

proposed. This meant that every candidate was elected on his or her individual merit, not on political affiliation. The use of political party, tribal, religious affiliations or other sectarian symbols was prohibited.<sup>17</sup>

At the time, then, election to leadership was based on personal merit, with political parties permitted to exist but forbidden from electoral campaigning and sponsoring candidates. Movement politics were emphatically opposed by multiparty supporters. As a compromise, it was agreed that the movement type of governance would be extended for another five years but that at the end of three years a public debate would be held on the matter and after four years the people of Uganda would choose between the two systems in a referendum.

On the whole, the constitution-making process in Uganda was highly participatory and inclusive, an exercise in reconciling society, reinstating democracy and the rule of law, and limiting the misuse of state power.<sup>18</sup> In the process leading to the birth of the 1995 Constitution, 25,547 separate submissions were sent to the Constitutional Commission.<sup>19</sup> Moehler notes that a higher percentage of individuals participated in a wider variety of activities over a longer period than in any other participatory constitution-making process in the world.<sup>20</sup> However, some commentators do not agree that the constitution-making process was participatory. Tripp, for example, points out that

[t]hroughout the process of the constitution making including the deliberations of the Constitutional Commission and Constituent Assembly, political parties were unable to organize freely and therefore the framework of the debate did not adequately allow for alternate views to be fully aired.<sup>21</sup>

Furley and Katalikawe observe that many of the undemocratic characteristics of the 1995 Constitution can be traced back to the undemocratic aspects of the constitution-making process, and note that while the Constitutional Commission was regionally balanced in its composition, only one member of the Democratic Party sat on it and it did not have any member who openly opposed the movement system.<sup>22</sup>

The 1995 Constitution was adopted in September 1995 by the Constituent Assembly.<sup>23</sup> The preamble states that the Constitution shall be

17 *Supra*, p. 66.

18 For further details see <http://www.constitutionnet.org/country/constitutional-history-uganda> (accessed 11 May 2016).

19 Uganda, Constituent Assembly 1994.

20 DC Moehler, "Participation and Support for the Constitution in Uganda", 44(2) *Journal of Modern African Studies* (2006), pp. 275-308.

21 AM Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, Boulder Colorado, Lynne Rienner Publishers (2010), p. 78.

22 O Furley & J Katalikawe, "Constitutional Reform in Uganda: The New Approach", 96(383) *African Affairs* (1997), pp. 243-261.

23 The 1995 Constitution was adopted on 27 September 1995 by the Constituent Assembly.

based on the “principles of unity, peace, equality, democracy, social justice and progress”, in addition to which the body of the document contains a long chapter on “National Objectives and Directive Principles of State Policy”. The Constitution provides that these objectives and principles shall guide all organs and agencies of the state, and all citizens, organisations and other bodies and persons, in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.<sup>24</sup>

In contrast to the Constitution of 1967, the current constitution contains a range of powers shared between the President, Parliament and other constitutional bodies. For instance, the presidential power to appoint the vice-president<sup>25</sup> and ministers<sup>26</sup> is subject to the approval of Parliament, and the appointment of permanent secretaries and heads of departments has to be made on the recommendation of the Public Service Commission.<sup>27</sup> Moreover, the Public Service Commission has the power to appoint all other civil servants<sup>28</sup> and judicial officers other than judges of the High Court, Court of Appeal and the Supreme Court, who are appointed by the Judicial Service Commission.<sup>29</sup> The powers of the executive are restricted in other areas too. For example, the President no longer has the power to dissolve Parliament and, in the area of legislation, Parliament can override the presidential veto by a two-thirds majority.<sup>30</sup> The executive’s powers to borrow money are also limited, since Parliament now first has to approve borrowing.<sup>31</sup>

In 2000 and 2005, important referenda on the system of government were held. The first referendum favoured a “no-party” system of government but was invalidated by a court ruling some years later because of procedural shortcomings, while the second referendum approved a multiparty system.<sup>32</sup>

24 National Objective I (i) of the Constitution of the Republic of Uganda 1995.

25 Article 108(2) of the Constitution of the Republic of Uganda 1995.

26 Article 114(1) of the Constitution of the Republic of Uganda 1995.

27 Article 172(1)(a) of the Constitution of the Republic of Uganda 1995.

28 Article 166 of the Constitution of the Republic of Uganda 1995.

29 Article 147 of the Constitution of the Republic of Uganda 1995.

30 Article 89 of the Constitution of the Republic of Uganda 1995.

31 Article 159 of the Constitution of the Republic of Uganda 1995.

32 The 2000 referendum was held on 29 June 2000 and the 2005 referendum, on 28 July 2005.

### 3 The implementation challenge: from theory to implementation

#### 3.1 Major institutions in constitutional implementation

A number of institutions and systems were created by the 1995 Constitution. The critical question, however, is whether these institutions have been able to deliver on their constitutional mandate. These include the Uganda Human Rights Commission (UHRC), the Electoral Commission (EC), the Inspectorate of Government (IG), the Equal Opportunities Commission, and the local government system premised on decentralisation.

As Odoki points out, these institutions had to be created to implement the Constitution.<sup>33</sup> It must be noted that the President is vested with the authority to appoint the respective heads and members of these constitutional bodies. While they are subject to parliamentary vetting, most of the appointees are beholden to the President, which presents a challenge inasmuch as they are supposed to be independent and autonomous in executing their mandates.

The Constitution proclaims the sovereignty of the people.<sup>34</sup> It states that the people shall express their will and consent regarding who shall govern them and how they, the people, should be governed, doing so through regular, free and fair elections of their representatives or through referenda.<sup>35</sup> The implementation of the right is demonstrated by the regular elections held in the country under the ambit of the EC, which is tasked with this responsibility under Chapter 5 of the Constitution.<sup>36</sup> More particularly, it is mandated, *inter alia*, to ensure that regular, free and fair elections are held.<sup>37</sup>

However, as pointed out earlier, Freedom House has observed that the appointment of the EC's commission members undermines its independence.<sup>38</sup> In February 2016, the EC conducted a general election in which Ugandans elected the President and Members of Parliament. The Commonwealth Election observer team concluded that the 2016 election fell short of the democratic benchmark.<sup>39</sup> The Citizens Election Observers Network (CEON) noted that

33 BJ Odoki, *The Challenges of Constitution-making and implementation in Uganda*, p. 281, available at [www.constitutionnet.org](http://www.constitutionnet.org) (accessed 9 December 2016).

34 Article 1(1) of the Constitution of the Republic of Uganda 1995.

35 Article 1(4) of the Constitution of the Republic of Uganda 1995.

36 Chapter 5 of the Constitution creates the Electoral Commission of Uganda.

37 Articles 60 and 61 of the Constitution of the Republic of Uganda 1995 as amended.

38 Freedom House, "Freedom in the World 2015: Uganda", available at <https://freedomhouse.org/report/freedom-world/2015/uganda> (accessed 20 May 2016).

39 The Commonwealth, *Statement Kampala*, 20 February 2016, p. 1.

[w]hile Election Day processes and tabulation at the district level were conducted relatively well, with the exception of certain locations, the credibility of the overall election process was undermined by fundamental and structural flaws. The context in which Uganda conducts its elections cannot allow for free, fair and credible elections.<sup>40</sup>

Although the East African Community Election Mission (EAC-EOM) described these elections as one of the most competitive in Uganda's history, commending Ugandans for turning out in large numbers and voting peacefully,<sup>41</sup> the consensus among several national and international observers was that the election had serious transparency and credibility issues that called the legitimacy of the outcome into question. It could therefore be concluded that the EC fell short on delivering its constitutional mandate of holding a free and fair election.

To examine another institution established under the Constitution, the UHRC was created in terms of its Article 51 to promote and protect fundamental human rights in the country. The Constitution stresses the importance of the protection of human rights by stating that "fundamental rights and freedoms of the individual are inherent and not granted by the state".<sup>42</sup> Chapter 4 provides for the protection and promotion of fundamental and other human rights and freedoms, including freedom from discrimination, freedom of religion, the prohibition of torture and slavery, and the rights to privacy and freedom of assembly and association.<sup>43</sup>

It is stated furthermore that the rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of government.<sup>44</sup> Article 51 is in line with the Universal Declaration on Human Rights of 1948,<sup>45</sup> demonstrating that the Ugandan Constitution recognises fundamental rights at both a national and international level. Accordingly, the UHRC plays a watchdog role in monitoring and ensuring the implementation of the Bill of Rights.

There is no doubt that since its creation in 1997 the UHRC has done a great deal to promote and protect human rights in Uganda. It now operates ten regional and field offices, with a staff complement of more than 250.<sup>46</sup>

40 The Citizens Election Observers Network Elections Report 20 February 2016, p. 110.

41 The East African Election Observer's Report, February 2016, p. 1.

42 Article 20 of the Constitution of the Republic of Uganda 1995, as Amended.

43 Chapter 4 of the Constitution, titled "Protection and Promotion of Fundamental and Other Human Rights and Freedoms", contained the Bill of Rights for Uganda.

44 Article 20(2) of the Constitution of Uganda.

45 The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217A) as a common standard of achievements for all peoples and all nations.

46 Uganda Human Rights Commission 18<sup>th</sup> Annual Report 2015, Uganda Human Rights Commission, ii.

The African Commission on Human and Peoples' Rights recognised the UHRC as the best African Human Rights Commission.<sup>47</sup> In addition, the UHRC has consistently been awarded "A" status by the International Coordinating Committee for National Human Rights Institutions.<sup>48</sup>

However, despite the work of the UHRC, there have been instances of direct interference in or violations of human rights by state agencies such as police. Furthermore, various pieces of legislation have been passed which are viewed as repressive from a human rights standpoint. An example is the Anti-Pornography Act 2014,<sup>49</sup> wrongly interpreted by the public as the "miniskirt law" and resulting in incidents of women being undressed on the street.<sup>50</sup> In this regard, a Freedom House report states:

In 2014, the implementation of the Public Order Management Act (POMA), the Anti-Homosexuality Act (AHA), and the Anti-Pornography Act (APA) led to increased discrimination, harassment, and abuses against the opposition, civil society, the LGBT (lesbian, gay, bisexual, and transgender) community, and women due to harsh and discriminatory provisions in the vaguely worded laws.<sup>51</sup>

Turning to a closely related matter, the right to life is provided for in the Constitution.<sup>52</sup> Before the 1995 Constitution, governments were responsible for arbitrary killings. By enacting this provision, the state ought to safeguard people's wider rights, seeing as this right is not limited to life per se but can be interpreted broadly to include the right to food, security, health and livelihood.

The Equal Opportunities Commission (EOC) was provided for in the Constitution in 1995,<sup>53</sup> although it took 12 years for it to be established. This indicates the lack of political will to create such essential institutions. The EOC was put in place in 2007 by the Equal Opportunities Commission Act 2007.<sup>54</sup> Section 14 of this Act provides for its role to monitor and evaluate policies, laws, plans, activities, practices, traditions, cultures, usages and customs to ensure that they are compliant with the principles of equal opportunities for, and affirmative action in favour of, groups marginalised on the basis of sex, race, colour, ethnic origin, tribe, creed, gender, age, or any other reason created by history, tradition or custom, the purpose of such compliance being to redress imbalances

47 Uganda Human Rights Commission, see <http://uhrc.ug/uhrc-wins-award>.

48 International Coordinating Committee for National Human Rights Institutions <http://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20.pdf> (accessed 26 May 2016).

49 Anti-Pornography Act 2014.

50 See M.Jingo, "Women get three-hour jail term for wearing miniskirts", Daily Monitor, 7 March 2014.

51 *Supra* p. 37.

52 Article 22 of the Constitution of the Republic of Uganda 1995.

53 Article 32(4) of the Constitution of Uganda 1995.

54 Equal Opportunities Commission Act 2007.

against these various groups.<sup>55</sup> It is difficult to assess how this crucial commission has fared in the implementation of the constitutional provisions on equal opportunities. Be that as it may, its performance still leaves much to be desired, as shall be seen shortly with regard to the implementation of women's rights.

Finally, corruption is a major threat to effective service delivery and economic development. In a bid to combat it, the Inspectorate of Government (IG) was provided for in the Constitution.<sup>56</sup> The IG is vested with powers to investigate and prosecute corruption cases.<sup>57</sup> Like the UHRC, it has made great strides in expanding its scope and reach to fight corruption in Uganda, for example by establishing ten regional offices. However, corruption remains a major problem in the rank and file of the public service in Uganda. The African Peer Review Mechanism (APRM) notes that corruption is pervasive in Uganda and appears to involve prominent members of the government.<sup>58</sup>

### 3.2 Implementation of the Bill of Rights

It can be argued that countries that fully respect the right to life do not advocate the death penalty. Uganda is one of the countries that retains the death penalty for serious offences such as murder.<sup>59</sup> However, it was put under the spotlight in the case of *Susan Kigula and 417 Others v the Attorney General*.<sup>60</sup> This petition was brought under Article 137(3) of the Constitution to challenge the constitutional validity of the death sentence. At the time of filing, the 417 petitioners were on death row. On 21 January 2009, the Supreme Court delivered a judgment concerning the imposition of the death penalty in Uganda. Susan Kigula and the other petitioners lost: the court refused to outlaw the death penalty. It also found that there was insufficient evidence to show that being hanged caused more pain and suffering to the person being executed than any other manner of execution.

The judges made several rulings, though. With the first, they ruled that the death sentence should not be mandatory, as that prevented courts from taking into consideration all the circumstances relating to the defendant and the crime. The sentencing would now be in the hands of the trial judge. Secondly, they ruled that the condemned person should not be kept on death row indefinitely and that a person should either be executed within three years or his or her sentence commuted to life. The Supreme Court

55 Section 14 of the Equal Opportunities Commission Act 2007.

56 Article 223 of the Constitution of the Republic of Uganda as amended.

57 The Inspectorate of Government Act 2002, available at <https://www.igg.go.ug/static/files/publications/ig-act.pdf> (accessed 26 May 2016).

58 African Peer Review Mechanism, Republic of Uganda Country Review Report No. 7, January 2009, p. 37.

59 Section 189 of the Penal Code Act Cap 120.

60 *Susan Kigula and 417 Others v the Attorney General*, Constitutional Petition No. 6 of 2003.



also said that the convicts on death row could go back to the High Court and plead in mitigation of their sentence. Since these rulings in 2009, a handful of prisoners have been released and approximately 180 death sentences commuted to life sentences.<sup>61</sup> In November 2011, in what Ugandan media described as an emotional High Court session, Susan Kigula's sentence was reduced to 20 years' imprisonment.<sup>62</sup>

Personal liberty is protected by the Constitution under Article 23.<sup>63</sup> It provides that a person arrested, restricted or detained shall be kept in a place authorised by law.<sup>64</sup> This provision is still routinely violated as the government has numerous unauthorised safe houses it uses as places of torture.<sup>65</sup> Most of these reported cases are politically motivated and involve persons opposing the ruling government.

The same article states that a person arrested or detained shall, if not earlier released, be brought to court as soon as possible but in any case not later than 48 hours from the time of his or her arrest.<sup>66</sup> The Uganda Law Society and *Avocats Sans Frontière* have noted with concern the persistent violation of fundamental rights of vulnerable persons in prolonged pre-trial detention in the criminal justice system in Uganda.<sup>67</sup> Suspects are routinely held in police custody well beyond 48 hours.

Article 28 of the 1995 Constitution provides for the right to a fair hearing.<sup>68</sup> However, instances have been noted in which the judicial system has been used to violate this right in favour of political interests, as in the case of Rt. Col. Kizza Besigye in 2005. In *Uganda v Kizza Besigye and 22 Others*,<sup>69</sup> Kizza Besigye, who heads the opposition Forum for Democratic Change (FDC), was tried for allegedly raping a family friend in 1997. The 49-year-old was charged in November with treason and rape, a fortnight after returning from four years of exile in South Africa to run for president. In counterargument, his lawyers held that that the government had fabricated the charge in an attempt to keep him from challenging President Yoweri Museveni in the February 2006 elections, in which he was considered the most formidable challenger.

61 J Banning, "Law and Order in Uganda, Part 2: Luzira Women's Prison and the Death Sentence" 19 February 2013, available at <http://www.janbanning.com/tag/attorney-general-vs-susan-kigula-and-417-others/> (accessed 13 May 2016).

62 See [http://www.newvision.co.ug/new\\_vision/news/1003454/kigulas-death-sentence-reduced-imprisonment](http://www.newvision.co.ug/new_vision/news/1003454/kigulas-death-sentence-reduced-imprisonment) (accessed 18 May 2016).

63 Article 23 of the Constitution of the Republic of Uganda 1995.

64 Article 23(2) of the Constitution of the Republic of Uganda 1995.

65 Uganda Human Rights Commission Annual Reports 1998-1999 details the use of Safe houses in Uganda.

66 Article 23 (4) of the Constitution of Uganda.

67 Legal Aid Service Providers' Network (LASPNET), "Combatting Prolonged Pre-trial Detention in Uganda", 7 August 2014, available at [http://www.laspnet.org/index.php?option=com\\_content&view=article&id=287:combating-prolonged-pre-trial-detention-in-uganda&catid=89&Itemid=435](http://www.laspnet.org/index.php?option=com_content&view=article&id=287:combating-prolonged-pre-trial-detention-in-uganda&catid=89&Itemid=435) (accessed 26 May 2016).

68 Article 28 of the Constitution of Uganda.

69 *Uganda vs Kizza Besigye and 22 Others*, High Court Criminal Case No. 955 of 2005.

Judge John Bosco Katutsi declared that the investigations were “crude and amateurish, betraying the motives behind the case”. He added, “I find that the prosecution dismally failed to prove its case against the accused and he is accordingly set free.” After the ruling, Besigye said:

I am very happy that another case of abuse of the legal process has been successfully disposed of ... I intend to seek legal redress for the malicious prosecution and the attendant damage that I have suffered. This case has had a serious adverse effect on me personally, my family and the Forum for Democratic Change as a whole ... as I believe it was intended to compromise my ability to campaign in the just-concluded elections. Voters were constantly reminded that I was a suspected rapist and with the prospect of conviction on a capital offense.<sup>70</sup>

Besigye appeared in court 25 times during the campaign period, and EU election observers agreed that his campaign was hampered by the court cases.<sup>71</sup> The *Besigye* case is indicative of the frequent disregard of the right to liberty, especially for critics of the regime.

Protection of freedom of conscience, expression, movement, religion, assembly and association is also enshrined in the 1995 Constitution.<sup>72</sup> In contrast to the regimes of Amin and Obote which curtailed the activities of political parties, the enactment of the 1995 Constitution opened the way for multipartyism.<sup>73</sup>

The right to education, too, is provided for under the Constitution,<sup>74</sup> and the government has put in place programmes to ensure this right is upheld. These include Universal Primary Education (UPE), Universal Secondary Education (USE), and the Students’ Loan Scheme for higher education. Education for all is also a part of the Millennium Development Goals. Nevertheless, it has been argued that the quality of education in Uganda is poor and that several projects established by the government using donor funding are being undermined by corruption and poor service delivery. Justice Kanyeihamba (as he was then) noted that these policies meant that the rate of literacy in Uganda had rapidly increased and improved. However, only a limited number of children in each family are chosen to benefit from this free education.<sup>75</sup>

The 1995 Constitution can be described as progressive in the area of women’s rights. Tripp observes that the 1995 Constitution has an

70 For further details see “Uganda’s chief opposition leader cleared of rape charge”, *The Guardian*, 8 March 2006, available at <http://www.theguardian.com/world/2006/mar/08/uganda.mainsection> (accessed 9 December 2016).

71 *Supra*.

72 Article 29 of the Constitution of Uganda.

73 Uganda has 36 registered political parties, though about only five or six are active. See <http://www.elections.co.ug> (accessed 17 May 2016).

74 Article 30 of the Constitution of Uganda 1995.

75 GW Kanyeihamba, *Constitutional and Political History of Uganda: From 1984 to the Present*, Kampala, Centenary Publishing House (2002), p. 265.

extraordinary number of clauses addressing women's rights, and thus at the outset the NRM won the approval of large numbers of women who were convinced that it was a government committed to improving the status of women.<sup>76</sup>

Affirmative action in favour of marginalised groups on the basis of gender, age, disability or any other reason created by history, tradition or custom is catered for under the Constitution.<sup>77</sup> This can be seen in the increasing number of female Members of Parliament, a female Vice-President, the provision of an extra 1.5 points for young women registering at university, and the parliamentary representative for persons with disability.<sup>78</sup> Nevertheless, a question that remains to be answered is whether women in Parliament have managed to improve the plight of poor rural women. Despite progress in addressing women's rights issues, problems persist, such as domestic violence and maternal health, with close to 30 women dying during childbirth every day.

The judiciary under the 1995 Constitution has also become a vanguard for women's rights to equality and non-discrimination. For instance, in the case of *Federation of Uganda Women Lawyers, Oloka-Onyango & Others v the Attorney General*,<sup>79</sup> the court declared various sections of the Divorce Act unconstitutional as these offered men and women different grounds for divorce. A man had to prove only one ground to obtain a divorce, whereas a woman had to prove two.

Article 40 on socio-economic rights states that, among other things, Parliament shall ensure the unionisation of workers as well as equal payment for equal work without discrimination.<sup>80</sup> Inasmuch as Parliament enacted the Employment Act of 2006, issues such as minimum wage have not been addressed yet. Labour unions are not all equally effective, and the high influx of foreign nationals taking on jobs which nationals have the skills to do is also still an issue.

The 1995 Constitution lays a good foundation for judicial independence. It emphasises that in the exercise of judicial power, the courts shall be independent and not be subject to the control or direction of any person or authority.<sup>81</sup> This provision is reinforced by further provisions that grant judicial officers immunity from being sued as a result of any action or omission committed during the exercise of judicial

76 AM Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, Boulder Colorado, Lynne Rienner Publishers (2010), p. 2.

77 Article 32 of the Constitution of Uganda 1995.

78 Uganda has 112 women Members of Parliament representing their respective districts. See <http://www.parliament.go.ug>.

79 *Federation of Uganda Women Lawyers, Oloka-Onyango & Others v the Attorney General* Constitutional Petition No. 6/2004.

80 Article 40 of the Constitution of Uganda 1995.

81 Article 128 of the Constitution of Uganda 1995.

power.<sup>82</sup> The security of tenure of judges is ensured by a provision that their salaries shall be drawn from the Consolidated Fund and that their salaries and other benefits should not be varied to their disadvantage.<sup>83</sup> The judiciary is self-accounting and deals directly with the Ministry of Finance with regard to its finances. Security of tenure is also ensured by methods for appointing and removing judges.

### 3.3 The judiciary and constitutional implementation

Article 126 states that “the exercise of judicial power is derived from the people”. The Constitution stresses the notion of an independent judiciary, with Article 127 providing for the participation of the people in the administration of justice. The judiciary consists of the Supreme Court, Court of Appeal and the High Court.<sup>84</sup> Parliament may establish further courts by law, including so-called *qadhis* courts, which are able to hear cases about marriage, divorce, inheritance of property and guardianship.<sup>85</sup>

The Supreme Court is the final court of appeal,<sup>86</sup> and consists of a Chief Justice and at least six other Justices.<sup>87</sup> A case is decided by a quorum of any uneven number of not less than five members of the court.<sup>88</sup> Previous decisions of the Supreme Court are usually binding on the Court itself and all other courts. However, according to Article 132, the Court may depart from a previous decision when it “appears right to do so”. When the Supreme Court hears appeals against decisions of the Court of Appeal sitting as a Constitutional Court, all the members of the Supreme Court have to be present.

Regarding questions about the interpretation of the Constitution, the Court of Appeal sits as a Constitutional Court with a bench of five of its members.<sup>89</sup> The Constitutional Court, which is not expressly mentioned as a court of judicature in Article 129, has the power to interpret the constitution. Any person alleging an infringement of the Constitution as laid down in Article 137 may petition the Court for a declaration to that effect. The Court may then grant an order of redress or refer the matter to the High Court to investigate and determine the latter. Questions as to the interpretation of the Constitution can also be referred by other courts of law.

Judges are appointed by the President on the advice of the Judicial Service Commission, with the approval of Parliament. They can be

82 Article 128(4) of the Constitution of Uganda 1995.

83 Article 128(7) of the Constitution of Uganda 1995.

84 *Supra*, Article 91.

85 *Supra*, Article 129.

86 *Supra*, Article 129(d).

87 *Supra*, Article 132(1).

88 *Supra*, Article 131.

89 *Supra*, Article 137.

removed from office only at the recommendation of a special tribunal constituted for the purpose of establishing that the judge can no longer perform the functions of the office due to inability of body or mind or that the judge is guilty of misconduct, misbehaviour or incompetence. Unfortunately, the Constitution does not define what constitutes misbehaviour, misconduct or incompetence. Nevertheless, these provisions still go a long way to enhance the independence of the judiciary in Uganda. Tripp points out that the judiciary was never able to assert its independence under any of the previous governments in Uganda, whereas under Museveni's government there have been considerable improvements in this area.<sup>90</sup>

Although the Constitution ensures the independence of the judiciary and therefore the rule of law, the law is less clear about accountability. One of the issues facing the judiciary in Uganda today is how to balance independence with a satisfactory level of accountability. Although judges are held to account by the appellate system, whereby judicial decisions can be reviewed and corrected, further measures are needed to ensure judicial discipline.

Steps to revise the 1995 Constitution started as early as 2000, when a referendum to decide whether to restore multipartyism was held. Voters were asked: "Which political system do you wish to adopt, Movement or Multiparty?" On a voter turnout of 51.1 per cent, the result was 90.7 per cent in favour of retaining the non-partisan "movement" system.

However, later in the year, the Constitutional Court delivered a judgment that nullified the referendum on restoring multi-party democracy. The government reacted in an intimidating manner towards the courts. The weekend following the delivery of the judgment, a furious President Museveni came out on national television to dismiss the ruling. He accused the Constitutional Court of usurping the powers of the people, of being corrupt and of having become sympathisers of the opposition party, Uganda Peoples' Congress (UPC). He said:

The government will not allow any authority, including the courts, to usurp people's power in any way. We shall not accept this. It will not happen. This is absurd and unacceptable.<sup>91</sup>

In the week after this landmark judgement, the Movement mobilised its supporters for a large demonstration against the judiciary. In an act clearly aimed at intimidating the Constitutional Court, hundreds of Movement supporters poured onto the streets of Kampala on 29 June 2004 to protest against the ruling, chanting anti-judiciary slogans and appealing to the

90 AM Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, Boulder, Colorado, Lynne Rienner Publishers (2010), p. 87.

91 *Supra*.

President to sack the five judges presiding over the case. They also presented a petition to the Speaker of Parliament, demanding that punitive action be taken against the judges. In a show of so-called “people power” against the judiciary, some judges were forced to stay away from their chambers and the courts.

Nevertheless, the judiciary too came out to assert itself. Chief Justice Benjamin Odoki called upon the government and the people to leave the courts to function without intimidation. He urged judges to continue to execute their duties without fear or favour. He also attempted to calm the storm by assuring the nation there would be no crisis as a result of the judgment.

It would not be far from the truth to say that no other judgment has caused such an uproar in Uganda. However, in a move that can be interpreted only as an effort to pre-empt the constitutional crisis which seemed inevitable at the time, the Constitution (Amendment) Bill 2005 provides in section 4 that “where any referendum is held under this Constitution, the result of the referendum shall be binding on all organs and agencies of the state and on all persons and organisations”.<sup>92</sup> One wonders whether to give the government credit for the additional provision – which is to the effect that the above section shall not affect the power of the courts to inquire into whether the subject matter should have been subjected to a referendum – or to question the compliance of the referendum with the procedures prescribed by the law.

The President’s later comments about Justice Kanyeihamba, describing him as “even unfit to be a judge of chicken thieves”, were most unfortunate.<sup>93</sup> Similarly, the attack on the High Court, a national emblem of justice, by military men after the release of the People’s Redemption Army (PRA) suspects on 1 March 2007 is another example of the challenges that the courts in Nigeria continue to face.<sup>94</sup>

The Constitutional Court was also put to the test in *Constitutional Petition No. 7 of 2000*,<sup>95</sup> in which the applicants challenged the validity of the Constitutional (Amendment) Act’s changes to Articles 88-90 of the Constitution. The bill for the Act had been debated, passed and assented to by the President on the same day. It was published in the Gazette the following day and thereby became law. The applicants, Ssemwogerere and Olum, petitioned the Constitutional Court for a declaration that the Act was invalid for failing to comply with the constitutional requirements for amendment of the Constitution.

92 Section 4 of the Constitution (Amendment) Bill 2005.

93 Remarks made by President Museveni were reported widely in the media in Uganda.

94 For details see Human Rights Watch, “Uganda: Government gunmen storm High Court again”, 5 March 2007, available at <https://www.hrw.org/news/2007/03/05/uganda-government-gunmen-storm-high-court-again> (accessed 9 December 2016).

95 *Ssemwogerere and Olum v The Attorney General*, Constitutional Petition No. 7 of 2000.

The Court, however, held that the amendment was made in accordance with the law and that there was nothing wrong in passing the Act in two days. The lone dissenting judgment of Twinomujuni, JA, who described the amendment as “a coup against the sovereignty of the people and the supremacy of the Constitution”, rang hollow at that time as the nation awaited the ruling of the Supreme Court on appeal.

In January 2004, the Supreme Court declared that Act 13 of 2000 was null and void because it was passed in total disregard of the Constitution. Needless to say, the ruling caused a lot of excitement among opposition Members of Parliament and among the legal fraternity. As stated by the petitioners’ lawyer, the Supreme Court ruling was a “landmark” judgment, notable not just for its ruling on parliamentary voting procedures but because it reaffirmed the judiciary as protector of human rights and a bulwark against an executive acting in cahoots with the legislature.

### 3.4 Local government and constitutional implementation

In its Chapter 11, the Constitution provides for the establishment of a local government system.<sup>96</sup> The system is based on the district as a unit under which there are sub local governments and administrative units. The underlying principle is that functions, powers and responsibilities are decentralised and devolved from the central government to the local government. This represented a fundamental change in the way the country was managed, given that local governments would be in effect responsible for planning and managing their areas.<sup>97</sup> The African Peer Review Mechanism (APRM) went as far as describing the local government system as remarkable and representing a radical re-engineering of the mechanisms of governance towards political, administrative and fiscal devolution of power.<sup>98</sup>

However, the local government system is constrained both by the multitude of districts, many of which are created for the expedience of the ruling party, and by very low resource mobilisation, which renders most local governments unviable. They depend on grants from the central government, and in most districts service delivery is severely lacking. Ojambo<sup>99</sup> and Tumushabe lament the failure of the local government system. Tumushabe states:

96 The Constitution of the Republic of Uganda 1995 as amended, Chapter 11.

97 S Fumihiko (ed), *Foundations for Local Government: Decentralization in Comparative Perspective*, Springer Seven and Business Media (2008), pp. 147-149.

98 African Peer Review Mechanism, Republic of Uganda Country Review Report No. 7, January 2009, p. 89.

99 H Ojambo, “Decentralisation in Africa: A Critical Review of Uganda’s Experience”, 15(2) *Africa Journal Online* p. 70.

[T]he quality of public service delivery is less than desirable; district local governments with no financial resources of their own have become mere agents of the centre while the accountability mechanisms for good governance and public service delivery are either non-existent or dysfunctional<sup>100</sup>.

Despite constitutional provisions for a highly elaborate local government system, which Steiner<sup>101</sup> describes as exceptional among developing countries, the system is yet to be effective. This could be attributed in large part to the executive's creation of hundreds of non-viable local governments or districts in order to serve its political interests.

## **4 The guardians of the Constitution**

From the discussion above it is evident that the 1995 Constitution does have progressive provisions which have been implemented to varying degrees of success. It is therefore crucial, going forward, that the guardians of the Constitution remain alert and focused on its implementation. Who are these guardians? They are numerous and diverse, and are outlined below.

### **4.1 The people of Uganda**

The preamble to the Constitution starts with the words, "We the people of Uganda".<sup>102</sup> By implication, the people of Uganda are the vanguards of the Constitution and they are supposed to hold their leadership to account. However, as indicated above, the vast majority of Ugandans have never seen the Constitution, let alone understand its provisions. How, then, can "the people" of Uganda be expected to be effective guardians of something they do not know about?

### **4.2 The Executive**

As set out in Article 98, the President of the Republic of Uganda is the Head of State, the Head of Government and Commander in Chief of the Armed Forces. Presidential candidates must be citizens of Uganda, between 35 and 75 years of age, and qualified to be a Member of Parliament.<sup>103</sup> The President is expected to exercise his executive authority in accordance with the Constitution.<sup>104</sup> Furthermore, he or she

100 GW Tumushabe, *Monitoring and Assessing the Performance of Local Government Councils in Uganda: Background, Methodology and Score Card*, Kampala, ACODE (2010).

101 S Steiner *Decentralisation in Uganda: Exploring the Constraints for Poverty Reduction*, Hamburg, GIGA (2006).

102 The Constitution of the Republic of Uganda 1995 as amended, preamble, p. 21.

103 Article 102 of the Constitution of the Republic of Uganda, 1995.

104 *Supra*, Article 99(1).



has a duty to abide by, uphold and safeguard the Constitution and the laws of Uganda.<sup>105</sup>

Despite these provisions, the President does have wide executive powers, and often can be said to exert considerable influence and power over the legislature and judiciary. This does not bode well for the rule of law and constitutional order. To illustrate this point, in 2005 it was reported that President Museveni, in a letter to Cabinet, ordered the arrest of Kizza Besigye, the then leader of one of the foremost opposition political parties, the Forum for Democratic Change (FDC).<sup>106</sup>

### 4.3 The Legislature

The unicameral Parliament,<sup>107</sup> a body of members directly elected to represent constituencies, has the power to make laws on any matter “for the peace, order, development and good governance of Uganda”.<sup>108</sup> Members of Parliament serve for a five-year term,<sup>109</sup> and according to Article 80 must be citizens of Uganda, registered voters and have obtained a minimum formal education of advanced level standard or its equivalent.

The ruling party, the NRM, has an overwhelming majority in Parliament.<sup>110</sup> Using the tyranny of numbers, the NRM is in most cases able to get its way in Parliament, which sometimes leads to the enactment of repressive laws such as the POMA. A case that typifies this was an amendment of the Constitution in 2005 that saw the removal of limits to the presidential term of office.<sup>111</sup> The Constitution had provided for a limit of two five-year terms; however, this was removed via an amendment that helped to entrench President Museveni’s stay in power.

### 4.4 Civil society organisations

Civil society organisations, mainly in the form of non-governmental organisations (NGOs), have played an important role in enhancing citizens’ constitutional knowledge and awareness. Through their promotional, outreach and advocacy mandates, NGOs have traversed the country, preaching the constitutional gospel using the human rights platform.

105 *Supra*, Article 99(3).

106 See Human Rights Watch Report 2005.

107 *Supra*, Article 77.

108 *Supra*, Article 79.

109 *Supra*, Article 78(2).

110 The 10<sup>th</sup> Parliament of Uganda has a total of 426 seats, of which 293 are held by the ruling party, NRM. See details at <http://www.parliament.go.ug> (accessed 13 May 2016).

111 The Observer, How term limits were kicked out in 2005, see <http://observer.ug/component/content/article?id=18710:how-term-limits-were-kicked-out-in-2005> (accessed 26 May 2016).

Several constitutional challenges before the Constitutional Court have been instituted by civil society organisations, leading in some instances to progressive outcomes. For example, in the case of *Law Advocacy for Women in Uganda v Attorney General*,<sup>112</sup> the issue before the Court was whether section 154 of the Penal Code was discriminatory against women, given that it provides that a man who has sexual intercourse with a married woman who is not his wife commits adultery, whereas it makes it an offence for a married woman to have sexual intercourse with a man who is not her husband. This section implies that a man who has sexual intercourse with an unmarried woman does not commit an offence, but that a married woman commits an offence by having intercourse with any man, married or not.

The Court agreed it was unconstitutional to have different grounds for men and women in the case of adultery, citing Article 21 of the Constitution.

## 5 Looking to the future

It is evident from the discussion in this chapter that Uganda's report card shows mixed results, with notable progress having been made in realising the promise of the 1995 Constitution, but with several challenges remaining to be addressed. Tripp offers an insightful account of the situation in her description of the Museveni government as a hybrid regime.<sup>113</sup> These are regimes in which the leaders adopt the trappings of democracy yet pervert democracy, sometimes through patronage and largesse, at other times through violence and repression, and all for the sole purpose of staying in power.<sup>114</sup> These hybrid regimes, Tripp goes on to say, are partly democratic, partly authoritarian. It is a credible analysis, and in the interests of strengthening and extending Uganda's democratic proclivities against its authoritarian ones, the following measures are suggested.

Civil society should intensify constitutional awareness campaigns to enlighten and empower the Ugandan citizenship. An empowered and enlightened citizenry is more likely to be able to hold its leaders accountable to the Constitution. Power and leadership respond to massive pressure from citizens, which can be brought about through empowerment.

112 *Law Advocacy for Women v The Attorney General*, Constitutional Petition No. 13/05 and 05/06 2007.

113 AM Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, Boulder, Colorado, Lynne Rienner Publishers (2010), p. 1.

114 *Ibid.*

In order for the rule of law and constitutionalism to take root, key guardians of governance institutions like Parliament need to be strengthened. This can be done by giving them training on the Constitution, the rule of law and human rights. At the moment, Uganda is in the stranglehold of an all-powerful executive President who in many ways has eclipsed the role of the other institutions in the country. This needs to be reversed to allow the various institutions and branches of government to execute their roles without having the shadow of the President influencing every decision they make.

This may have to take the form of a new deal for Uganda in which the ruling elites genuinely pledge to abide by the Constitution. Such a deal would necessitate respect for and an embrace of the constitutional order as a way of doing business. The new deal could be debated and agreed to in a national dialogue on democracy and governance that brings together Ugandans of all political shades and opinions. This may light up the road to constitutional reforms and the establishment of a constitutional culture and ethos in Uganda.

## **6 Conclusion**

Twenty years after the adoption of the 1995 Constitution, it is clear that some positive strides have been made to entrench the promise of constitutionalism in Uganda. Several key institutions have been established, such as the UHRC, the EOC, the Independent Electoral Commission of Uganda, and the Inspectorate of Government. As shown in this chapter, they are operating with varying degrees of success. In addition, a decentralised local government system has been put in place, which, too, is operating with mixed results. However, a strong executive, in the form of the President, plays an instrumental role in appointing the members of these vital constitutional vanguards and thereby seriously undermines their independence.

From the above report card it is evident that there is still some way to go to make the Constitution a living reality for the majority of Ugandans it purports to protect. It is therefore incumbent upon guardians of the Constitution such as the parliament, the media, public institutions, the judiciary, and civil society to ensure that constitutionalism, the rule of law and respect for human rights become engrained in the national governance landscape.

In this regard, civil society has a particularly important role to play in creating awareness about the Constitution among citizens and empowering them to hold their leaders to account. Leadership and governance in Uganda cannot, and should not, remain the same. The country has to “hit the reset button” in favour of a real constitutional order based on rule of law, institutional autonomy, separation of powers and

genuine commitment to protecting human rights. There is a need to heed the advice of Odoki, who declared that the challenge now is for the government and the people of Uganda to commit themselves to internalising, upholding and defending the Constitution by creating and sustaining a culture of constitutionalism.<sup>115</sup>

115 BJ Odoki, “The Challenges of Constitution-making and implementation in Uganda”, p. 284. Available at [www.constitutionnet.org](http://www.constitutionnet.org) (accessed 26 May 2016).

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*Susan Kigula and 417 others v the Attorney General*, Constitutional Petition No. 6 of 2003.

# THE ROLE OF CIVIL SOCIETY ORGANISATIONS AND CHAPTER 9 INSTITUTIONS IN IMPLEMENTING SOUTH AFRICA'S CONSTITUTION

*Wandisa Phama and Palesa Madi*

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## 1 Introduction

South Africa's post-apartheid constitutional dispensation commenced with the adoption of the Interim Constitution in 1993,<sup>1</sup> the entry into force of its finalised text in 1997, and the establishment of institutions designed to ensure its proper implementation. This chapter explores the role of these institutions and that of civil society in advancing compliance with the Constitution and giving effect to its provisions and ethos.

As such, the enquiry examines different types of civil society organisations and movements, their focus areas and strategies. In particular, the chapter looks at the work of the Centre for Applied Legal Studies (CALS), an organisation based in the Law School at the University of the Witwatersrand (Wits), and the role of so-called Chapter 9 institutions, established in the ninth chapter of the Constitution as state entities to support constitutional democracy.

A point of focus in this regard is the functions, powers and successes of the Office of the Public Protector and the South African Human Rights Commission (SAHRC). The chapter concludes by considering the challenges as well as the future prospects of civil society organisations and Chapter 9 institutions.

1 The Interim Constitution of the Republic of South Africa, 1993.

## **2 Civil society's role in constitutional implementation**

### **2.1 An overview of organisations and movements**

Many of South Africa's civil society organisations have existed for more than 30 years. Some of them were formed to mobilise citizens to campaign for their human rights. The organisations include both grassroots movements and non-governmental organisations (NGOs) specialising in legal matters. Legal organisations such as CALS, Lawyers for Human Rights (LHR) and the Legal Resources Centre (LRC) were active during the apartheid era and have continued to work into the present day in service of South Africa's constitutional democracy.

Since the new constitutional dispensation, many more civil society organisations have been established. They vary in size and speciality, and use different (but often similar) strategies to help ensure that the provisions of the Constitution are a lived reality for all people living in South Africa. Some organisations, such as CALS, LRC, LHR, the Socio-Economic Rights Institute (SERI), Equal Education Law Centre (EELC) and Section 27, are registered law clinics, providing legal assistance and advice when constitutional rights are violated. In addition to their legal services, they conduct research and advocacy to raise awareness about constitutional rights.

However, not all such organisations necessarily employ all three of these strategies, namely litigation, research and advocacy. Organisations like Equal Education, Black Sash, People Opposing Women Abuse (POWA), and Sex Workers and Education and Training Task Force (SWEAT) run advocacy campaigns and training programmes and are often litigants for the realisation of constitutional rights. Among the rights for which these institutions advocate are the right to education, just administrative action and freedom and security of the person. The organisations also deal with issues such as gender, access to information, labour law, social work and crime prevention.

In addition, numerous community-based organisations and grassroots social movements play a role too in the implementation of the Constitution. Examples are the Treatment Action Campaign (TAC), Social Justice Coalition (SJC), Abahlali baseMjondolo and Sikhula Sonke. Like other civil society organisations, they work with communities in campaigning for the advancement of constitutional rights such as the right to health-care services, life, dignity, equality, property and an environment which is not harmful to health and well-being.



The next section discusses some of these organisations and their contribution to constitutional implementation.

## 2.2 Key interventions by civil society organisations

Over the years, TAC has played a critical role in the interpretation and realisation of the right to health through its campaigns for access to HIV/AIDS treatment. Before the organisation had any victories, its campaign strategies include meetings with ministers of health, organising demonstrations and drafting memoranda. Its most successful intervention came in the now-famous 2002 case of *Minister of Health v TAC*.<sup>2</sup>

In this case, the government applied to the Constitutional Court to challenge an order from the High Court which held that the government had acted unreasonably, firstly, by refusing to make the antiretroviral drug Nevirapine available in the public health sector, and secondly, by not setting out a time-frame for a national programme to prevent mother-to-child transmission of HIV.<sup>3</sup> The application in the High Court had been brought by a number of associations and members of civil society (the principal applicant being the TAC) that were concerned about the treatment of people with HIV/AIDS.<sup>4</sup>

The Constitutional Court held that the government had not taken reasonable steps to meet its constitutional obligations to provide the public with health-care services, taking into account the pressing need for them.<sup>5</sup> The Court also held that the limited provision of Nevirapine to certain test centres for the purpose of preventing mother-to-child transmission of HIV was wrong, and it ordered the government to lift without delay the restriction on the supply of the drug.<sup>6</sup> Thanks to this landmark judgment, millions of South Africans are now receiving Nevirapine and thus enjoying their constitutional right to health care.

Furthermore, as a result of concerted pressure from TAC, in 2007 Parliament adopted the National Strategic Plan (NSP) on HIV, STIs and Tuberculosis 2007-2011.<sup>7</sup> The South African National AIDS Council is currently engaged in a series of stakeholder consultations to feed into the development of the first public draft of the NSP on HIV, TB and STIs 2017-2022.<sup>8</sup>

2 *Minister of Health v TAC* 2002 (5) SA 721 (CC) 756.

3 *Ibid.*

4 *Ibid* paragraph 3.

5 G Marcus & S Budlender, *A Strategic Evaluation of Public Interest Litigation in South Africa* (2008), p. 88. Also see *Minister of Health v TAC* 2002 (5) SA 721 (CC) 756.

6 *Ibid.*

7 *Ibid.*

8 Website of the South African National AIDS Council, <http://sanac.org.za/2016/08/31/sanac-launches-consultations-for-the-national-strategic-plan-on-hiv-tb-and-stis-nsp-2017-2022/> (accessed 16 September 2016).

Another area in which civil society organisations have played an important role is child rights. The Centre for Child Law, based at the University of Pretoria, has been at the forefront of the fight to promote the rights of children. It does this through litigation, advocacy, research and education.<sup>9</sup> As part of its litigation project, the Centre has successfully obtained court orders directing various government departments to respect and implement the rights of children.<sup>10</sup>

In a 2007 Constitutional Court case, *S v M*,<sup>11</sup> the Centre for Child Law intervened as *amicus curiae*. In this case, the applicant was a single mother of three boys aged 16, 12 and eight, had been convicted on a number of fraud charges and sentenced to a fine as well as four years' imprisonment.<sup>12</sup> She applied to the Constitutional Court to appeal against the custodial sentence. The Centre for Child Law intervened, arguing that section 28(2) of the Constitution prohibited such a custodial sentence when the person involved is a primary caregiver of minor children. The Court upheld the appeal and set aside the custodial sentence on the grounds that it was not in the best interests of the children, which were a paramount consideration.

Another organisation active in campaigning for the implementation of constitutional rights is Equal Education (EE). This civil society organisation consists of learners, parents, teachers and community members working for quality and equality in South African education.<sup>13</sup> EE intervened following the amendments to the School Act,<sup>14</sup> which required the Minister of Education to make regulations prescribing minimum uniform norms and standards for public school infrastructure. When the Minister failed to do so in spite of several petitions and other actions, EE, represented by the LRC, approached the courts on two occasions to request an order to compel the Minister to promulgate the norms and standards.<sup>15</sup> A court order was issued and the Minister eventually complied,<sup>16</sup> with the result that learners were able to study in an environment with adequate infrastructure.

CALS is a further organisation with an important role in constitutional implementation, and is discussed in detail in the case study below.

9 Centre for Child Law website, <http://www.centreforchildlaw.co.za/about-us/about-us> (accessed 16 September 2016).

10 Centre for Child Law, *Filling the Gap between Law and Reality: The Use of Strategic Impact Litigation*, available at <http://www.dgmt-community.co.za/organisations/university-pretoria-centre-child-law/learning-briefs/centre-child-law-filling-gap> (accessed 16 September 2016).

11 *S v M* (CCT 53/06) [2007] ZACC 18.

12 *Ibid* paragraph 2.

13 Equal Education website, <http://equaleducation.org.za/> (accessed 16 September 2016).

14 Act 84 of 1996.

15 *Ibid*.

16 *Ibid*.

## 2.3 The Centre for Applied Legal Studies

CALS was founded in 1978 by Professor John Dugard as a legal research unit at Wits University. Its purpose was to encourage law reform and improve access to justice during the apartheid era. CALS envisions a socially, economically and politically just society in which repositories of power, including the state and the private sector, uphold human rights.

The Centre's mission is to “deconstruct the legacy of apartheid, challenge and hold to account systems that perpetuate harm, poverty, inequality and human rights violations, and to reconstruct an inclusive and equal society”.<sup>17</sup> Research, advocacy and litigation are the strategies it uses across its five intersecting programmes, namely, basic services, business and human rights, gender, rule of law and environmental justice.

### 2.3.1 Legal research

Legal research is crucial for advancing the rights enshrined in the Constitution. Publications by academics as well as legal practitioners in civil society shape the discourse on law and thus influence the manner in which the Constitution is implemented.

Academic research with detailed analysis and recommendations has been of great assistance to judicial officers, state officials and the private sector in ensuring that they respect, protect, promote and fulfil the rights in the Bill of Rights. To give three examples of such work produced at CALS: reports on the status of remand detainees in South Africa; an analysis of social and labour plans in the mining sector; and a report on sexual violence in schools.

The report on the status of remand detainees highlighted, among other issues, the overcrowding in prisons, the communicable diseases that inmates are at risk of contracting, and the delay in finalising criminal trials.<sup>18</sup> These are evidence of a breach of multiple constitutional rights: the right to health-care services (section 27 of the Constitution), the right to equality (section 9), the right to human dignity (section 10), the right to freedom and security of the person (section 12), and related rights of those arrested, detained and accused (section 35).

The recommendations that were made – directed in particular at officials in the criminal justice system (including the Department of Correctional Services, the Department of Justice and Constitutional

17 Centre for Applied Legal Studies website, <https://www.wits.ac.za/cals/about-us/our-history/> (accessed 16 September 2016).

18 The Centre of Applied Legal Studies, *A Measure of Last Resort: Research Report on Remand Detention in South Africa* (2013), p. 4.

Development and the National Prosecuting Authority – include the imposition of further time for matters to be finalised before verdict, the creation of an ombudsman to monitor role-players in the criminal justice system, and the training of police officials.<sup>19</sup>

In 2016, CALS released a Trends and Analysis Report<sup>20</sup> on the Social and Labour Plan (SLP) System in the mining sector. It conducted research on the effectiveness of the SLP system in meeting its objectives, the aim being to discover any failures in its implementation.<sup>21</sup> SLPs can be viewed as part of government’s broader project to address the legacy of colonialism and apartheid. As such, they fall squarely under the fundamental provisions of the Constitution: that South Africa is a state founded on human dignity, equality and the advancement of human rights and freedoms.<sup>22</sup> The report made recommendations on policy changes, cooperative governance and meaningful community consultations, all directed at mining companies, communities, the labour force and various government departments.

Within the framework of its gender programme, CALS produced a report on sexual violence by educators in South African high schools. Conducted in collaboration with the Cornell Law School’s Avon Global Centre for Women and Justice and International Human Rights Clinic,<sup>23</sup> the research examined gaps in accountability that had enabled sexual violence against learners in Gauteng to go unpunished.<sup>24</sup> Arguably, these gaps lead to violations of constitutional rights such as the right to freedom and security of the person (section 12) and the right of every child to be protected from maltreatment, neglect, abuse or degrading treatment (section 28).

The report made recommendations to the Departments of Basic Education, Justice and Constitutional Development, and Social Development; the National Prosecuting Authority; South African Police Service; judiciary; civil society; and other institutions aiming to strengthening constitutional democracy.<sup>25</sup> The recommendations included raising awareness among learners about their constitutional rights, screening all prospective teachers for previous convictions of sexual offences, ensuring that the same police investigators are assigned to an

19 *Ibid*, pp. 33-34.

20 The Centre for Applied Legal Studies, *The Social and Labour Plan Series, Phase 1: System Design, Trends Analysis Report* (2016).

21 *Ibid*, p. 6.

22 Section 1(a) of the Constitution.

23 The Centre for Applied Legal Studies and Cornell Law School’s Avon Global Center for Women and Justice and International Human Rights Clinic, *Sexual Violence by Educators in South African Schools: Gaps in Accountability* (2014).

24 *Ibid*, p. 3.

25 *Ibid*, pp. 68-71.

abused learner through all the stages of an investigation, and appropriate training of officials and educators.<sup>26</sup>

It is clear from the above examples that academic research, given pointedness with practical recommendations to stakeholders who have the power and mandate to adopt them, can be of great assistance in implementing the Constitution. Other advocacy strategies and campaigns by civil society are equally important, as explained below.

### ***2.3.2 Advocacy projects***

The Merriam Webster dictionary defines advocacy as “the act or process of advocating or supporting a cause or proposal”.<sup>27</sup> Civil society organisations do this often. CALS appreciates the crucial role civil society can play through advocacy projects aimed at ensuring that constitutional rights are realised. The advocacy projects at CALS take various forms.

CALS organises workshops for community clients to make them aware of what the Constitution and other relevant legislation provide for in respect of their constitutional rights. The content of these workshops is often informed by the litigation on behalf of the clients. For example, CALS represents clients with very limited access to water. Limited access to water contravenes the Water Services Act<sup>28</sup> and Regulations,<sup>29</sup> and violates the right of access to adequate water (section 27(1) and (2) of the Constitution), the right to equality and equal treatment (section 9(1)), the right not to be discriminated against (section 9(2)) and the right to dignity (section 10).

In a workshop context CALS explains the legal framework, how to realise these rights, and what the challenges and limitations. The aim is usually to share legal information with clients so that they can share it in turn with people in their communities. This is especially important considering that access to justice, particularly to legal services, is not a reality for most South Africans, especially those who are indigent.

In these workshops CALS also conducts civic training, educating citizens about how to use the law to hold their local government accountable, about their rights as voters, and about other mechanisms built into the Constitution to realise their rights. CALS has assisted clients seeking to exercise their right to protest in order to hold local governments accountable. In these circumstances CALS advises communities on how

26 *Ibid.*

27 Merriam-Webster, <http://www.merriam-webster.com/dictionary/advocacy> (accessed 16 September 2016).

28 Section 3 of the Water Services Act no. 108 of 1997.

29 Water Services Act no. 108 of 1997; Regulations Relating to Compulsory National Standards and Measures to Conserve Water, 8 June 2001.

to protest lawfully, attends meetings with state officials to get “consent” for the protest action, and in some instances assists clients who have been arrested unlawfully for protesting.

Another advocacy strategy that CALS employs is to make submissions to Parliament on bills, draft regulations, and draft white papers. Its advocacy work involves taking part in regional and international campaign forums for the realisation of human rights, with a focus on the global south perspective. CALS regards it as essential that civil society engage with pending laws or regulations to ensure that these are consistent with the Constitution.

CALS also often uses film as a tool to advocate for human rights. At the Marikana Commission of Inquiry (the Farlam Commission), it represented the SAHRC and submitted as evidence a video of women from the Marikana community talking about their lives in Marikana. This narrative, particularly inasmuch as it examined how the women’s constitutional rights are violated in the mining community, raised issues the Commission had not sought to investigate.

Like many organisations, CALS uses media platforms to encourage discourse on constitutional and human rights. Because the media are a powerful tool in narrating events and influencing public opinion, it is essential that civil society engage with media houses to ensure not only that accurate information is reported but that the public understands what the law says and how it affects them: the public cannot exercise its constitutional rights if it does not know they exist in the first place.

Civil society is stronger and more effective in its advocacy projects when people come together, form coalitions and partnerships domestically, regionally and internationally. Recognising this, CALS is a member of the CSN network, the Annual Public Interest Law Gathering, Know Your Constitution Campaign, and Judges Matter Coalition. In addition to its research and advocacy, CALS represents clients at court (at lower and higher level) and quasi-judicial bodies, and is often an institutional client in proceedings.

### ***2.3.2 Strategic litigation***

The Preamble to the Constitution, which provides that the Constitution has been adopted so as to, inter alia, lay the foundation for a democratic and open society that will improve the quality of life of all citizens, taken together with the Bill of Rights, is indicative of the Constitution’s protection of socio-economic rights.<sup>30</sup> In the case of *President of the Republic*

30 C Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice*, Pretoria, Pretoria University Law Press (2009), pp 2-3.

of *South Africa v Modderklip Boerdery*,<sup>31</sup> the Supreme Court of Appeal heard a matter in which a private company that owned a farm was unable to execute an order for eviction against unlawful occupiers. In remedying this, the Court held that courts have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.<sup>32</sup>

There have been a number of court victories in enforcing and realising constitutional rights, particularly socio-economic rights. An example is the landmark *Blue Moonlight*<sup>33</sup> judgment. In this case CALS represented residents who were opposing an eviction application by a private owner. The residents joined the City of Johannesburg to the proceedings and sought an order compelling the City to provide them with temporary alternative accommodation.<sup>34</sup> The South Gauteng High Court ruled in the residents' favour, as did the Supreme Court of Appeal following an appeal by the City.<sup>35</sup> On appeal, the Constitutional Court held that a policy that failed to take into account evictions by private owners was unconstitutional and that the City must provide the residents with temporary accommodation near the property.<sup>36</sup>

In practice, however, private owners are still applying to courts for evictions without enjoining the City to provide alternative accommodation should residents be rendered homeless. In some of the many cases in which CALS has represented residents facing evictions, some courts have granted eviction orders even when residents will be rendered homeless. Sometimes, even where a judge correctly grants a ruling in line with the *Blue Moonlight* verdict, the City often does not comply fully, if at all, with such orders.

After the *Blue Moonlight* judgment was handed down, the City failed to engage meaningfully and timeously with the residents on options for accommodation.<sup>37</sup> This lack of engagement is still evident in some recent cases. In a number of matters where CALS represented residents facing eviction, the City has either opposed being joined in eviction proceedings, or avoided engaging with the residents on alternative accommodation, even after a court order directed them to do so.

Three weeks after the Court had ordered the eviction in *Blue Moonlight*, and with no engagement from the City on alternative accommodation, the residents applied to the Constitutional Court for an urgent order that the

31 *President of the Republic of South Africa v Modderklip Boerdery* 2004 (6) SA 40 (SCA).

32 *Ibid*, paragraph 42.

33 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 3.

34 *Ibid*.

35 *Ibid*.

36 *Ibid*.

37 J Dugard, "Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing", CCR (2014), p. 296.

City engage with them to give effect to the judgment, but the application was dismissed.<sup>38</sup> The Constitutional Court held that the court was not the appropriate forum to enforce or vary an order given by a lower court.<sup>39</sup> The residents therefore went back to the High Court seeking the same relief. The High Court, in granting the application, ordered the City to provide alternative accommodation days before the new execution date of the eviction, a date which the court had suspended.<sup>40</sup> In addition, it ordered that the City report back to it on its progress and arrange a site visit for all parties involved.<sup>41</sup>

Eventually, the residents were provided with alternative accommodation, a shelter by the Metro Evangelical Services. However, the residents occupying the shelter challenged the constitutionality of the rules imposed on them by the shelter and went to the High Court seeking to have those rules judged unconstitutional. The first rule they challenged was related to gender segregation: the shelter separated females from males and thus separated families. The second was a lock-out rule that does not allow the residents access to the shelter during the day.

The High Court ruled in the residents' favour and held that the rules are an unjustifiable infringement of the applicants' constitutional rights to dignity, freedom and security of person as well as privacy enshrined in sections 10, 12 and 14 of the Constitution.<sup>42</sup> The City, however, lodged an appeal which the Supreme Court of Appeal (SCA) upheld, setting aside the High Court's order.<sup>43</sup> The SCA held that the rules in the shelter offered by the City, in an attempt to accommodate the occupiers in an emergency situation, are not in themselves unreasonable.<sup>44</sup> At the time of this writing, the residents, now represented by SERI, had filed an application to appeal the decision of the SCA and were seeking an order from the Constitutional Court that the rules be declared unconstitutional.

Like civil society organisations, Chapter 9 institutions are pivotal in implementing the Constitution and holding actors accountable for violations of constitutional provisions. Although they also differ from civil society organisations, their work overlaps with the latter and the two sectors have often formed partnerships. At times civil society organisation have acted as complainants to Chapter 9 institutions for violations of rights

38 *Ibid.*

39 *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* (CCT 12/12) [2012] ZACC 9.

40 Unreported order; *Occupiers of Saratoga Avenue and Others v City of Johannesburg Metropolitan Municipality and Others*, South Gauteng High Court case number 2012/13253.

41 *Ibid.*

42 *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* (39502/12) [2014]. ZAGPJHC 211.

43 *City of Johannesburg v Dladla & Others* (403/15) [2016] ZASCA 66.

44 *City of Johannesburg v Dladla & Others* (403/15) [2016] ZASCA 66 at 24.



in communities where they work, and in turn Chapter 9 institutions have acted as clients of legal NGOs in matters of public importance.

The next section considers the role of Chapter 9 institutions and their relationship with civil society organisations. The focus is on the SAHRC and the Office of the Public Protector.

### 3 The implementation role of Chapter 9 institutions

In Chapter 9 of the Constitution, the drafters listed a number of institutions whose express purpose is to support and strengthen South African democracy. These include the Public Protector, the SAHRC, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Auditor General and the Electoral Commission.<sup>45</sup>

Chapter 9 institutions are mandated to perform their tasks independently and impartially, which is essential as many of the complaints they receive from the public relate to the government. Their independence helps ensure that they are free of political interference.<sup>46</sup>

Section 181(2) of the Constitution states that Chapter 9 institutions are independent and subject only to the Constitution and the law, endowed with the responsibility to implement their mandates impartially without fear, favour or prejudice. To ensure some form of accountability, the Constitution stipulates that these institutions are accountable to the National Assembly and must submit reports annually on their performance.<sup>47</sup> Their powers are spelt out in Chapter 9.<sup>48</sup>

According to section 185, the functions of the Commission for the Promotion and the Protection of Cultural, Religious and Linguistic Communities are to

- (a) promote respect for the rights of cultural, religious and linguistic communities;
- (b) promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

45 Chapter 9 of the Constitution of the Republic of South Africa, 1996.

46 Southern African Catholic Bishop's conference, Parliamentary Liaison Office Briefing Paper 287, April 2012.

47 Section 181(5) of the Constitution.

48 The functions of the various chapter nine institutions are provided in sections 182 to 191 of the Constitution.

Under section 187 the Commission for Gender Equality is required, inter alia, to promote respect for gender equality and the protection, development and attainment of gender equality. It has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

Section 188 deals with the office of the Auditor-General. The Auditor-General must audit and report on the accounts, financial statements and financial management of

- (a) all national and provincial state departments and administrations;
- (b) all municipalities; and
- (c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

The Auditor-General may also audit and report on the accounts, financial statements and financial management of

- (a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or
- (b) any institution that is authorised in terms of any law to receive money for a public purpose.

Another Chapter 9 institution is the Electoral Commission. Under section 190 of the Constitution its functions are to

- (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
- (b) ensure that those elections are free and fair; and
- (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

The SAHRC and the Office of the Public Protector will be used as case studies on the role of the Chapter 9 institutions in implementing the Constitution.

### **3.1 The South African Human Rights Commission**

The powers of the SAHRC are spelt out in section 184(1) of the Constitution. According to these provisions, the SAHRC must

- (a) promote respect for human rights and culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.

Section 184(2) provides that the SAHRC has the powers to

- (a) investigate and report on the observance of human rights;
- (b) take steps to secure appropriate redress where human rights have been violated;
- (c) carry out research; and
- (d) educate.

Additional powers are conferred on the SAHRC by the Human Rights Commission Act 54 of 1994, as amended by the Human Rights Commission Act 40 of 2013. In fact, the 2013 Act considerably expands the powers of the SAHRC beyond the scope of the 1994 Act.

### ***3.1.1 The SAHRC's role in strengthening democracy***

The Human Rights Commission Act empowers the SAHRC to make regulations for dealing with its procedures. One such regulation is the Complaints Handling Procedure, which the SAHRC has used to deal with complaints lodged by residents of South Africa. Over the years, the SAHRC has investigated complaints relating to lack of access to basic services such as water, housing, sanitation and health, and to police brutality, racism and general forms of discrimination.<sup>49</sup>

When individuals or communities submit complaints of human rights violations to the SAHRC, the Commission investigates and issues findings with recommendations about steps to be taken pertaining to the violation. Some of the SAHRC's leading investigations in the field of socio-economic rights were the so-called open-toilet cases. These complaints were lodged with the Commission in its Free State and Western Cape provincial offices. In both cases the provincial government had erected open communal toilets, or what came to be known pejoratively as "loos with a view".

Before stating the importance of the Commission's findings, the sections below summarise how the cases were brought before the Commission for investigation.

### ***3.1.2 The Makhaza complaint: Western Cape Province***

A complaint was lodged with the SAHRC by the African National Congress Youth League (ANCYL) in the Dullah Omar region in the Western Cape. It was lodged after the City of Cape Town erected open-flush toilets in the impoverished community of Makhaza in Khayelitsha.

49 Website of the SAHRC, <http://www.sahrc.org.za> (accessed 21 October 2016).

According to the SAHRC's finding, in 2005 the City of Cape Town decided to develop an informal settlement in Khayelitsha known as Silvertown in terms of the Upgrading of Informal Settlements Programme (UISP).<sup>50</sup> However, the Silvertown area was not large enough to accommodate the members of the community who had to relocate, pending the development. The City decided to relocate some of the residents of Silvertown to two underdeveloped areas, namely Makhaza and Town Two, during the development programme. It was then decided to include these two receiving areas in the development planned for Silvertown, and as part of the planned upgrade the City began installing communal toilets in the three areas in 2007.

According to testimony submitted in court, "These communal toilets consisted of a concrete slab on which the toilet was built with the cistern and water pipes and this was enclosed with a pre-cast concrete structure."<sup>51</sup> The City built 63 communal toilets for the residents of Makhaza, with one toilet per five households.<sup>52</sup> In reaction, the community expressed its dissatisfaction because the toilets were unhygienic and, since they were shared, it was difficult for people to tell who had last used the toilets and when. The community demanded a toilet per household, and as a result the municipality stopped the construction of the communal toilets.<sup>53</sup>

In 2007 the City met with the community to discuss the issues. Four years later, the City installed 225 unenclosed toilets in Makhaza. At this point,

[t]he unenclosed toilets consisted of a concrete slab for the toilet to stand on with the cistern and a water pipe that was not affixed to any walls. The toilets were completely open and in full view of every person in the community, and mostly situated close to the road.<sup>54</sup>

Residents would cover themselves with blankets when they used the toilets, as they were in full view of the public.<sup>55</sup> Despite the risk these toilets posed to people's health and safety, the City made no effort to engage the community to evaluate their appropriateness.

50 *African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza Residents v City of Cape Town*, South African Human Rights Commission Report: WC/2010/0029.

51 *Beja and Others v Premier of the Western Cape and Others* 2011 (3) All SA 401 (WC).

52 *Beja and Others v Premier of the Western Cape and Others* 2011 (3) All SA 401 (WC), paragraph 17.

53 *Ibid.*

54 *Ibid.*, paragraph 19.

55 *Ibid.*

In April 2010, a 76-year-old resident, Mrs Beja, used one of the unenclosed toilets and on leaving it was attacked, sustaining injuries that required medical treatment.<sup>56</sup> At that time, a number of residents had tried to cover some of the toilets with whatever mixed materials they could find, as they could not afford proper enclosures. In 2010 a total of 225 of the unenclosed toilets built by the City were enclosed by the residents, but 55 toilets remained unenclosed.<sup>57</sup>

In January 2010, after consulting with the residents of Makhaza, the ANCYL lodged a complaint with the SAHRC on behalf of the residents who were forced to use the 55 unenclosed toilets.<sup>58</sup> The Youth League alleged that the City has violated the residents' rights to human dignity and privacy, as set out in sections 10 and 14 of the Constitution, respectively.

After receiving the complaint, the SAHRC began its investigation, conducting an inspection in Makhaza.<sup>59</sup> It scheduled a mediation session between the Youth League and the City to resolve the situation. However, the mediation broke down, and when it became clear the breakdown was irreversible, the Chairperson of the SAHRC decided to make a finding on the matter. The City supported the decision of the SAHRC to make a finding. As a result of the wide media coverage of the issue, though, the City tried to enclose the 55 unenclosed toilets with corrugated sheets. Twenty-six toilets were enclosed, but the metal closures were immediately removed by angry people in Makhaza.<sup>60</sup>

On 24 May 2010, after the City had attempted to enclose the toilets but been forced to stop because the toilets had been vandalised, the Mayor ordered that the toilets be removed entirely from the area. The removal forced residents to resort to communal toilets, which at that point were in an appalling condition.

On 4 June 2010, the SAHRC found that even though the City's decision to provide toilets for the residents in each household was reasonable and commendable, its implementation was not.<sup>61</sup> It noted that, given that residents had had to use the unenclosed toilets for almost three years, the City did not take into account the privacy, dignity and safety of vulnerable groups, including girls and women and those who could not afford to enclose the toilets themselves.<sup>62</sup>

56 *Ibid*, paragraph 23.

57 *Ibid*, paragraph 20.

58 *African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza Residents v City of Cape Town*, South African Human Rights Commission Report: WC/2010/0029.

59 *Ibid*, p. 3.

60 *Ibid*, p. 3, paragraph 3.7.

61 *Ibid*, p. 7, paragraph 6.2.1.

62 *Ibid*.

The SAHRC noted, moreover, that proper consultation is crucial when dealing with vulnerable groups, and that in this case it was clear there had been none.<sup>63</sup> Because there was no proper channel for sharing information with the residents, the one meeting which the City had relied upon for the consultation process was inadequate.<sup>64</sup> The SAHRC concluded that the residents' rights to dignity and privacy had indeed been violated.

When the City appealed against the SAHRC's decision in an internal appeal process, the residents lodged an application with the High Court (the *Beja* case).<sup>65</sup> In their application, the residents asked for a declaratory order to the effect that by providing open toilets the City had violated the residents' constitutional rights to equality, dignity and privacy, and the security of one's person.<sup>66</sup> They also asked the Court to order the City to re-install all the toilets that had been removed, but with adequate enclosures.

The Court found that the City had violated the community's fundamental constitutional rights.<sup>67</sup> Furthermore, it found that although the City alleged it had reached an agreement with the community prior to erecting the toilets, the agreement was not valid as it was unclear whether it existed or not.<sup>68</sup> The Court ordered the City to enclose all of the 1316 toilets that were part of the Silvertown project.<sup>69</sup>

### **3.1.3 The Rammulotsi complaint: Free State Province<sup>70</sup>**

In September 2010, a complaint was lodged with the SAHRC by the executive director of the Democratic Alliance (DA) on behalf of the residents of Rammulotsi Township, Viljoenskroon, in the Free State.<sup>71</sup>

The facts of the Free State complaint are similar to those of the one above lodged in Cape Town. The complaint was lodged after the municipality of Rammulotsi erected unenclosed flush toilets in each house in the area. The complainant argued that the SAHRC should make a finding in the light of the *Beja* judgment by the Cape Town High Court, which was based on the Cape Town sanitation complaint initially lodged with the SAHRC. The complainant asked the SAHRC to declare that the

63 *Ibid.*

64 Para 6.2.2.

65 *Beja v the Premier of Western Cape* supra at 47.

66 Paragraph 71.

67 Paragraph 192.

68 *Ibid.*

69 *Ibid.*

70 *Van Onselen Gareth obo Democratic Alliance v Moqhaka local Municipality*: South African Human Rights Commission FS/2010/0231.

71 Paragraph 2.1.

Rammulotsi municipality had violated the rights of the community to dignity, privacy and a clean environment.<sup>72</sup>

The SAHRC found that in planning and implementing a project like the one the municipality undertook in this case, community participation was necessary from the planning through to the implementation phase.<sup>73</sup> The SAHRC further held that the municipality would have avoided wasteful expenditure if it had engaged meaningfully with the community in the process, as that would have enabled them to understand the community's needs.<sup>74</sup> The SAHRC found that in the absence of such consultation, the municipality had failed to follow the legal framework in conducting the project and had violated the community's rights to dignity, privacy and a clean environment.<sup>75</sup>

These investigations show the importance of the role of the SAHRC in advancing constitutional rights. The Commission has also partnered with civil society organisations to promote and strengthen democracy. In 2012 President Jacob Zuma established a commission to investigate the massacre of miners at Marikana.<sup>76</sup> Led by a retired judge, Ian Farlam, the commission became known as the Farlam Commission. The SAHRC instructed CALS to represent it in this body. There, CALS provided valuable evidence of excessive use of force by the police at Marikana. The SAHRC engaged a specialist from Ireland, Gary White, who testified as to why the South African Police Services officials deployed in Marikana were too many for the purposes of public order policing.

Additionally, the SAHRC has published numerous pamphlets on human rights issues, in keeping with its constitutional obligations to educate people in the country about their rights. On its website, the Commission has publications on similar issues, including community protests, the prevention of torture, and current bills such as the Expropriation Bill.

The SAHRC also periodically holds hearings with communities on various human rights issues. Recent hearings have focused on water, access to housing, land restitution, and safety and security on farms. The findings of these hearings are then made available to the broader public in the form of a report.

Through these engagements, the SAHRC has been active in ensuring the implementation of the Constitution and in guarding the democratic

72 Paragraph 2.2.

73 Paragraph 10.3.

74 *Ibid.*

75 Paragraph 14.1.4.

76 Website of the Marikana Commission of Inquiry, <http://www.marikanacomm.org.za> (accessed 21 October 2016).

space. It has, however, encountered several challenges to fulfilling its mandate, which this chapter examines further below.

### **3.2 The Public Protector**

As mentioned previously, the Office of the Public Protector is one of the six Chapter 9 institutions established to strengthen South Africa's democracy in terms of section 181 of the Constitution.<sup>77</sup> According to section 182, the powers of the Public Protector are

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- (b) to report on that conduct; and
- (c) to take appropriate remedial action.

One important limitation of its powers is that it cannot investigate court decisions.<sup>78</sup> However, the Public Protector also has additional powers in terms of the Public Protector Act 23 of 1994, which include:<sup>79</sup>

- (a) investigating maladministration in connection with the affairs of any institution in which the State is the majority shareholder or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act of 1999;
- (b) investigating abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity where the State is a majority shareholder;
- (c) investigating improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity in which the state is a majority shareholder or controlling shareholder; or
- (d) investigating an act or omission by a person in the employ of an institution or entity in which the state is a majority shareholder or the controlling shareholder.

Over the last few years, there has been debate about the Office of the Public Protector and the status of its reports and recommendations. This was recently settled in the famous Nkandla saga. The Department of Public Works carried out significant improvements on President Zuma's personal residence in Nkandla that cost more than R246 million. An investigation carried out by the Public Protector at the request of members of the public

77 The Constitution of South Africa, 1996.

78 Section 182(4) of the Constitution.

79 Section 6(5) of the Public Protector Act.



and the official opposition party, the DA, concluded that some of the improvements were not related to ensuring the security of the property and that Zuma and his family had benefited unduly from them.<sup>80</sup> It found that the President had violated the ministerial handbook which guides such upgrades and was liable to repay certain of the costs.

When the Public Protector's report was submitted to Parliament, an ad hoc committee was set up to study it and make recommendations to the House. Subsequently, Parliament adopted the findings of the report, which exonerated Zuma from paying for non-security features at Nkandla, despite strong objections from opposition parties.<sup>81</sup> One of the opposition parties, the Economic Freedom Front (EFF), which was later joined by the DA and the Public Protector, filed an action before the Constitutional Court arguing that "the National Assembly had failed to fulfil its obligations to hold the executive accountable"<sup>82</sup> and that the President had violated the Constitution in not complying with the Public Protector's recommendations.

In *Economic Freedom Fighters v Speaker of the National Assembly and Others* and *Democratic Alliance v Speaker of the National Assembly and Others*,<sup>83</sup> the Constitutional Court held that the President's failure to comply with the remedial action taken against him by the Public Protector was a violation of his duty under section 181(3) of the Constitution to assist and protect the office of the Public Protector to maintain its independence, impartiality, dignity and effectiveness.<sup>84</sup> It also held that the failure of the National Assembly to hold the President accountable and ensure that he complied with the remedial action taken against him similarly violated their constitutional duty under section 181(3), as well as their general duty to scrutinise and oversee executive action.<sup>85</sup>

Although the *EFF* case dealt with the powers only of the Public Protector, the reasoning of the Constitutional Court with respect to the effect of the recommendations made by the Public Protector applies to similar recommendations by other Chapter 9 institutions. This case illustrates some of the challenges that civil society organisations and

80 The non-security-related upgrades for which President Zuma was asked to pay included a visitor's centre, a cattle kraal, a chicken run, a large swimming pool, a culvert and an amphitheatre.

81 <http://www.news24.com/SouthAfrica/News/Parliament-adopts-Nkandla-report-20150818> (accessed April 2016).

82 <http://ewn.co.za/2015/08/07/EFF-puts-pressure-on-ConCourt-over-Nkandla> (accessed April 2016). With its 249 members in a parliament of 400, the ANC used a variety of tactics to delay and frustrate the process of holding the president accountable. It was therefore no surprise when the party rejected the Public Protector's report.

83 [2016] ZACC 11 of 31 May 2016.

84 *Ibid*, paragraph 103.

85 *Ibid*, paras. 104-105.

Chapter 9 institutions face in promoting respect for and compliance with the Constitution.

## **4 Challenges to constitutional implementation**

### **4.1 Challenges facing civil society organisations**

Civil society organisations encounter many difficulties in doing their work. One is their reliance on charitable funding. This funding, especially for grassroots and community organisations, is often insufficient to enable them to carry out all their activities. Moreover, their actions, whether it be campaigning or litigation, can provoke hostility, in some cases to such an extent that activists' lives are threatened. The government is often slow to respond to demands, and in most cases responds only when there is a threat of litigation. Litigation itself has a number of disadvantages as a strategic recourse.

As the *Blue Moonlight* case shows, litigating a matter is a long process. It is not just a question of finding the funds to be able go to court: sometimes civil society is faced with a conservative judiciary reluctant to develop common law in line with the new transformative constitutional imperatives. Even when litigation ends in a favourable judgment, there can be problems in seeing it applied. State parties seldom comply fully with court orders, or do so only after long delays that aggravate the hardship of the party in whose favour the judgment was made.

### **4.2 Challenges facing Chapter 9 institutions**

Chapter 9 institutions face three main challenges limiting their effectiveness. Firstly, although they have offices in each province, it is often difficult for people who live far away from city centres to access them. Furthermore, many citizens have little or no knowledge of the existence and purpose of these institutions or how to access them.<sup>86</sup> This is especially true of the poorest and most vulnerable groups in the country.

Secondly, the institutions tend to have significant budgetary constraints. There has been talk of certain Chapter 9 institutions receiving more funding than others; on the other hand, some have been criticised for being injudicious in how they spend their budgets.<sup>87</sup>

Lastly, the status of their reports and recommendations was for a long while uncertain. As a result of the clear position taken by the

86 Human Science Research Council, *Final Report: Assessment of the Relationship between Chapter 9 Institutions and Civil Society* (2007).

87 *Ibid.*

Constitutional Court in the *EFF* case, the position now is fairly settled. Nevertheless, it remains likely that the government and other para-public institutions will continue to use tax-payers' money to delay compliance with court decisions until the point is reached at which they are forced to do so.

## 5 Conclusion

Civil society organisations in South Africa, as grassroots movements or NGOs, are of varying size and implement the Constitution in different ways and with different focus areas. One organisation, the TAC, succeeded in getting government to provide antiretroviral drugs to AIDS patients, thereby enabling many people to enjoy their constitutional right to health. The Centre for Child Law, through its *amicus curiae* interventions, has assisted the courts in developing rules which have facilitated the implementation of the constitutional rights of children. Equal Education, through its activism and court applications, succeeded in compelling the Minister of Education to publish binding norms and standards on school infrastructure, thus enabling learners to exercise their constitutional right to basic education.

Academic research consisting of detailed analysis and practical recommendations on constitutional rights violations will continue to be a useful tool in ensuring the implementation of the Constitution. Through organisations like CALS sharing legal knowledge with clients, communities, law students and the public, people are made aware of their rights, how to realise them and how to hold government accountable for conduct inconsistent with the Constitution.

Civil society organisations and Chapter 9 institutions have similar objectives and often collaborate in implementing the provisions of the Constitution. The SAHRC has the power to investigate human rights violations, educate the public on human rights and secure appropriate redress. It has investigated complaints, made findings and issued orders in respect of a range of rights. It also holds hearings with various stakeholders on human rights and constitutional law issues. The Office of the Public Protector has been instrumental in ensuring that state organs comply with the provisions of the Constitution, most notably in the Nkandla judgement, where the Constitutional Court clarified the binding effect of the Public Protector's powers.

However, Chapter 9 institutions and civil society organisations face challenges and limitations, such as budgetary constraints. Activists and practitioners often encounter hostility from state organs. Litigation is costly and lengthy, and even where there is judicial success, state organs rarely comply fully with court orders. A further problem for these

institutions and organisations is their accessibility to the poor and the limited public awareness of their existence.

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# WOMEN'S RIGHTS AND GENDER EQUALITY IN THE NEW ZIMBABWEAN CONSTITUTION: THE ROLE OF CIVIL SOCIETY IN IMPLEMENTATION AND COMPLIANCE

*Makanatsa Makonese*

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## 1 Introduction

Zimbabwe's first post-independence Constitution was adopted in 1980. Nineteen amendments were made to it before a new constitution was adopted on 22 May 2013.<sup>1</sup> The latter was borne out of protracted political and economic challenges and their resultant negotiations, led by the Southern African Development Community (SADC) and facilitated by the former President of South Africa, Thabo Mbeki.

While the priority was to address these same challenges, the way in which this constitution was developed allowed for the creation of a modern, holistic text engaging with broader issues. The Constitution emerged from a widely participatory process, one led by a Parliamentary Select Committee with the assistance of technical committees and experts. The Committee held nationwide public consultations, and the draft Constitution was put to a national referendum<sup>2</sup> before its adoption.

However, unlike jurisdictions such as Kenya where the constitution provides for a commission to implement it, Zimbabwe had no provision of this kind. Implementing the Constitution and aligning it with existing laws was left to an inter-ministerial task force comprised of legal advisers from government ministries.<sup>3</sup> How effective this was as an approach to managing constitutional implementation remains to be seen.

1 Constitution of Zimbabwe Amendment (No. 20) Act 2013.

2 The referendum was held on 16 and 17 March 2013, and the draft constitution approved by 94.5 per cent of voters.

3 See K Bwititi, "Alignment of laws on course", *The Sunday Mail*, 5 July 2015.

## 2 Protection of women's rights in the 1980 Constitution

The 1980 Constitution of Zimbabwe did not prohibit discrimination on the grounds of sex and gender. It was only many years later, through Constitutional Amendment No. 14 (in 1996), that this prohibition was included in the text.<sup>4</sup> The 1980 Constitution had failed to address issues of gender and women's rights because the focus of concern was instead on political issues, the land question and the protection of white interests in the new Zimbabwe. That so few women were involved in negotiating the Constitution in 1979 shows how little importance was attached to women's rights and gender equality at that point in Zimbabwe's history. As Ndulo observes:

The need to deal with gender inequality and adopt measures to ensure its elimination in Zimbabwean society did not receive as much attention as it deserved [during the 1999 constitution-making process]. This was true of the 1980 Lancaster House constitutional conference as well, at which there were only two women amongst the sixty-five delegates.<sup>5</sup>

When constitutions fail to recognise women's rights and gender equality, this is often so because women are under-represented in the constitution-making process and do not participate on an equal basis with men. Key constitutional issues on women's rights and gender equality are then given secondary priority, leading to constitutions and laws that mainly address men's problems. Political considerations such as determining the extent of executive power, power-sharing agreements in the event of disputed elections, and entrenching masculine privilege take centre stage in the process.

Like many other post-independence constitutions in Africa, the 1980 Zimbabwean Constitution was caught up in debates about legal pluralism and the need to maintain the dual system of law the country had adopted under colonialism. The focus of constitutional provisions was hence on preserving customary law and its application to personal matters relating to the rights and lives of Africans. Section 23(a) and (b) of the 1980 Constitution therefore provided, among other things, that

[n]othing contained in any law shall be held to be in contravention of subsection (1) (a) [the non-discrimination provision] to the extent that the law in question relates to any of the following matters – (a) matters of personal law; (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where

4 L Madhuku, *Gender Equality in Employment: The Legal Framework in the Case of Zimbabwe*, Harare, ILO/SAMAT (2001), p. 6.

5 M Ndulo, "Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order", *Framing the State in Times of Transition* (undated), pp. 176-203.



such persons have consented to the application of African customary law in that case.

Such a provision dispelled the euphoria that followed the war of liberation, during which women fought side by side with men and were promised equality when the country attained independence. The government made efforts at the legislative level to grant equal rights to men and women, but these were thwarted by the constitutional provision above in situations where customary law was applicable.

The Legal Age of Majority Act of 1982 was one such effort, but the tension between this Act and the Constitution was made explicit in the case of *Magaya v Magaya*, when the Supreme Court ruled out the possibility of women enjoying equality with men under customary law. In his concurring judgment, Mucchechere JA said:

On the intention of the Legislature in passing the Majority Act, my view is that although it wanted to emancipate women by giving them *locus standi* and ‘competencies’ in all matters generally, especially under common law, it was never contemplated that the courts would interpret the Majority Act so widely that it would give women additional rights which interfered with and distorted some aspects of customary law.<sup>6</sup>

The Court pointed out that the Constitution is the supreme law of the country and therefore if it allowed for discrimination on the basis of customary law, a mere statute could not correct matters. This form of discrimination was thus permissible and could not be challenged without changing the constitutional imperatives.

Nyamu-Musembi argues that the existence of legal pluralism or multiple systems of law is not a problem in itself. The problems arise, however, when such systems are not subject to legal or constitutional scrutiny, as provided by the “exemption clauses” in various sub-Saharan Constitutions. “Through the constitutional exemption of personal law from scrutiny,” Nyamu-Musembi writes, “States have availed themselves of a ready excuse for doing nothing to redress the discriminatory impacts of the application of religious and customary laws.”<sup>7</sup> This was the case with Zimbabwe’s independence Constitution, and similar provisions also remain in force in several other constitutions in southern Africa.<sup>8</sup>

6 *Magaya v Magaya*, 1999 (1) ZLR 100 (SC), p. 112

7 C Nyamu-Musembi, “Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol” in A Hellum & HS Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law*, Cambridge, Cambridge University Press (2013), pp. 183-213.

8 For example in Lesotho, Botswana and Swaziland.

### **3 Protection of women's rights in the 2013 Constitution**

The 2013 Zimbabwean Constitution introduced a number of changes regarding the rights of women. It contained more provisions than in the previous Constitution to protect women's rights, and in many instances this was the first time that particular issues affecting women had been considered and then included in Zimbabwe's supreme law. A few of the provisions merit further analysis, which is given in the sections below.

#### **3.1 Aligning customary law with the Constitution**

Under Zimbabwean Law, the Constitution is the supreme law of the country. As Madhuku notes,

Under Zimbabwean law, there is one piece of legislation that is supreme and overrides all other laws to the contrary. This is the Constitution of Zimbabwe. The Constitution is itself an Act of Parliament but it is superior to all other Acts of Parliament.<sup>9</sup>

This meant that, with the entry into force of the new Constitution, all laws that infringed on women's rights became invalid to the extent of their inconsistency with the Constitution. However, hundreds of other laws also became incompatible with it. In May 2014, the government announced that more than 400 such laws had to be realigned with the Constitution – a mammoth task.<sup>10</sup> That was almost a year after the adoption of the new Constitution, at which point it was reported that only two amendment bills had found their way to Parliament. At this rate, it would take the government 200 years to complete the legislative realignment!

What the situation highlights is that expediting such processes requires political will, which, unfortunately, has been lacking. One writer explains this lack as follows:

In most African countries, it is the politicians in power who are at the forefront when it comes to supporting violations of human rights. They are not in a position, therefore, to support any initiatives to sensitise people about their rights [or enforce such rights]. They seem able to find a multitude of ways to block [this] ... Thus, politicians are in most cases the spoilers of many initiatives to promote and protect human rights on the continent.<sup>11</sup>

9 L Madhuku, *An Introduction to Zimbabwean Law*, Harare, Weaver Place and Friedrich-Ebert-Stiftung (FES) (2010), p. 14.

10 See F Munyoro, "Alignment of laws needs political will", *The Herald*, 26 May 2014.

11 CM Peter, *Human Rights Commissions in Africa – Lessons and Challenges* (undated).

To political opposition parties in Zimbabwe, the government's reluctance seems to arise from the fear of aligning electoral and security sector laws with the Constitution. In a bid to force the government to do so, opposition parties have formed a coalition called the National Electoral Reform Agenda (NERA), which has been at the forefront of organising protests.<sup>12</sup> The reality is that political considerations have impacted on all the laws requiring alignment, regardless of their perceived implications. This includes the laws that seek to promote women's rights and gender equality in the country.

The incompatibility between the old laws and the new Constitution does not, however, preclude citizens from enjoying the rights enshrined in the Constitution. In the first place, the problem instead is that it makes the implementation of the Constitution, and the enjoyment of rights, that much more difficult; this is usually easier if the enabling Acts of Parliament are consistent with the Constitution, as implementers will otherwise use the laws to insist on the old way of doing things and so deny citizens their rights in the process. Secondly, an enabling Act is a legal instrument for the implementation of the Constitution. Thirdly, misalignment between the Constitution and the laws can lead to constitutional challenges when citizens try to enforce their rights against intransigent government bureaucrats who insist on cleaving to the old order. This clogs the justice delivery system and restricts citizens' ability to access justice.

The realignment project therefore must be made a government priority so as to ensure that a framework for the implementation of the Constitution is in place and citizens can enjoy their constitutional rights.

In terms of customary law and the rights of women, the new Constitution states that “[a]ll laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of that infringement”.<sup>13</sup> This means that existing legislation on customary law which is not consistent with the provisions of the Constitution is invalid to the extent of the inconsistency. Aligning laws with the Constitution is thus crucial for removing any lingering ambiguities that can undermine the rights of women under customary law.

### **3.2 Gender equality**

The new Constitution has extensive provisions dealing with gender equality. As noted above, this is the first time in the country's history that the issue has been addressed comprehensively in the national constitution. Chapter 2 of the Constitution sets out the national objectives with the aim of guiding the state and all institutions and agencies of government “at

12 See <http://www.nerazimbabwe.org>.

13 Section 80(3).

every level in formulating and implementing laws".<sup>14</sup> Attaining these objectives through the government's operations is envisaged as leading to "[t]he establishment, enhancement, and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives".<sup>15</sup> The national objectives are thus guiding principles, which, if materialised through full and proper implementation, will result in prosperity and the enjoyment of human and constitutional rights.

In total, there are 26 such objectives in the Constitution, one of which is "Gender Balance". Section 17 provides that "the State must promote full gender balance in Zimbabwean society", with a focus on ensuring the following:

- Women fully participate in Zimbabwean society on the basis of equality with men.
- Government takes measures, including legislative ones to ensure that:
  - (i) both genders are equally represented in all institutions and agencies of government at every level; and that
  - (ii) women constitute at least half the membership of commissions and other elective and appointed governmental bodies.
- State and State Institutions take measures to ensure access to resources by women, including land on the basis of equality with men; and finally that
- the State takes positive measures to remedy gender discrimination caused by past practices and policies.

A governance approach that implements these principles will go a long way to ensuring that women are treated on an equal basis with men. It will also help to ensure that women no longer suffer from the prejudices and stereotypes that undermine their status and infringe their rights. The inclusion of women in national institutions plays an important role in their advancement as leaders and in generating engagement with issues affecting women. As the National Democratic Institute (NDI) states, "Women are highly committed to promoting national and local policies that address the socio-economic and political challenges facing women, children and disadvantaged groups."<sup>16</sup>

Such inclusivity in national institutions is thus a key element in the broader implementation of women's rights as provided in Constitutions and other pieces of legislation. Further to this, the government has made efforts to ensure gender parity in the appointment of commissioners who

14 Section 8(1).

15 *Ibid.*

16 <https://www.ndi.org/gender-women-democracy>.

sit in the independent commissions established under the Constitution to support democracy.<sup>17</sup> The new Constitution also provides for affirmative action in the appointment of women parliamentarians for the life of the first two parliaments after its promulgation.<sup>18</sup>

However, there have been no similar attempts to include women in Cabinet as ministers. The first Cabinet to be appointed after the promulgation of the 2013 Constitution had only three women out of 26 ministers, three women out of 13 ministers of state, and five women out of 24 deputy ministers.<sup>19</sup> This was indeed a lost opportunity, given that the President was meant to lead by example in appointing a representative Cabinet. In trying to justify this patently gender-skewed Cabinet, the President said,

This time we did proportional representation but there were just not enough women. Women are few in universities. It's no longer necessary to do affirmative action. It's free for all.<sup>20</sup>

The suggestion that there were too few educated women to appoint to Cabinet was not only false but a bad precedent to set in a country that had just promulgated a new constitution aiming to promote women's rights and gender equality.

### 3.3 The Zimbabwe Gender Commission

To promote gender equality and the enjoyment of equal rights by women, the Constitution establishes the Zimbabwe Gender Commission (ZGC).<sup>21</sup> Its functions are<sup>22</sup>

- to monitor issues concerning gender equality and ensure gender equality;
- to investigate possible violations of gender-related rights;
- to receive and consider complaints from the public and take appropriate action;
- to conduct research and make recommendations for legal and practice changes on issues of gender equality and social justice;
- to advise public and private institutions on steps to take to ensure gender equality;

17 These Commissions are: the Zimbabwe Electoral Commission; the Zimbabwe Human Rights Commission; the Zimbabwe Gender Commission; the Zimbabwe Media Commission; and the National Peace and Reconciliation Commission.

18 Section 124(1)(b) of the 2013 Constitution.

19 B Dube & C Dziva, "The Appointment of 2013 Cabinet Ministers in Zimbabwe: A Lost Opportunity for Gender Parity in Decision Making Positions", 5(1) *International Journal of Politics and Good Governance* (2014).

20 See F Zaba & H Ndebele, "Outrage over cabinet gender bias", *The Independent*, 20 September 2016.

21 Section 245.

22 Section 246.

- to recommend prosecution for gender-related rights violations;
- to secure appropriate redress in the event of gender rights violations; and
- to promote gender equality.

The functions of the ZGC are wide and varied. Coupled with the national principle addressing gender balance, these functions provide it with a basis to carry out its mandate effectively. Unfortunately, the enabling Act for the Gender Commission, the Zimbabwe Gender Commission Act, Chapter 10:31, has faced challenges. Human rights activists and researchers believe some of the Act's provisions are *ultra vires* the provisions of the Constitution. One of them requires the Commission to inform the Minister of Women Affairs, Gender and Community Development about its investigations and recommendations before it tables reports before Parliament.<sup>23</sup> This provision goes against the Constitution, which states that independent commissions "are not subject to the direction or control of anyone [and that] they are accountable to Parliament for the efficient performance of their functions".<sup>24</sup> In short, the requirement to inform the Minister before reporting to Parliament opens the door for executive interference in the work of the Commission.

The Research and Advocacy Unit (RAU) in Zimbabwe has pointed out some of these problems.<sup>25</sup> In a report on the Gender Commission, the RAU notes that "[t]he provisions in the Gender Commission Act and the approach of government generally to this Commission have the effect of rendering the Commission more a department within a Ministry rather than an independent body".<sup>26</sup> The report continues:

While it is permissible, and indeed highly desirable that there is an enabling Act for each Commission to establish the parameters of their operations within the confines of the Constitution, section 341 of the Constitution requires that such Acts do not compromise the Commissions' independence or effectiveness. The contrary is clearly the case in regard to this Act, but fully in keeping with Government's insistence on, and inability to wean itself from, highly centralised control. It suggests a conceptual difficulty by government with the very notion of independent Commissions.<sup>27</sup>

Research and legal analyses such as that undertaken by RAU help in identifying loopholes in constitutional implementation by the government. Needless to say, to facilitate the effective implementation of the Constitution and its provisions on gender equality and human rights, the Government of Zimbabwe must allow the Gender Commission to be independent and assist it in delivering on its mandate. Executive

23 Section 7.

24 Section 235(1)(a) and (c).

25 The Research & Advocacy Unit (RAU), "Reluctant Reformers: Legislative Misalignment and the New Constitution", Harare, RAU (2016).

26 *Ibid.*, p. 26

27 *Ibid.*

interference and micromanagement of commissions will only render them ineffective and weaken public confidence in them.

### 3.4 Women's land rights

One of the most enduring inequality issues in Zimbabwe relates to the rights of women to access land on an equal basis with men. From the colonial to the post-independence era, the prevailing notion has been that women have no business in accessing land in their own right as they could always utilise land owned by male members of the family, such as fathers, husbands and uncles. As a result, for many years after independence there was no provision in any Act of Parliament or the Constitution addressing the need for women to access land on the same basis as men. While land was one, if not the major, driving factor behind the country's wars of liberation (the first and second Chimurenga),<sup>28</sup> when independence was finally attained the focus was on addressing racial imbalances in land ownership. Very little attention was paid to gender imbalances in the ownership of this precious national resource. It was only in 2005, 25 years after independence and in response to mounting pressure from women's rights organisations, that the Constitution was amended to recognise the need for non-discrimination on the basis of gender in accessing resettlement land<sup>29</sup> in the country.

However, at that stage the provision for non-discrimination in resettlement land matters did not extend to other types of land such as communal land, urban land or other titled commercial land, thereby failing to address adequately the land needs and land rights of women. The 2013 Constitution, though, gives extensive coverage to the issue of women's rights to access land on the basis of equality with men. Its section 296 establishes the Zimbabwe Land Commission, one of the functions of which is to promote "equitable access to and holding and occupation of agricultural land"<sup>30</sup> and, in particular, "the elimination of all forms of unfair discrimination, particularly gender discrimination".<sup>31</sup> The need for the removal of gender barriers to access to land is therefore a new and important feature of the Constitution.

The Constitution also recognises the need to ensure that women access economic resources, including land, on an equal basis with men.<sup>32</sup>

28 "Chimurenga" is a Shona word for "uprising" (Shona is the main language in Zimbabwe); it was the name given to the first (1896-1897) and the second (1966-1979) wars of liberation in the country.

29 Resettlement land is land acquired by the government from white commercial farmers and allocated to black citizens through the various land reform programmes that have been implemented since independence in 1980, including the controversial developments in the 2000s.

30 Section 297(1)(ii).

31 Section 297(1)(ii)(A).

32 Section 17(1).

Legislation such as the Agricultural Land Settlement (Permit Terms and Conditions) Statutory Instrument 53/2014 has been put in place to support the implementation of the constitutional provisions relating to land acquisition and redistribution. The instrument attempts to protect the rights of women to access land in their own right as well as to have entitlement to land acquired by their husbands by ensuring joint registration. The instrument does, however, have various shortcomings, particularly its failure to protect women's land rights adequately in the event of a divorce in situations where the land is solely registered in the name of the husband.

A major challenge in the implementation of the constitutional provisions on the rights of women to agricultural land is that by the time the Constitution was promulgated, most of the agricultural land under the Fast Track Land Reform Programme (FTLRP) had already been allocated, mostly to men. The Utete Commission<sup>33</sup> Report puts the access levels for women at 18 per cent in the A1 small-scale allocations and 12 per cent in the A2 commercial and large-scale allocations.<sup>34</sup> Given that women make up more than 52 per cent of the population, the access levels are therefore small indeed. Since the bulk of the agricultural land is already in men's hands, how is the government going to achieve the gender equity imperatives on land access as provided for by the Constitution?

A proposal that has been made repeatedly is that the government implement a land audit as provided for in the Constitution to ensure that those that hold land are not holding more than government policy allows.<sup>35</sup> Section 297 of the Constitution gives the Land Commission the mandate to undertake periodic agricultural land audits and advise the government on "the enforcement of any law restricting the amount of agricultural land that may be held by any person or household".<sup>36</sup> The government, however, has been reluctant to implement the land audit provisions, meaning that existing holders of land will continue to hold onto it and those who have not accessed land under the country's land reform programme, the majority of whom are women, will continue to suffer from lack of access to land.

The government's reluctance, then, has fuelled allegations by civil society and researchers that senior ZANU-PF and government officials are

33 The Commission was set up by the President of Zimbabwe to assess the successes or otherwise of the country's land reform programme that had started in the year 2000.

34 *Report of the Presidential Land Review Committee on the Implementation of the Fast Track Land Reform Programme, 2000-2002* ("The Utete Report"), p. 25

35 The government's policy is that there should be no multiple ownership of farms and that land allocations must not exceed the allowable maximum farm size, which varies from one natural region to another. Zimbabwe has five natural regions (1-5), with natural region one receiving the highest amount of rainfall per year and natural region five the lowest. Farm sizes are smaller in the high rainfall regions and larger in those with lower rainfall, which usually focus on livestock ranching.

36 Section 297(1)(c)(ii)(B).



the major beneficiaries of multiple farm ownership and therefore afraid a land audit will expose them.<sup>37</sup> As long as the land audit goes unimplemented, it remains difficult to identify land that can be allocated to women. The result is that women's enjoyment of land rights on an equal basis with men is an entitlement they have on paper only and not in reality.

The implementation of the Constitution has a number of shortcomings, then, and it has taken intervention by civil society actors to highlight what they are, as is discussed below.

## 4 Civil society's role in compliance and implementation

Civil society in Zimbabwe has played a critical role in seeking to ensure compliance with, and implementation of, the new Constitution. It has done so in a variety of areas, including the promotion of gender equality and women's rights. Civil society has used three main strategies in this regard: advocacy, litigation and research. Often these strategies are employed together by individual organisations or, to make them more effective, in collaboration with other organisations. Civil society organisations (CSOs) undertake research in order to inform their advocacy efforts and litigation strategies. Individual citizens have also played their part, especially in litigation to ensure that the Constitution is implemented. Below is an overview of the work of some CSOs in Zimbabwe.

### 4.1 Advocacy

Section 7 of the 2013 Constitution enjoins the government to promote public awareness of the Constitution by undertaking the following:

- translating it into all officially recognised languages and disseminating it as widely as possible;
- requiring [the] Constitution to be taught in schools and as part of the curricula for the training of members of the security services, the Civil Service and members and employees of public institutions; and
- encouraging all persons and organisations, including civic organisations, to disseminate awareness and knowledge of [the] Constitution throughout society.

37 D Moore, N Kriger & B Raftopoulos, *Progress in Zimbabwe? The Past and Present of a Concept and a Country*, Routledge (2013).

Commentators have argued, however, that “this is not an area in which the State has shown any particular concern, resulting in low levels of constitutional awareness”.<sup>38</sup> In 2015, the Mass Public Opinion Institute (MPOI), a research organisation, reported that Zimbabweans were largely ignorant of the 2013 Constitution. Following a survey, the Institute’s key findings were:

- Three out of 10 adult Zimbabweans (30%) indicated that they know ‘nothing at all’ while almost half (48%) said they know a ‘little bit’ about the new national charter. Only one in five (16%) of the respondents said they know the country’s supreme law.
- Both urban and rural dwellers have limited knowledge about the country’s supreme law but about one in four (26%) of urbanites and almost one in three rural dwellers (32%) conceded absolute ignorance about the national charter.
- Almost half of the respondents (49%) believe that the new Constitution has to be translated into local languages and copies made available to all Zimbabweans in order to enable them to have more knowledge about the national charter.<sup>39</sup>

These findings show that very little has been done by the government to ensure that the Constitution and its provisions are known and understood by citizens. Often working with very limited resources, CSOs are responsible for the little that has been done in raising public awareness. For instance, the Civil Society Monitoring Mechanism (CISOMM) has been instrumental in monitoring the implementation of the new Constitution. Initially set up to monitor the Global Political Agreement signed between ZANU-PF and the MDC, the CISOMM shifted to monitoring the implementation of the Constitution when the Government of National Unity (GNU) ended in 2013. The CISOMM has “facilitated debates, discussions and rural outreach programmes”<sup>40</sup> on the Constitution. During outreach initiatives, it realised that copies of the Constitution were unavailable in communities and even in libraries, and in response developed “simplified translations, factsheets and brochures to address the asymmetry”.<sup>41</sup>

Through their engagement with communities on the Constitution, CSOs have also taken it upon themselves to identify instances of human rights infringement that require litigation, taking the cases to the Constitutional Court and other courts. Leading CSOs in this regard

38 DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, Constitutionnet, 25 May 2015.

39 Mass Public Opinion Institute, *Zimbabweans largely ignorant of the 2013 Constitution* (2015).

40 DT Hofisi, “Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe”, Constitutionnet, 25 May 2015.

41 *Ibid.*

include the Zimbabwe Lawyers for Human Rights (ZLHR), the Zimbabwe Women Lawyers' Association (ZWLA) and Veritas.

## 4.2 Litigation

The misalignment between the new Constitution and the bulk of the country's laws was an indication that the Constitution sought to embody internationally accepted standards for the protection of human rights, good governance, democracy and rule of law, among many other tenets. It was therefore not surprising that many Acts of Parliament, some of them promulgated during the colonial era, were found incompatible with the dictates of the new supreme law.

Although the alignment of laws with the Constitution is not a prerequisite for citizens to start enjoying their constitutional rights, the reality is that efforts to claim those rights have met with resistance from government bureaucrats who argue that they cannot implement the new Constitution without the enabling legislation. Given how long alignment will take, the state has exploited this as a rationalisation to avoid its obligations and to stall the alignment project.

To emphasise, however, that the Constitution is indeed the supreme law of the country and any law incompatible with its provisions is invalid to the extent of that inconsistency, CSOs have litigated at the Constitutional Court to challenge unconstitutional decisions or to assert the rights of citizens as provided for in the Constitution. Issues that have been brought before the Court are varied, and include the following:

- One citizen,<sup>42</sup> a lawyer by profession, has been a party in different applications challenging as unconstitutional the criteria that are used to confer hero status<sup>43</sup> on citizens and the celebration of 22 December as Unity Day in the country.<sup>44</sup> He has also sought an order compelling Parliament to investigate President Mugabe's health status and his fitness to hold office, given the persistent rumours about his failing health.<sup>45</sup>
- Represented by the ZLHR,<sup>46</sup> the suspended Mayor of Harare, Bernard Manyenyeni, approached the courts seeking to have his suspension

42 Tinomudaishe Chinyoka, a Zimbabwean lawyer based in the United Kingdom and a former student leader at the University of Zimbabwe in the early 1990s. All the cases in which he has been a party are yet to be determined by the courts.

43 The application challenged the National Heroes Act Chapter 10:16, in particular on the grounds that in effect it gave the ruling party ZANU-PF the sole right to choose national heroes.

44 In this case, the conferral of national holiday status (Unity Day) to 22 December – the day on which ZANU-PF and PF-ZAPU united to form ZANU-PF – was challenged on the grounds that it should be celebrated by the political parties concerned rather than foisted on citizens who are not or were never members of theirs.

45 According to section 97(1)(d) of the Constitution, physical incapacity is one of the grounds upon which a president can be removed from office.

46 The ZLHR is a lawyer-based non-profit organisation focusing on creating and promoting the culture of human rights in Zimbabwe (see [www.zlhr.org.za](http://www.zlhr.org.za)).

declared unconstitutional on the grounds that the Minister of Local Government, Public Works and National Housing who suspended him no longer has the powers to do so in terms of the new Constitution. The Minister used the Urban Councils Act, Chapter 29:15, in effecting the suspension, but the provisions of the Act are not consistent with the Constitution and therefore invalid to the extent of this incompatibility. Nevertheless, the Minister took the opportunity of this misalignment to suspend the Mayor. The suspension was subsequently lifted by the High Court following litigation by the ZLHR.<sup>47</sup>

There has also been litigation around women's rights. The most recent, and celebrated, case is *Loveness Mudzuru and Anor v the Minister of Justice and Ors.*<sup>48</sup> The application was brought by Loveness Mudzuru and Ruvimbo Tsopodzi,<sup>49</sup> two former child brides who brought their application in terms of section 85(1) of the Constitution, which provides for the enforcement of fundamental human rights and freedoms. They challenged the practice of child marriage, in particular the laws that made it possible, and sought a declaratory order.<sup>50</sup> The Constitutional Court unanimously ruled in favour of the applicants and awarded the relief sought.<sup>51</sup>

This was a major victory that crowned many years of advocacy for the protection of children against child marriage. Previous efforts had failed to

47 See "Manyenyeni wins suspension case", *Newsday*, 29 June 2016.

48 CCZ 12/2015.

49 The young women were supported by two non-governmental organisations, Veritas and Real Open Opportunities for Transformation and Support (ROOTS), in bringing their case to the Constitutional Court.

50 The applicants sought a declaratory order to the effect that:

- The effect of section 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 is to set 18 years as the minimum age of marriage in Zimbabwe.

- No person, male or female, in Zimbabwe may enter into any marriage including an unregistered customary law union or any other union including one arising out of religion or a religious rite before attaining the age of eighteen (18)

- Section 22(1) of the Marriage Act [Chapter 5:11] is unconstitutional. [The section provides that a girl can consent to marriage from the age of 16 while a boy can consent to marriage from the age of 18. This provision has long been challenged by women's rights advocates as constituting discrimination on the grounds of sex.]

- The Customary Marriages Act [Chapter 5:07] is unconstitutional in that it does not provide for a minimum age limit of eighteen (18) years in respect of any marriage contracted under the same.

51 The Court made the following order:

- It is declared that s 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 sets eighteen years as the minimum age of marriage in Zimbabwe.

- It is further declared that s 22(1) of the Marriage Act [Chapter 5:11] or any law, practice or custom authorising a person under eighteen years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down.

- With effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years.

yield positive results because the age of consent for marriage had not been specified in the old constitution. With the 2013 Constitution having set 18 years as the age of consent for marriage for boys and girls, it has become easier for citizens to litigate on the issue and ask the courts to strike down offending legislation

#### 4.2.1 Locus standi

An important development is that the Constitutional Court has reinforced the wide *locus standi* rules that are provided for in the new Constitution. In the old constitutional era, *locus standi* rules were limited: unless there were exceptional circumstances, only a person directly affected by an action was allowed to approach the courts for redress. Some of these exceptional circumstances included situations where the person whose rights were being infringed or are likely to be infringed is in detention<sup>52</sup> or where the person affected by an action is a minor or is mentally incapable of standing on their own in court. In the case of *Retrofit (Pvt) Ltd v PTC and Anor*,<sup>53</sup> Gubbay CJ (as he then was) held that a person seeking redress

[h]as no right to do so either on behalf of the general public or anyone else. Put otherwise, a constitutional right that invalidates a law may be invoked by a person affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law.

In the case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Ors*,<sup>54</sup> Gubbay CJ emphasised the same position:

[S]ection 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law.

The strict rules of standing in Zimbabwe stemmed from a constitutional dispensation that made it difficult to litigate in the public interest on behalf of another person or in situations where one was not directly affected by the action under complaint. The requirements were that the person approaching the courts must have a “personal, direct and substantial interest” in the matter in which they were litigating. This approach was in line with the common law position regarding *locus standi in judicio* in litigation.

52 Section 24(1) of the (old) 1979 Constitution of Zimbabwe.

53 1995 (2) ZLR 199 (S), (paragraph 207G-208E).

54 1997 (2) ZLR 254 (S), (paragraph 258 B-E).

However, the new Constitution has taken a different approach, granting people the right to approach the courts on behalf of others and in the public interest. In this regard, section 85(1) grants the right of standing to enforce fundamental human rights and freedoms to the following categories of people:

- any person acting in their own interest;
- any person acting on behalf of another person who cannot act for themselves;
- any person acting as a member, or in the interests, of a group or class of persons;
- any person acting in the public interest; and
- any association acting in the interests of its members.

When any person listed above has approached the courts, “the court may grant appropriate relief, including a declaration of rights and an award of compensation”.<sup>55</sup>

The Constitution also seeks to ensure that procedural and technical issues are not used as a barrier to prevent citizens from accessing the courts when their rights and freedoms have been or are likely to be infringed upon. That a person has contravened any law is not a reason to deny him or her the right to approach the courts. In addition, rules of court are required to:

- fully facilitate and not hinder access to justice;
- ensure that formalities relating to proceedings are kept to a minimum;
- ensure that courts are not unnecessarily encumbered by procedural technicalities; and that
- amicus curiae are admitted with the leave of the court to ensure that courts are able to effectively dispense justice<sup>56</sup>

This new approach has emboldened citizens to approach the courts to have their rights protected and interpreted. In the *Mudzuru* case,<sup>57</sup> Malaba DCJ concluded that

[t]he form and structure of s 85(1) shows that it is a product of the liberalisation of the narrow traditional conception of *locus standi* ... The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society.

55 Section 85(1).

56 See section 85(3) of the 2013 Constitution.

57 CCZ 12/2015.

This ruling emphasises that courts are now required to apply a broad approach to the rule of standing so as to ensure that the enjoyment of fundamental rights and freedoms as enshrined in the Constitution are not only a paper provision but enjoyed by citizens in reality. The litigation by Mudzuru and Tsopodzi in the public interest led to a clearer interpretation of the rules of standing by the Constitutional Court and this will pave way for other individuals, non-governmental organisations and associations to litigate to protect the fundamental rights and freedoms of ordinary citizens, especially those with limited financial resources. Increased levels of litigation involving violations of fundamental rights and freedoms are already evident in Zimbabwe today.

#### ***4.2.3 Clogging the court system***

While the country has been celebrating the broadened rules of standing, there are concerns that the many cases being filed at the Constitutional Court in terms of section 85(1) are clogging the court system, leading to backlogs and delays in finalising cases. It has also been argued that because of the broad rules of standing, many people are filing frivolous and vexatious cases, thereby denying people with genuine grievances an opportunity to have their matter heard timeously by the Court. Some of those who have sought to use the courts to claim their rights or vindicate the rights of others have been targeted for insult, with the state media, for example, labeling Tinomudaishe Chinyoka a “legal nuisance” for having filed a number of cases with the Constitutional Court.<sup>58</sup>

It must be realised, however, that it is the right of citizens to approach the courts for redress and that it is for the courts to make a determination on whether the cases so filed are frivolous or vexatious and whether the litigants are indeed a nuisance. Where the court system is struggling as a result of the many cases that are being filed, it is the responsibility of the court administrators and the state to ensure that resources, both human and material, are made available and proper guidance given to litigants to ensure access to justice and effective justice delivery. For example, the Constitutional Court Practice Directive No. 2 of 2013 helped in explaining the procedure litigants must follow in bringing and defending cases that are filed before the court in terms of section 85(1) of the Constitution.

### **4.3 Research**

The value of research in highlighting and clarifying constitutional rights and how they can be implemented cannot be overemphasised. Research organisations, academic institutions and individuals within and outside

58 See T Shumba, “Chinyoka now a legal nuisance”, Zimbabwe Broadcasting Corporation, 11 February 2016.

Zimbabwe play an essential role both in elaborating the rights of citizens under the new Constitution and how these can be enjoyed as well as in analysing court judgments to determine the extent to which they provide effective remedies to citizens.

The Research and Advocacy Unit (RAU) is one of the foremost research non-governmental organisations in the country. In March 2016, RAU produced a research report titled *Reluctant Reformers: Legislative Misalignment and the New Constitution*. It sheds light on the government's failure to abide by the provisions of the new Constitutions in respect of four main areas: voter registration; operationalisation of the Zimbabwe Gender Commission and National Peace and Reconciliation Commission; the powers of the National Prosecuting Authority; and criminal procedure. The report concludes by stating:

Zimbabwe's Constitution is currently being violated in several ways – the failure to establish constitutionally required institutions, the failure to introduce new legislation to give effect to the Constitution and the failure to amend or formally remove legislation which has become unconstitutional by virtue of the new Charter, referred to by the misnomer of 'alignment.' The latter process, which merely gives formal recognition to an extant situation on account of such laws already having been rendered void, has proved a convenient fig leaf for government.<sup>59</sup>

The report has helped to highlight what is widely believed to be governmental reluctance to embrace the new Charter and ensure that citizens enjoy their constitutional rights. Academics from various institutions have made similar contributions. Examples include Lovemore Chiduzo (University of Limpopo) and Paterson Nkosemntu Makiwane (Walter Sisulu University), who have conducted research on *locus standi* provisions in the new Zimbabwean Constitution.<sup>60</sup>

## 5 Conclusion

The implementation of the new Constitution of Zimbabwe has met with various obstacles. Often it has taken pressure from citizens through litigation and advocacy for the government to make efforts to implement the Constitution. However, even as the government has made these efforts, there have been accusations that it is cherry-picking laws for alignment, choosing the "easier ones" and leaving out the more contentious ones, especially those with political implications.

59 See the Research & Advocacy Unit (RAU), *Reluctant Reformers: Legislative Misalignment and the New Constitution*, Harare, RAU (2016), p. 41.

60 L. Chiduzo & PN Makiwane, "Strengthening *Locus Standi* in Human Rights Litigation in Zimbabwe: An Analysis of the Provisions of the New Constitution", 19 *Potchefstroom Electronic Law Journal* (2016).



The government has also made significant efforts to operationalise institutions supporting democracy (constitutional commissions), as provided for in Chapter 12 of the Constitution. These are the Zimbabwe Gender Commission, the Zimbabwe Human Rights Commission, the Zimbabwe Electoral Commission, the Zimbabwe Media Commission, the National Peace and Reconciliation Commission, the Land Commission and the Anti-Corruption Commission. These commissions have all been set up, but the government has been criticised for deliberately starving them of resources and interfering excessively in their work, thus compromising their ability to be truly independent.

Civil society, lawyers, academics and even individuals in Zimbabwe have, however, played a remarkable role in working to see the enforcement of the Constitution. Efforts have centred on research, litigation and advocacy. The courts in Zimbabwe are increasingly taking a positive stance to ensure that citizens' fundamental rights and freedoms are respected and that the Constitution is implemented. This marks a clear departure from the pre-2013 scenario. One can argue it is still too early to expect all the provisions of the 2013 Constitution to have been implemented. On the other hand, there must be political will if constitutional implementation is to succeed: when stalling is part of a political game, citizens have good reason to worry.

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# CHAPTER 9

## THE USE OF SPECIALISED COMMISSIONS FOR CONSTITUTIONAL IMPLEMENTATION: AN INSIDER VIEW OF THE KENYAN CIC

*Kamotho Waiganjo*

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### **1 Introduction**

Across the globe, but especially in Africa, we have witnessed a new wave of public demand for constitutional review and change, which, as was the case in Kenya, has been referred to as “the second liberation”. This quest for constitutional change has been premised largely on the need to recalibrate state governance so that it is based on the rule of law and more democratic, responsive, and accountable. In the majority of cases involving a demand for constitutional change, those in power have used executive dominance to limit the democratic space crucial for good governance.

As documents that define or sometimes even reshape the sphere of governance, constitutions are not self-executing: they must be implemented in order to realise the gains that motivated their adoption. It is thus critical to examine how countries that adopted new constitutions have fared. The Constitution of Kenya 2010 provided for the Commission for the Implementation of the Constitution (CIC), which had the specific task of overseeing its implementation process and ensuring that the process was orderly and effective. This chapter examines the Kenyan experience to take account of the dynamics, challenges and achievements of its constitutional implementation and the lessons to be learned from it.

### **2 The rationale for constitution implementation**

Generally, constitutions are not self-executing: deliberate processes are needed to translate their textual existence into actuality. As Yash Ghai observes:

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 life, which they use in their daily existence, which

governs and controls the exercise of state power, and which promotes the values and aspirations expressed in it. The fortunes of a constitution are shaped by many factors: personalities and elites, political parties and other organisations, social structures, economic changes, traditions of constitutionalism – and by the rules and institutions in the constitution itself.<sup>1</sup>

The CIC was a transitional institution incorporated into Kenya's 2010 Constitution to oversee and guide the first five years of its implementation. In terms of section 5 of the sixth schedule it was mandated to facilitate the development of legislation and administrative procedures and, critically, to monitor implementation of the ambitious devolved government system. As Ghai notes, a constitution is a special document that ought to be the subject of a deliberate, predictable and legally enforceable process aimed at ensuring that its spirit and textual provisions are realised.<sup>2</sup> Such a process must transcend the political machinations and interest-laden impediments that may be laid in its path (post-enactment) by those in favour of the status quo.

The Kenyan Constitution transformed the existing governance framework. Positive changes that it brought about include a review of the political and institutional structure at national level, a general organisation of government, an expanded Bill of Rights, devolved governance, and increased accountability and citizen participation. It has been noted that

Kenya's historical context and the previous constitutional failures informed the 2010 Constitution. It mandates an extensive reformation of the executive, puts strict limits on its powers, and institutes strong checks between the branches of government. It provides a strict code of ethics for elected officials to combat the culture of national cake politics. The new Constitution also makes citizen participation a national value and a principle of governance and involved citizen participation in nearly every part of the government, and provides for an extensive Bill of Rights for citizens.<sup>3</sup>

As Benjamin Odoki observes, it is necessary to align the implementation of the Constitution with the expectations of the Kenyan people and the law:

In order to implement the constitution, appropriate democratic institutions must be established through which the people must exercise power directly or through their selected representatives. Democratic values and practice must be fostered amongst the population to empower them to actively participate in their own governance. Implementing a constitution is an expensive enterprise.

1 Y Ghai, "Kenyan Constitution: History in the Making: The Challenges of Implementation". Pambazuka News (2010). Available at [www.pambazuka.org/en/category/features/66501](http://www.pambazuka.org/en/category/features/66501) (accessed 2 April 2016).

2 *Ibid.*, p. 1.

3 F McEvoy, "An Evaluation of Constitutional Implementation in Kenya", available at [www.pository.usfca.edu/cgi/viewcontent.cgi?article=1061&context=artsci\\_stu](http://www.pository.usfca.edu/cgi/viewcontent.cgi?article=1061&context=artsci_stu) (accessed 14 April 2016).

Therefore, adequate resources must be made available to facilitate the building of strong democratic institutions and pillars of state.<sup>4</sup>

Odoki underscores the need to ensure that implementation of the Constitution is informed by representation or inclusion of the citizenry either directly or indirectly. He emphasises that the process also requires considerable funding. It will be seen later that the financing of the CIC was critical to its success.

The expected outcomes of the constitutional implementation exercise are policy, institutional and administrative reforms. Sihanya points out that

[p]olicy reforms are crucial to provide clear parameters on legislation and administrative reforms. One approach would be to enact an omnibus policy framework on the legislative, administrative and institutional architecture required for the implementation of the Constitution. This should be complemented by thematic and sectoral policies, for example, on health, security, education, gender, youth, food security, energy, transport and communication, among others. Happily, there are policy instruments in some of these fields that need just some review while in other fields there are useful draft policy papers that should be finalized.<sup>5</sup>

Raila Odinga<sup>6</sup> too emphasises that the goal of constitutional implementation is to ensure that governance structures are reformed for the benefit of the Kenyan people:

The task ahead now is to implement the New Constitution of Kenya by making it a living document, not a hollow script. I repeat, our first task is to implement the Constitution and not just to confine ourselves as a Parliament to the duty and obligation of enacting enabling or implementing legislation. [...] Implementation means that the national values and principles of governance which include integrity and transparency must be enforced now. The essential pillars of the New Constitution on which rest all the structures of governance including the representation of the people, the executive, the judiciary and devolution, are found in Chapter Four and Chapter Six of the Constitution, that is the Bill of Rights and Leadership and Integrity.<sup>7</sup>

It must be reiterated that the implementation phase of the Constitution “encompasses the executive, legislative, administrative and judicial actions that transform the constitutional text into policies, statutory laws, and institutions”, and that it follows on after the “approval and adoption

4 B Odoki, “The Challenges of Constitution-making and Implementation in Uganda”, 15 *Constitutionalism in Africa* 281.

5 B Sihanya, “Implementing the Constitution of Kenya, 2010” (unpublished).

6 Former Kenyan Prime Minister during the Coalition Government that lasted between 2008 and 2013.

7 RA Odinga “Implementation of the New Constitution of Kenya: A New Dawn, a New Era”, Keynote address to the Kenyan National Assembly, 29 September 2010.

of the new constitution and consists of the practical translation of constitutional theory into political action.”<sup>8</sup>

Based on the foregoing and the need to ensure that the constitution evolves from theory into practice, from words to action, Dimitrijević observes: “If there is a strong determination, accompanied with impressive rhetoric, not to observe the constitution, and if – on the other hand – there is no determination to defend the constitutional regime and no incitement to abide by it, the whole structure can disintegrate, suddenly or gradually.”<sup>9</sup>

Kenya’s 2010 constitution is one example among many of a constitution which, in seeking to overhaul state structures, faces resistance from entrenched interests. New institutions and structures require not just time but public support and good leadership to achieve their constitutional imperatives. Effective governance can result only from constitutional reforms that are well received by the public and the political class. It is in this respect that the CIC played a crucial role in Kenya.

### 3 The CIC: rationale, establishment and mandate

History is full of examples of constitutions that fail, especially in their formative stages. The principal idea behind the establishment of the CIC was to manage the transition from the old to the new constitutional order. McEvoy notes:

How a constitution moves from a ‘written constitution’ to a ‘real regime’ is the issue of implementation. As Lane argues, constitutions are only effective if they are successfully implemented, and become the rule of law for ‘it is one thing to devise a constitution but quite another matter to implement it’. This is a weakness in Sartori’s constitutional engineering: implementation is a difficult process. The machine has output only if it is given power to do so. Much as a machine only has output when supplied with enough power, constitutions only operate effectively when fully implemented with enough power to be effective.<sup>10</sup>

The promulgation of the Commission for the Implementation of the Constitution Act, 2010, was followed by the appointment of a chairperson

8 A Bonime-Blanc, “Spain’s Transition to Democracy: The Politics of Constitution-Making”, New York, Westview Press (1987).

9 V Dimitrijević, “Societal and Cultural Prerequisites for Promotion and Implementation of the Democratic Control of Armed Forces” (2001). He compares this to the Weimar Republic of Germany, which was perverted and subsequently destroyed because of its lack of support from the strongest political classes as well as from the bureaucracy that was meant to sustain it. Dimitrijević likens the situation to a democracy without democrats.

10 F McEvoy, “An Evaluation of Constitutional Implementation in Kenya”. The author makes reference to G Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes* (New York, New York University Press (1994)).

and eight members to the Commission. Candidates were required to have experience in public administration, human rights and government.<sup>11</sup> The vetting of the commissioners was rigorous. The Commission coincided with the tenure of a coalition government<sup>12</sup> and so the process of appointment reflected the political dynamics of the time. On the one hand, some wanted to have party loyalists shepherding such a critical institution; on the other, there were those who preferred “neutral”, politically unaligned persons.

Consultations and horse-trading went on until finally the coalition partners negotiated a compromise whereby, with a few exceptions, the appointed commissioners were established professionals in their area of expertise, were not directly affiliated to the coalition parties, and reflected the constitutional requirement for ethnic and gender diversity.

Getting the right calibre and mix of individuals was critical in view of the task at hand. The commissioners had to be competent and independent to avoid their being swayed or intimidated by political interests. They had to be politically astute too, aware that the implementation process was also a political process and that they needed political support, provided it did not compromise the Commission’s pursuit of its mandate. The CIC’s success lay partly in the appropriate mix of its commissioners.

The CIC was by law meant to work with other constitutional commissions to ensure that the letter and the spirit of the new Constitution was upheld.<sup>13</sup> The CIC was expected to cooperate with other institutions, as dictated by need or the direct requirements of the Constitution. Among the stakeholders with which it worked were the World Bank, institutions of higher learning, civil society organisations and interest groups. Its mandate was set to run for five years or upon full implementation of the constitution, as determined by Parliament, or whichever occurred earlier. The National Assembly had the power to extend the CIC’s life via Parliamentary decision, but in the event it decided against this and the tenure of the Commission ended on 31 December 2015.

### **3.1 Working relations with Parliament**

The CIC was mandated to make regular reports to a parliamentary body, the Constitutional Implementation Oversight Committee (CIOC),<sup>14</sup> on its progress in implementing the Constitution and any impediments it

11 Section 5 of the Sixth Schedule to the 2010 Constitution of Kenya.

12 In 2008 the two principal contestants in the 2007 elections, the Orange Democratic Movement (ODM) and Party of National Unity (PNU), entered into a grand coalition which governed the country until 2013 when the first elections under the 2010 Constitution were held.

13 See Article 5 of the sixth schedule of the 2010 Constitution of Kenya.

14 Section 4(a) of the sixth schedule of the 2010 Constitution of Kenya.



encountered. Through the CIOC, Parliament had the responsibility of enacting legislation that supported and guided the implementation process, which included setting milestones and ensuring they were met. It had to make sure that this enacted legislation was consistent with the letter and spirit of the Constitution.

The implementation schedule provided time-frames for the enactment of specific legislation.<sup>15</sup> Parliament had the power to extend timelines for various reasons, power it exercised on numerous occasions during CIC's five years of existence.<sup>16</sup> Constitutional laws that had the timeline for their enactment extended included: the Public Audit Bill (2014), the Public Procurement and Asset Disposal Bill (2014), Fair Administrative Action Bill (2014), the Victims Protection Bill (2013), the Rights of Persons Deprived of Liberty Bill (2014) and the Values and Principles of the Public Service Bill (2014).

There were high expectations that the parliamentary oversight committee would aid the Commission in the scrutiny of bills presented to Parliament for debate, thereby helping to avoid conflict between the Constitution and the laws before Parliament. Such an approach would also have served to curtail any real or potential threats of anti-reformists or opportunists undermining the wishes and aspirations of Kenyans as embodied in the Constitution.

Ideally, the oversight committee should have been able to assess how the provisions of the bills related not only to the provisions of the Constitution but also to the wishes and expectations of ordinary Kenyans. As John Uhr notes, "The reason we have parliaments is that we desire good laws; and one threshold quality of good laws is that they do not unduly, or without good reason, trespass on the rights and liberties of ordinary citizens."<sup>17</sup>

However, the implementation process was beset by a number of challenges, ranging from capacity considerations to parliamentarians' lethargic commitment to bills that directly affected their interests. For instance, despite protests from various quarters, Parliament passed a Leadership and Integrity Act that fell far short of the requirements of the Constitution. Parliament also delayed applying provisions of the Elections Act that touched on their academic qualifications.

15 See Implementation Schedule as provided for under schedule 5 of the 2010 Constitution of Kenya.

16 See Article 261(3) of the 2010 Constitution of Kenya.

17 J Uhr, "Keeping Government Honest: Preconditions of Parliamentary Effectiveness" p. 58-59. This was an address to the Western Australian Commission on Government in Perth in August 1995. Available at [http://www.aph.gov.au/senate/~/~/~link.aspx?\\_id=54B15879D3FA4BFE84D1A1885AE7950C&\\_z=z](http://www.aph.gov.au/senate/~/~/~link.aspx?_id=54B15879D3FA4BFE84D1A1885AE7950C&_z=z) (accessed 13 April 2016).

The oversight committee was largely able to strike political settlements as a way of dealing with the problems that plagued the implementation process. Some of these problems were institutional disputes of a political nature that were best dealt with by parliamentary consensus. In the instances where Parliament failed to enact constitutionally compliant legislation, the Commission ended up challenging the constitutionality of such legislation. This often involved it in a process that was not only costly and time-consuming but which strained the relationship between Parliament and the Commission.

Despite the fact that the law required the CIC and Parliament to consult and cooperate with each other, their relationship was not entirely smooth. Where parliamentarians had a direct interest in certain issues, they acted contrary to the advice and opinions of the CIC and other stakeholders. For instance, by way of an amendment to section 22<sup>18</sup> of the Elections Act, which dealt with academic qualifications of electoral aspirants, Parliament deferred its implementation to a later date, simply because at that point it was inconvenient for many parliamentarians to comply with it.

Most of the disputes that pitted the CIC against Parliament were resolved amicably; some, though, were referred to the courts for adjudication and settlement. Other examples of difficulties experienced in the course of working with Parliament are discussed later in this chapter under implementation challenges.

### **3.2 Working relations with the Attorney General's office**

Section 6 of the Sixth Schedule to the Constitution provides for the Commission to consult and work with the Attorney General (AG) and the Kenya Law Reform Commission in tabling before Parliament legislation required in the implementation of the Constitution.

This association took the form of CIC's receiving bills for its consideration from the executive through the office of the AG and ensuring that they were consistent with the Constitution. After review, the bills were referred back to the AG for incorporation of editorial considerations, including legislative drafting edits, and then conveyed to the National Assembly for debate and enactment.

Despite the provisions of the Constitution on the institutional relationship between the CIC and the AG, in a number of instances the

18 Section 22(2A) of the 2012 Elections Act as amended reads as follows: "For the purposes of the first elections under the Constitution, section 22(1)(b) and section 24(1)(b), save for the position of the President, the Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and County Assembly representatives."

CIC was ignored and bills were submitted directly to Parliament. Such bypassing of the CIC occurred mainly at a time when bills relating to agriculture and education were being considered. This led to the passage of bills that fell below the standards of the Constitution and so created challenges for the sectors and institutions relevant to these bills. An example is the Crops Act, which was passed in this fashion and as a result ignored the constitutional principle of devolution and separation of functions between the national and county governments.

By virtue of Article 156 of the Constitution, the AG is the Chief Legal Advisor to the government. The CIC in its facilitatory role gave numerous advisory opinions to the government on issues relating to constitutional implementation, particularly so when it believed the government had violated the Constitution or compromised the implementation process. Although in most cases the CIC's views were consistent with those of the AG, in some critical matters the AG offered the government contrary opinions, leading to unnecessary confusion and tension in the administration.

### **3.3 Working relations with the public service**

Early in its term the CIC recognised that it was going to be impossible to implement sustainable institutional reforms without fundamental reform of the public sector. From the outset, the Commission sought ways of incorporating the public service bureaucracy as a partner in the implementation process and of encouraging institutional change management. This would ensure not only that the new institutions and laws – the “hardware” of the Constitution – were in place, but that the “software”, a changed way of thinking that reflected the values of the Constitution, was also applied by all in the sector.

In its first six months the Commission held numerous meetings with senior leadership in the civil service, culminating in a circular, prepared by the Commission but issued in the name of the Head of the Public Service, calling on all institutions in the public service to support the work of the Commission. In particular, the circular required the heads of institutions to carry out civic education on the Constitution, to review all their existing policies and laws to ensure these were compliant with the Constitution, and to implement a change management process. The institutions were required to report quarterly to the Commission on their achievements and challenges. The Commission followed up on these reports, and in many instances facilitated the civic education and change management programmes. Many of the institutions duly reviewed their internal processes, laws and administrative procedures to align them with the Constitution – a review process that continued beyond the life of the Commission.

### 3.4 Working relations with other constitutional and independent offices

Chapter 15 of the Constitution provides for the establishment of constitutional commissions and independent offices. Article 249 specifies that their role is to

- protect the sovereignty of the people;
- ensure state organs observe democratic values and principles; and
- promote constitutionalism.

These constitutional offices have played a significant role in the implementation of the Constitution, particularly in shaping policy, legal, regulatory and institutional reforms. As noted in the CIC report,

[t]he establishment of these institutions was in response to the call by Kenyans to have independent public institutions to deal with issues of national interest while being insulated from undue political interference. Coming from a history where similar State agencies could easily be rendered redundant by, among other means, the withholding of funding and arbitrary dissolution of membership, it was imperative that such institutions be independent of political influence and arbitrary exercise of executive power.<sup>19</sup>

The CIC was mandated to work with these commissions and offices to ensure that the letter and the spirit of the Constitution were respected in the course of its implementation. As noted by the CIC in one of its annual reports, alliances between such bodies played a key role in protecting the sovereignty of the Kenyan people and promoting constitutionalism:

Working together, the commissions and independent office have been instrumental in facilitating the nation to record significant progress in the implementation of the Constitution, including policy, legal and regulatory reforms as well as review and development of related institutional frameworks. Key achievements include (a) the successful conduct of the first general elections under the constitution in 2013; (b) facilitating smooth transition to the system of devolved government; and (c) working together with national and county governments to facilitate institutional reforms and the establishment of appropriate systems for effective service delivery in accordance with the principles of devolution specified in article 6 of the Constitution. The commissions and independent offices have also come together on various occasions to seek judicial intervention in matters of national interest and in defence of the constitution.<sup>20</sup>

Collaboration between the commissions and offices was facilitated by the Forum of Chairpersons and Heads of Independent Offices, which

19 Commission for the Implementation of the Constitution (CIC) End Term Report (2015), xiv.

20 *Ibid.*

convened regularly to take stock of joint initiatives and provided a space for shaping and consolidating views on implementing the constitution.

The CIC was also expected to work with these institutions for the purposes of entrenching constitutionalism within the affairs of governance. Constitutionalism goes beyond the existence of a constitution and governmental apparatus corresponding to it.<sup>21</sup> It is premised on the notion that the constitution is a social contract between people and their leaders that defines democratic governance, guarantees individual rights and empowers the citizenry to use it as a living document reflecting their needs and aspirations. As Yash Ghai notes,

[t]he viability and success of a constitution presupposes constitutionalism, a belief in the value of restrictions on power, and the practice of the rule of law, with the emphasis on rules and their enforcement. Paradoxically, countries like Kenya, which try to use the constitution for social transformation, lack the traditions from which these ideologies spring. This situation is aggravated by a lack of knowledge of the role and content of the constitution among those who would benefit from respect and enforcement of the constitution.<sup>22</sup>

Fatton has expressed similar sentiments:

Constitutionalism requires the regulated political unpredictability of polyarchy; a form of uncertainty contained within and structured by a predictable system of rules. Most critically, political actors have – at a minimum – to be convinced that the uncertainties of defeat do not outweigh the gains of a possible future victory. ... Constitutionalism is not merely a set of constraints on majority rule, a binding limit to ‘passions’ and arbitrary power; it is also a pattern of behaviour reflecting the balance of class forces. ... Power relations are thus decisive in the consolidation of constitutionalism. When popular classes erupt onto the political stage and upset the existing balance of class power, the constitution is unlikely to prevent ruling classes from launching a coup de force.<sup>23</sup>

These institutions played an important role in monitoring accountability and transparency in the implementation process and ensuring it was democratic.<sup>24</sup> However, their role was debated and they faced a variety of challenges, including issues relating to their composition, the appointment and terms of office for members, inadequate or delayed funding from the exchequer, and institutional conflicts arising from encroachment on

21 W Maina, “Constitutionalism and Democracy” in K Kibwana *et al* (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996), p. 1-6.

22 Y Ghai, “Kenyan Constitution: History in the Making; The Challenges of Implementation”. Pambazuka News, 5 August 2010. Available at [www.pambazuka.org/en/category/features/66501](http://www.pambazuka.org/en/category/features/66501) (accessed 15 April 2016).

23 R Fatton Jr, “Constitutions and Constitutionalism in Africa”. Paper presented at the 1996 African Studies Association Annual Meeting (San Francisco).

24 K Kindiki, “The State of Constitutionalism in East Africa for the year 2005: The Role of the East African Community”, p. 1. Available at <http://www.kituoachakatiba.co.ug/Constm%20-EAC%202005.pdf> (accessed 14 April 2016).

mandates and intimidation from other arms of government, especially Parliament and the executive.

## **4 Funding implementation of the Constitution**

A Constitution cannot be implemented effectively if the necessary funding is not made available. The fundamental reengineering of Kenyan political institutions that was occasioned by the new Constitution was certainly expensive but a worthwhile cost. In 2010 the Parliamentary Committee on the Implementation of the Constitution (CIOOC) made it clear that the government needed to set aside some 4 billion Kenyan shillings to accomplish the activities entailed by implementation of the Constitution. However, it was postulated that this sum would last only for the first two years of the exercise.<sup>25</sup>

As the implementation period progressed, smaller budgetary allocations were made to fund it. Critical institutions were continually underfunded and implementation activities downgraded or shelved altogether. The CIC depended largely on exchequer allocations from the national government which, given the CIC's work plans, were never sufficient. To fill its budgetary deficits, the CIC had no option but to seek support from donors and like-minded institutions.

Budgetary cuts were also used as a tool of intimidation by the political class whenever its relationship with the CIC soured. Some of these threats were not hollow but acted upon. Fortunately, its strong leadership, widespread public support and help from multilateral donors enabled the CIC to surmount its financial handicaps and prevent the implementation process from being fatally compromised.

## **5 Critical gains and successes in the implementation exercise**

The importance of the CIC's role in the implementation process cannot be overstated. Constitutional implementation is not an everyday task and is fraught with challenges for a fledgling democracy like Kenya's that emerged from decades of dictatorship. In the face of much adversity, the CIC succeeded in its task of reshaping the structure and institutions of governance. The most notable areas where its intervention yielded positive gains were as follows:

- (1) The CIC facilitated the passage of all legislation required by the Constitution within the set timelines. Save for a few bills whose

25 See "Taxpayers face new Sh4b bill for constitution", *Daily Nation* (Kenya), 19 October 2010.

enactment period was extended beyond the CIC's lifespan, all the legislation was enacted in time. More critically, the most of the legislation was considered as compliant with the Constitution and highly useful in facilitating its effective implementation.

- (2) It played a significant role in providing checks and balances on institutions at the national and county level. This mainly took the form of providing legal advice to relevant institutions, initiating judicial proceedings to challenge administrative actions that were contrary to the constitution or rule of law, building consensus through consultation, and reaching amicable settlements on matters relating to the Constitution's implementation.
- (3) Despite some resistance, the CIC successfully lobbied for the establishment of institutions critical to the implementation process. Institutions established through the demands of the CIC after inexplicable delays include the National Police Service Commission, the National Land Commission, the Teachers Service Commission and the Kenya National Commission on Human Rights.
- (4) The CIC undertook several judicial interventions. This included engaging with the politically sensitive issue of the legality and/or constitutionality of the Parliament-controlled Constituency Development Fund,<sup>26</sup> which at its core not only negated the Constitution but assigned MPs a direct role in managing public finances. The courts agreed with the CIC on the unconstitutionality of the said law and struck it out. This was a major victory for the CIC, but achieved not without intimidation from the National Assembly, including threats of budget cuts and disbandment.

The CIC also successfully sought court intervention<sup>27</sup> to ensure that the first Chief Justice, AG and Controller of Budget were appointed in accordance with the new Constitution.

- (5) One of issues requiring resolution was the constitutional provision relating to the two-thirds gender rule. Early in the implementation exercise, it was imperative to know how the gender rule would apply not only to the composition of offices already established under the Constitution but to those that would come into effect after the elections and with the onset of devolved governance.

26 High Court of Kenya Petition No. 71 of 2013 *The Institute for Social Accountability & Anor v The National Assembly & 2 others* - the petitioners sought declarations that the Constituencies Development Fund Act, Act No. 30 of 2013, violated the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national and county government and the public finance management and administration. The Court held in favour of the petitioners and declared the law as being unconstitutional for the reasons raised by the petitioners.

27 High Court Petition of Kenya No. 16 of 2011 *Centre for Rights Awareness & 7 Others v the Attorney General* - the petitioners sought a declaration that the nominations for purposes of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 were in violations of Articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void. The Court eventually agreed with the petitioners.

The CIC sought judicial intervention, with the result that a number of entities that were initially reluctant to do so, among them the Kenya Defence Forces (KDF) and National Police Service, were obliged to incorporate gender parity principles in their practices. As the CIC noted:

Historically, the Police Service recruited very few women as compared to male members of the Service. With the introduction of a recruitment process that required that recruited officers would not be more than two thirds of either gender, there has been an increase in the number of women being recruited into the Service.<sup>28</sup>

The CIC made its recommendation to the KDF on the two-thirds gender rule as follows:

The Commission for the Implementation of the Constitution recommends that the constitutional principle of two-thirds gender representation be upheld in appointments to KDF. Attempts to claw back on this principle should be resisted by Parliament. There continues to be disparity in the ratio of women to men in the Defence Forces, but the disparity can only be addressed by faithful adherence to the constitution at all levels of offices in KDF. Moreover, it is recommended that only those amendments that meet the threshold of compliance with the Constitution be enacted with regard to the amendments of the KDF Act.<sup>29</sup>

The only challenge that still needs to be resolved is the composition of national and county institutions, which is determined largely by election of members. While it was easy at county level to nominate as many women as was needed to achieve the two-thirds gender balance, the same cannot be said for national-level institutions like the Senate and National Assembly.

- (6) The CIC helped to dispel the controversy as to when the first elections should be held, maintaining – in the face of numerous differing viewpoints on the matter – that they ought to be conducted as per the Constitution. It approached the courts to review the matter and offer direction. Even though the courts did not agree with the CIC's view, the CIC's actions helped to end the controversy and prepare the country for the system of devolved governance that followed the first elections.
- (7) Among their other positive results, the CIC's legal advisories served to remind the establishment that official practices ought to be reviewed in a manner consistent with the Constitution.
- (8) The management of public finances and related budgeting under the new Constitution marked a definite break with past practice. The CIC issued an advisory to the executive to present estimates of revenue and expenditure to the National Assembly at least two months before the end of the financial year 2011/2012 in accordance with Article 221 of the Constitution. The advisory prompted some protest from government quarters, but ultimately the provisions of the new Constitution prevailed.

28 Commission for the Implementation of the Constitution (CIC) End Term Report, p. 132.

29 *Ibid.* p. 142.



- (9) The CIC was able to bring matters to executive and parliamentary attention that were contrary to the Constitution, be they matters arising within the Constitution itself or in state-generated policy, legal and administrative proposals. The CIC's advisories were sent principally to the entities under whose portfolio the matters fell.

## **6 Key challenges experienced in the implementation exercise**

The implementation of the Constitution was not without its challenges. However, the CIC was steadfast in its resolve to exercise its mandate and ensure that official state practices conformed with the Constitution. Several of the key challenges are enumerated below.

### **6.1 Bypassing the CIC in the review and submission of bills to Parliament**

Article 261 of the Constitution was clear about the involvement of the CIC in matters pertaining to the review of legislation necessary for constitutional implementation. On a few occasions legislation that touched on the implementation of the Constitution was not passed through the CIC prior to its submission before Parliament. In some cases this was deliberate, and official protests by the CIC to Parliament did not yield satisfactory results. This was also the case with certain private member bills. The net effect of bypassing the CIC was the enactment of laws that were either deficient in their capacity to facilitate implementation or entirely unconstitutional. As a counter-strategy, the CIC referred the majority of these disputes to the CIOC for settlement. While some were resolved, others in which Parliament had an interest were either delayed or left unresolved.

### **6.2 Failure to meet constitutional deadlines for the enactment of laws**

In the early stages of the transition (prior to the elections in 2013), Parliament passed some of the laws listed in the implementation schedule within their stipulated timelines. Gradually, though, it lost its sense of urgency and opted for time extensions that slowed the pace of institutional reform. For example, Parliament extended the time for the enactment of the Audit Bill and Procurement Bill by nine months, but the bills were not passed even within that period.

### **6.3 Development of legislation with no policy or administrative framework**

In its End Term Report, the CIC made the following observations about the development of legislation without a policy or administrative framework:

Due to the tight deadlines for enactment of legislations in the Fifth Schedule to the Constitution, the national executive embarked on the development of Bills without putting in place overarching policies. This has led to many pieces of legislation, which are not aligned with the national development priorities, occasioning several amendments. There have also been delays in the development of administrative procedures to actualize enacted laws, thus undermining their effective implementation.<sup>30</sup>

It is evident, then, that legislation was often conceptualised without policy direction. The problem would be compounded when policy documents were formulated after the passage of legislation, with the result that legislation appeared to be giving rise to policies, rather than vice versa. The CIC tried hard to correct this situation, but with limited success.

### **6.4 Inadequate public participation and civic awareness**

One of the principles infusing every aspect of the Constitution is that public participation is required in the affairs and workings of government. The Constitution made clear the right and need for the citizenry to be involved in issues ranging from legislative proposals to the management of public resources. Public participation was welcomed as an ideal, but its realisation in practice was made slow in coming by a lack of official policies and procedures. In many cases, exercises in public participation were driven more by the need to go through the motions of formal compliance with legal requirements than by a desire to make them effective and meaningful.

The problem lay with officialdom as well as members of the public, who became apathetic. Public meetings were poorly attended, partly because the public was not properly informed about either the importance of its participation or what this entails. The Kenyan public has yet to appreciate the extent to which it can be a pivotal force in state decision-making.

30 Commission for the Implementation of the Constitution (CIC) End Term Report (2015), p. 168.

## 6.5 Disregard of court decisions and laws

State officers, including Members of Parliament and the executive, were the biggest culprits in disregarding court orders and provisions of the law, especially those that were not in their favour. Disobeying court orders or decisions had the effect of undermining judicial authority. In most cases, Parliament was the most vociferous of all when it came to decisions that did not meet expectations or which were seen as court interference.

## 6.6 Violation of the ideals of leadership and integrity

There was a rise in official misconduct by state and public officers both at national and county level. From public diatribes to physical confrontations, and from being named in matters of graft and public theft of resources to generally acting in a manner unbecoming of their positions, public and state officers were guilty of conduct that was clearly in violation of the requirements of the Constitution. What was even more alarming was that the very institutions meant to deal with such matters, be these matter disciplinary or otherwise, seemed unable to do so.

When the Leadership and Integrity Bill (2012) was presented before the National Assembly for consideration, parliamentarians proceeded to expunge entire sections with which they were uncomfortable. In effect, what Parliament passed was a mutilated version of the original legislation which had been painstakingly crafted and presented for consideration by the CIC. Among the parts deleted in their entirety were provisions regarding the declaration of assets, income and liability of state officers, along with the requirement, as per Chapter Six of the Constitution, of a Certificate of Compliance for persons seeking election or appointment to state office.

This prompted the CIC to take the matter to court to challenge the constitutionality of the legislation enacted by Parliament. In the legal dispute,<sup>31</sup> the court declined to declare the Act as unconstitutional and held that Part IV of the Act provides procedures and mechanisms for enforcement of the General Leadership and Integrity Code and, by extension, of the principles set out under Chapter Six. It ruled that these mechanisms would be supplemented by rules and regulations passed by the Ethics and Anti-Corruption Commission.

31 Constitutional and Human Rights Division Petition No. 454 of 2012 – *CIC v Parliament of Kenya & Anor*. The Commission sought to challenge the constitutionality of the Leadership and Integrity Act, No. 19 of 2012, on the grounds that it fell short of the constitutional threshold required of an integrity and leadership law contemplated under Article 80 of Chapter Six of the Constitution because it did not establish procedures and mechanisms for the effective administration the Chapter.

## 7 Going forward

Kenya is now beyond the transitional phase of the new Constitution, and there is a need to take stock of developments since the latter's promulgation and implementation. Is the country on the right track? Is the constitutional dream of the second liberation being realised – a vision in which Kenyans break free of official neglect, suppression, corruption and disregard of the rule of law?

The CIC was just one player in the matrix of institutions and state organs with roles to play in the change management programme occasioned by the Constitution of Kenya 2010. From the perspective of the CIC, the implementation of the Constitution was a great success. Despite facing a number of odds, including political intimidation and inadequate financing, the CIC stayed the course in working with Kenyans and like-minded institutions towards achieving the goals of the new Constitution.

The case of the CIC demonstrates the usefulness of such institutions in countries that have adopted new constitutions and wish to implement them effectively. Such institutions must be ready to work in an environment laden with the conflicting expectations of reformists, anti-reformists, the political class, and the citizenry. What ought to keep these institutions going is the ability to garner the support of the masses. But for this to happen, it is crucial that the people can see that their expectations are being met by the implementing institutions.

What remains to be seen is whether the institutions that succeed the CIC will be committed to the ideals of the Constitution and safeguard the gains from adverse interests. The CIC notes in this regard that

[t]his is the moment for Wanjiku<sup>32</sup> to discharge her Article 3 mandate, the obligation to respect, uphold and defend her Constitution. This is the moment for Wanjiku to maintain the highest level of vigilance, and to hold accountable, all those to whom she has, in terms of Article 1 of the Constitution, delegated her sovereign power.

There is no question that this Constitution was made by Kenyans for their own sake and that of posterity. It is on this basis that it proclaims sovereignty of the people in its first Article. In order to guarantee the Constitution's success, it is vital that the Kenyan populace play an active role in the implementation process. They must resist impunity, corruption, ethnicism and any other social ill or strategy that may be used by politicians to compromise their participation and the creation of the envisioned state. As Yash Ghai observes, they must hold onto the vision

32 In Kenya, the name Wanjiku is often used to mean ordinary Kenyans. It is a name that became the slogan for constitutional activism and other socio-political debates in the country.

of a Kenya that they helped to shape, in numerous meetings and submissions over the years – of a democratic and caring society, based on inclusion and social justice, fundamental human rights, respect for cultural differences but united in our search for harmony and unity, and the common commitment to the worth and dignity of us all.<sup>33</sup>

## 8 Conclusion

The 2010 Constitution of Kenya paved the way for a complete reengineering of the state in terms of its politics and approach to governance, and therefore it ought to have been implemented in a manner that engenders constitutionalism within the Kenyan polity. This exercise was never going to be smooth or free of controversy. As the Kenyan case demonstrates, the process of constitutional implementation faced a number of challenges, but fortunately was never entirely derailed by them. It took commitment on the part of the CIC leadership to steer the process through the hostilities and frustrations that anti-reformists levelled at them. It is this professional commitment to multi-stakeholder involvement (including the citizenry) that undergirded the successes identified in this chapter.

Additionally, the lessons outlined in this chapter demonstrate the need, especially in Africa, for institutions that are dedicated to implementing newly passed constitutions. Some of the measures that help to make these institutions a success include ensuring that they are established under the law – preferably under the Constitution – and with such law succinctly defining the institution’s mandate, responsibilities, structure, composition and secure sources of institutional funding; most importantly, the implementation institution has to be fortified as far as possible against any intimidation by the political class. The CIC was able to survive the parliamentary threat of dissolution simply because its tenure was secured under law and abolishing it before the end of its term would have required a referendum.

In terms of overall impact, the implementation process had to be reformatory and broad-based, deliver on the precepts for good governance, and create the platform upon which Kenyans could engage with their government in an accountable and transparent manner. This chapter has enumerated many of these successes. Public participation has become the norm in affairs of government, demands for change management across the spectrum of governance are being observed, and institutions are increasingly basing their actions on the Constitution.

33 Y Ghai, “Kenyan Constitution: History in the Making; The Challenges of Implementation”, *Pambazuka News*, 2010. Available at [www.pambazuka.org/en/category/features/66501](http://www.pambazuka.org/en/category/features/66501) (accessed 15 April 2016).

This is not to say that all is quiet on the constitutional implementation front: much is still being undertaken by successor institutions to the CIC, and the results thereof will be clear only when their performance is scrutinised at a later date.

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*Jane Serwanga*

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## 1 Introduction

The promulgation of Kenya's Constitution in 2010 was met with palpable optimism and high expectations. Alongside the excitement, however, there was apprehension about whether its implementation would succeed in translating the Constitution and its gains into lived realities. This process was defined in detail to ensure that enabling legislation would be enacted within five years of promulgation, as spelt out in the Fifth Schedule of the Constitution; that existing laws and policies would be reviewed so as to reflect the spirit of the Constitution; that Article 59 institutions and other independent organs were established; that existing state institutions were realigned with the new structure of governance; and that the devolved system of government was set up.<sup>1</sup> The process stood to benefit from a well-thought-through framework.

The promulgation brought Kenya's Constitution into immediate effect. It was anticipated that its effective implementation would depend on robust legislation and establishing appropriate mechanisms, institutions and frameworks. Such structures were seen as all the more important given the country's highly polarised environment: there was goodwill from proponents of immediate implementation, but quiet resistance from those favouring the status quo.

State and non-state actors alike were assigned roles in the process. As such, the Constitution<sup>2</sup> established the Commission for the Implementation of the Constitution (CIC), an independent organ responsible for oversight of the enabling legislation and for facilitating implementation.

1 B Sihanya, "Constitutional implementation in Kenya, 2010-2015: Challenges and prospects", FES Kenya Occasional Paper No. 5, October 2011.

2 Section 5(6) of the Sixth Schedule Constitution of Kenya 2010.



## 2 Background to Kenya's constitutional transformation

### 2.1 Key developments leading to reform

Kenya's new constitutional dispensation arose from a lengthy process, and the constitutional reform itself involved several protracted steps. In the 1990s Kenya saw partial reform in the return to a *de jure* multiparty democracy following the repeal in 1991 of section 2A of Kenya's then Constitution, which had declared Kenya a one-party state. Its repeal fuelled calls for a new constitutional democracy to bring lawful, meaningful change to a system which had entrenched autocracy by an imperial presidency.<sup>3</sup> Under this system, the country sank to a low point of unconstitutionality characterised by corruption on a grand scale, severely limited political space, gross violations of human rights, a moribund judiciary, an inept electoral management body, and executive interference in key state institutions.

However, in the 1990s developments in the global arena, including the end of the Cold War, led to strong international pressure for good governance and democracy. Against this backdrop, intense agitation by Kenyan civil society and opposition parties succeeded in initiating dialogue on constitutional reform. The critical turning point, though, was the violence and institutional crisis that followed the disputed elections of 2007. This prompted calls for the crisis to be resolved and the historical factors underlying it, addressed. Under the leadership of the African Union Panel of Eminent African Personalities, the main opposing forces were convened within the framework of the Kenya National Dialogue and Reconciliation (KNDR). Four agenda items were regarded as key to resolving the dispute and ensuring a lasting solution. Among these was agenda item number 4, which sought to deal with longstanding issues including constitutional, legal and institutional reforms.<sup>4</sup>

The Constitution of Kenya (Amendment) Act 2008,<sup>5</sup> itself a product of the KNDR, established the Committee of Experts (CoE) as a temporary organ to deliver a Constitution in the manner and process prescribed by the Act.<sup>6</sup> This required the CoE to review contentious and non-contentious

3 Final Report of the Committee of Experts on Constitutional Review, 11 October 2010, <http://www.katibainstitute.org/Archives/images/11-10-2010%20CoE%20Final%20Report.pdf> p 16 (accessed 12 June 2016).

4 South Consulting, Ltd., The Kenya National Dialogue and Reconciliation (KNDR) monitoring project, Project Context and Summary of Findings, February 2009, p. 1.

5 The 2008 Review Act was enacted "to facilitate the completion of the review of the Constitution of Kenya".

6 Section 7 of the Constitution of Kenya Review Act also established the Parliamentary Select Committee on the Review of the Constitution as a review organ in the Constitutional Review process. It is one of the organs envisaged under the Act to

issues<sup>7</sup> and consult on the thematic issues with the relevant role-players, members of the public, and a reference group.<sup>8</sup> This time-bound process led to the publication of a Draft Constitution in November 2009. After its approval by the legislature, the draft was put to a national referendum on 4 August 2010. A majority of 67% of the population voted in favour of the Constitution, which was promulgated and entered into force on 27 August 2010. Save for the suspension of selected provisions (ones under Article 262, together with the Sixth Schedule), it became operational immediately upon its adoption, with an enabling legislative framework being required to give effect to its key processes.

The adoption of Kenya's new, negotiated Constitution renewed Kenyans' hopes that the promise of constitutionalism would be realised. The expectation was that the new order would promote accountability for state actions, facilitate economic growth, and protect human rights. It was also hoped that state organs would be restructured so that the state derived its legitimacy from the governed and observed good governance and the rule of law.

## 2.2 A synopsis of the new dispensation

The Constitution provides a broad framework for democratic governance. Article 10 articulates national values that bind all state organs and aim to address ethnically divisive politics. It introduced mechanisms and new or restructured institutions to drive an inclusive governance agenda, in particular a devolved system of government for sharing resources and power equitably between central government and county governments. The Constitution also seeks to make service delivery more effective and accountable, promoting public participation in matters of governance by means of 47 county units. The Fourth Schedule gives county governments distinct roles, in addition to which a bicameral system of parliament, consisting of the Senate and National Assembly, was established to ensure broader representation.

The Constitution affirms the principle of separation of powers and speaks directly to the independence of the judiciary with respect to its administrative and fiscal management.<sup>9</sup> The Supreme Court was

undertake the review process, the other organs being the National Assembly, Committee of Experts, and the Referendum. The Parliamentary Select Committee also had the task of constituting the Committee of Experts, the Interim Independent Electoral Commission, Interim Independent Boundaries Commission and the Interim Independent Dispute Resolution Court.

7 This was done by examination of successive drafts, the result of previous processes including the Bomas Draft, the CKRC Draft, and the proposed new Constitution/Wako draft.

8 The Committee of Experts on Constitutional Review, Advertiser's Feature, *Daily Nation*, 26 October 2009. The reference group comprised civil society actors.

9 Article 160 Constitution of Kenya 2010.

established, and the Constitution was lauded for its robust and justiciable Bill of Rights,<sup>10</sup> which protects civil, political, economic, social and cultural rights.<sup>11</sup> The Constitution introduced a gender equality principle requiring that not more than two-thirds of any elective or appointive body should be from either gender. This was also included as a key principle of the electoral system.<sup>12</sup> Chapter 6, on integrity in leadership, introduced several checks to executive power. In Article 59, the Constitution established the Human Rights and Equality Commission as an independent organ with the mandate to check abuses of human rights by state and non-state actors.<sup>13</sup>

Given Kenya's history of land allocation, the Constitution established an independent organ, the National Land Commission, to oversee management of all public land and provide guidance to the central government.

### 3 Breathing life into the Constitution by using special mechanisms

#### 3.1 The rationale for a special mechanism

Constitution-making in countries with established constitutions is initiated largely by two exigencies. In the first instance, the old constitution may no longer be relevant; in the second, the existing structures of power may be discredited due to a compromised constitution.<sup>14</sup> The latter was the case in Kenya. The Commission tasked with the inquiry into the 2007 post-election violence found that numerous, piecemeal amendments to the Constitution gradually had concentrated power in the hands of the President while limiting the voice and space of other organs, particularly the legislature and judiciary.<sup>15</sup> Commentators also noted that an overly negotiated constitution-making process risks compromising the implementation process.<sup>16</sup>

Implementation risks being co-opted by narrow interests. Political negotiations were prominent throughout the constitution-making process, as

10 Article 258 of the Constitution includes the right to institute court proceedings where there is a contravention or a threat of contravention to human rights.

11 Chapter 4 Constitution of Kenya 2010.

12 Article 81(b) Constitution of Kenya 2010.

13 Article 252 Constitution of Kenya 2010.

14 M Tushnet, "Constitution-Making: An Introduction", 91 *Texas Law Review* (2013), pp. 1983-2014.

15 Report of the Commission of Inquiry into Post-Election Violence (CIPEV).

16 B Kennedy and L Bieniek, *Moving Forward with Constitutional Reform in Kenya: A Report of the Center for Strategic and International Studies (CSIS) Africa Program* (2010), Washington, D.C. Cited in B Sihanya, "Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects", FES Kenya Occasional Paper No. 5, October 2011.

politicians jockeyed to secure the best possible arrangement for themselves and their constituents. These tendencies are likely to be repeated in the implementation stage as well.

This background shows that Kenya's political history and weakened system of institutional checks and balances necessitated an independent constitutional implementation commission.

### **3.2 A constitutionally mandated implementation framework**

The true spirit of a constitution comes alive only when it is translated into lived reality for the governed. Kenya's extended constitution-making process faced the challenge of responding to diverse political, economic, social and cultural interests, which, if not well managed, had the potential to retard implementation. The framers of Kenya's new Constitution were careful to entrench within it two temporary bodies to spearhead the process.<sup>17</sup> The Sixth Schedule<sup>18</sup> established the Parliamentary Select Committee, which became known as the Constitutional Implementation Oversight Committee (CIOOC), to oversee the implementation process. In addition, the Commission for Implementation of the Constitution (CIC) was created as an independent body with a five-year mandate to implement the constitution.<sup>19</sup>

Implementation requires close involvement by key state organs, particularly to ensure that the relevant legislative reforms are undertaken. The legislature has the law-making function, but the office of the President provides the final assent to enacted legislation. State ministries and departments provide information about existing legal and policy frameworks. Publication of bills remains the purview of the office of the Attorney General.<sup>20</sup> The judiciary acts as an objective arbiter in resolving disputes and interpreting the Constitution. The Kenya Law Reform Commission (KLRC) maintains its role in legislative drafting and review. Other constitutional commissions and independent offices also play roles in the process. Clear differentiation and understanding of these roles is essential for a smooth implementation process.

17 M Njuguna Nganga, "Law Reform and Constitutional Implementation, Experiences and Challenges: The Case of Kenya", A Presentation to the Australasian Law Reform Agencies Conference, 2-4 March 2016, Melbourne, Australia.

18 Read together with Article 262 of the Constitution of Kenya 2010, which provides for transitional and consequential provisions.

19 Sixth Schedule and the Commission for the Implementation of the Constitution Act 2010.

20 B Sihanya, "Constitutional implementation in Kenya, 2010-2015: Challenges and prospects", FES Kenya Occasional Paper No. 5, October 2011, p. 22.

### **3.3 Management of the Constitutional Implementation Commission**

#### ***3.3.1 Technical competence of CIC members***

The CIC played an important role in monitoring the quality of the legislation with which it dealt. The diverse expertise of the commissioners and staff enabled them to deal with a broad range of issues. Commissioners and staff were selected on the basis of social representivity as well as their individual skill and experience.

#### ***3.3.2 Leadership of the Commission***

The Commission was tasked with a role calling for a high degree of technical expertise, wide knowledge, the ability to engage with people from all sectors of society, and agility in responding to the political terrain. Charles Nyachae's appointment as the chairperson of the Commission was well received. Although he did not have an active political career, he was the son of a famous and influential former cabinet minister. As a practising lawyer Nyachae embodied the image of an apolitical figure, which helped him and his team in navigating the difficulties of constitution implementation. He had a firm grasp of the substantive legal issues and provided intellectual leadership.

#### ***3.3.3 Funding the Commission's work***

Constitutional implementation is an expensive affair, calling for capital, infrastructural and human resource investment. A criticism of the CIC is that it relied heavily on financial aid from development partners, but it is doubtful if the process would have succeeded without this generous support. The CIC's financial orphaning by the exchequer highlights the executive's lack of commitment to the work of constitutional implementation.

### **3.4 The mandate and functioning of the CIC**

The CIC's mandate is outlined under section 5(6) of the Fifth Schedule of the Constitution and section 4 of the CIC Act. The core of this mandate included monitoring, facilitating and overseeing the development of legislation and administrative procedures required to implement the Constitution.

It was also envisaged that there would be coordination with the Attorney General (AG) and the KLRC in the preparation of implementing legislation. Related to this mandate is Article 261(4) of the Constitution,

which required the AG to consult with the CIC in preparing relevant bills for tabling before Parliament, as soon as reasonably practicable, to enable Parliament to enact legislation within the period specified under the Fifth Schedule.

The CIC was expected to report regularly to the CIOC on progress in implementation and to work with other constitutional commissions to ensure respect for the letter and spirit of the Constitution. Section 15(2)(d) of the Sixth Schedule empowered Parliament to provide legislative mechanisms to help the CIC monitor the implementation of devolution.<sup>21</sup> The CIC depended on the support and cooperation of public and state officers to respond to inquiries, furnish reports on the status of implementation and provide information on state organs.<sup>22</sup>

The CIC Act repeated verbatim the functions of the CIC outlined in the Sixth Schedule of the Constitution, thereby missing the opportunity to clarify broad terms such as “coordinating” or “in consultation” with the AG and KLRC and “working with” other constitutional commissions. The failure to elaborate on these key functions was not simply of theoretical concern: it posed serious practical hurdles to the work of the Commission and possibly contributed to the challenges it faced later in executing its mandate. To illustrate this difficulty, the following quote from the AG regarding the term “consultation” is apt:<sup>23</sup>

What does consultation mean? We get the draft from the parent ministry, do the drafting, we share the draft with the CIC and tell them to quickly give their comments on it, and send the law back to us. If they make comments that we find inappropriate we will not agree with them.

Greater specificity in the drafting of the CIC Act could have prevented the foregoing scenario.

The years immediately after promulgation focused on enactment of supporting legislation. The CIC brought a team on board with the technical expertise to ensure that the priority legislation set out under Schedule 5 of the Constitution was enacted.<sup>24</sup> The CIC adopted a thematic

21 B Sihanya, “Constitutional implementation in Kenya, 2010-2015: Challenges and prospects”, FES Kenya Occasional Paper No. 5, October 2011, p. 22.

22 Annual Report of the CIC, 2011-2012.

23 J Lakin, “Rhetoric: What Githu Muigai, Omar Hassan can learn from JM Kariuki”. Available at <http://www.theeastafrican.co.ke/OpEd/comment/What-to-learn-from-JM-Kariuki-/434750-1306074-v5f2srz/index.html> (accessed 6 October 2016).

24 See <http://www.katibainstitute.org/Archives/images/11-10-2010%20CoE%20Final%20Report.pdf>, p. 151. Schedule 5 sets out priority legislation and timelines for their enactment. These include laws that are to be passed in the first year after promulgation, including electoral laws and those setting up county governments; laws that give rise to minor amendments to existing statutes (e.g. citizenship); and laws to be passed in the second year, including those establishing new courts and financial legislation as well additional legislation on county governments. The remaining laws required by the new Constitution are to be passed within five years.

approach in redesigning government's executive functions. The eight thematic areas related to the chapters in the Constitution: Human Rights and Citizenship; Land and Environment; Public Service and Leadership; Representation of the People & the Legislature; the Executive and Security; the Judiciary and Constitutional Commission; Devolved Government; and Public Finance.

The CIC also designed other modalities to fulfil its mandate and ensure public participation. It engaged in litigation and other court processes; collaborated with constitutional commissions and independent public offices; and drew on comparative analysis and international best practice in its work. Planning and tracking of progress was supported by results-based programmatic approaches to monitoring, evaluation and reporting.<sup>25</sup>

### **3.5 The role of the CIC in law-making<sup>26</sup>**

In the enactment of any law, a series of steps had to be followed involving the CIC, key state organs and other stakeholders. In stage 1 a draft bill would be generated by a line ministry, government department or mandated institution. Public views would be incorporated in the policy and bill, both often be created with the assistance of the KLRC and AG. The draft would then be presented to the KLRC and AG's office. In stage 2, the KLRC and AG's office would forward the draft bill to the CIC. The CIC would upload it onto its website and call for engagement from the public and stakeholders. The website would always show the status of the bill, indicating, for instance, if it was a priority bill.

In stage 3, the CIC would convene a series of stakeholder consultations to ensure compliance with the Constitution on the substance of the bill. It would engage further with the AG, the KLRC and line ministries or departments to agree on how best to address any gaps that had been identified. Stage 4 involved making amendments to the bill after consultations. The CIC would confirm that the amended version was in conformity with the Constitution. In stage 5, the AG would prepare the bill and present it to Cabinet for approval. The CIC website would reflect this status.

In stage 6, any changes proposed by Cabinet were made. At this point, there would be a possibility for further engagement with the CIC if the proposed changes were unconstitutional. In stage 7 and following Cabinet approval, the bill would be published by the AG and tabled for parliamentary debate. The CIC would prepare an advisory note to

25 Annual Report of the CIC, 2011-2012, ix.

26 <http://www.cickenya.org/index.php/public-notice/item/166-making-laws-understanding-the-journey-of-the-bills#.V2VMxv197IU> (accessed 12 June 2016).

Parliament if any changes presented unconstitutional provisions. Stage 8 entailed parliamentary debate, after which the bill would be returned to the AG for preparation of a copy to be handed over for presidential assent. Once the President had signed the bill, in stage 9, the AG would publish it.

## **4 Prospects and challenges in the implementation process**

### **4.1 Identifying promising practices**

#### ***4.1.1 Enabling the Constitution through legislation***

The CIC facilitated the enactment of rules and regulations that enabled a broad range of constitutional reforms. The process was long and tedious, but, working with civil society and other stakeholders, the CIC met the first-year deadline prescribed in the Constitution. In that period, 18 pieces of legislation were passed, firstly, to restructure the judicial system, secondly, to establish various commissions and institutions, and, thirdly, to prepare for the first elections under the Constitution.

Legislation on the restructured judiciary served, among other things, to establish the Supreme Court, the Industrial Court, and the Land and Environment Court. To facilitate judicial reform and transformation, the Vetting of Judges and Magistrates Act and the Judicial Service Commission Act were enacted. The second group of enabling legislation related to the establishment of Article 59 commissions and other independent commissions. Legislation included the Kenya National Commission on Human Rights Act; the Gender and Equality Commission Act; the Commission on Administration of Justice Act; the Commission on Revenue Allocation Act; and the Salaries and Remuneration Commission Act. Among the laws relating to election preparation were the Independent Electoral and Boundaries Commission Act, the Elections Act, and the Political Parties Act.<sup>27</sup>

In the second year of its operations, the CIC worked towards legislation covering matters of security and legislation aiding transition to the devolved government system within the stipulated time-frame. By August 2013, the following had been enacted: the Defence Forces Act; the National Service Intelligence Act; the National Security Council Act; the County Government Act; the National Government Coordination Act; and the County Government Public Finance Management Transition Act.<sup>28</sup>

27 CIC Annual Report, 2011-2012.

28 Commission for the Implementation of the Constitution, 2012-2013 “Three Years After Promulgation: Tracking Devolution”.



In a few instances, the National Assembly responded to delays in enacting legislation by extending the prescribed period on the grounds that comprehensive consultation was necessary to resolve disputes. Examples include the legislation on public finance management and on land and county governments.<sup>29</sup>

#### **4.1.2 Effective civil society engagement**

Effective implementation is a painstaking process likely to encounter bottlenecks.<sup>30</sup> Diverse social and political interests, along with the heightened sensitivity caused by the post-election crisis, made the situation in Kenya highly charged. During the constitutional review process it was generally agreed that the CIC – with the support of civil society – would play a key role in facilitating a smooth transition from a mistrustful context to one characterised by optimism.

The CIC identified civil society actors and mapped out thematic areas they could work on. These actors were invited to discussions on the implementation process to share technical content that could contribute to the development of legislation. In this way, the CIC drew on civil society's knowledge of a range of matters, including representivity, transition to devolution, judicial reforms, property rights and inheritance.

Consultation with civil society partners led to the enactment of the Leadership and Integrity Act and a debate on whether to have a stand-alone National Gender and Equality Commission by splitting up Article 59 into two or three entities. In matters of transitional justice, there was extensive engagement with the CIC on draft security legislation, particularly in seeking to resolve the overlapping mandates of the National Police Service Commission and the Inspector General of Police. Women's rights organisations also report that CIC was consistent in calling for strict adherence to the constitutional principle of affirmative action.<sup>31</sup>

#### **4.1.3 The CIC's role in judicial reforms**

As mentioned, autocratic rule by President Moi led to an ineffective, inefficient judiciary with little perceived legitimacy. By the early 1990s confidence in the judiciary had hit an all-time low. The criteria and processes for selecting persons to serve in the judiciary were unclear. Delays in the hearing of cases resulted in a massive case backlog. The judiciary became a den of corruption, developing jurisprudence that served

29 CIC Annual Report, 2011-2012.

30 B Sihanya, "Constitutional implementation in Kenya, 2010-2015: Challenges and prospects", FES Kenya Occasional Paper No. 5, October 2011.

31 Staking claims for women's gains in the Constitution, 2010. <http://www.cickenya.org/index.php/reports/itemlist/tag/News%20Bill%20of%20Rights%20and%20Citizenship?start=10> (accessed 15 June 2016).

the ruling class and did little to uphold the Bill of Rights and constitutionalism. It became the vendor of justice to the highest bidder, leading to the adage, “Why pay a lawyer when you can buy a judge?”.

Public perception and a general lack of confidence in this institution fuelled demands for its reformation. Members of the public recommended the judiciary be dismissed in its entirety.<sup>32</sup> The enactment of the Constitution in 2010 served to catalyse efforts to transform the judiciary and rebuild public trust in it as the final arbiter in the interpretation of the Constitution.<sup>33</sup>

Among key recommendations made to address corruption, ethics and integrity in the judiciary was a call for the enactment of a legal framework establishing the process and mechanism for vetting judges serving on the bench. This was to be undertaken by an independent tribunal within the first year of the Constitution’s promulgation.<sup>34</sup>

The raft of proposed reforms would necessarily include legislation regarding not only the procedures for vetting judges and magistrates but the establishment of a restructured Judicial Service Commission and the enactment of a Supreme Court Act and Rules. The CIC embarked on a process leading to the enactment of legislation to implement judicial reform, and in doing so it included Kenyan civil society as a key partner. Since the year 2000, civil society organisations had actively participated in processes informing judicial reforms. Among these were a Task Force on Judicial Reforms and the civil society reference group on constitutional reform. It was thus advantageous to constitutional implementation that these organisations were already so intimately experienced in the judicial reform process.

Under the leadership of the CIC, the projected reform processes were undertaken. The CIC often asked stakeholders to submit memoranda to guide various stages of the implementation process. This contributed to the fast pace of judicial reform, several aspects of which are still currently under way. There were, however, two failures in this regard: a failure to facilitate the enactment of legislation under Article 168(10) of the Constitution for procedures to remove judges and, likewise, to see the passage of legislation regulating a Judiciary Fund, as provided for in Article 173.

32 The Kenyan Section of the International Commission of Jurists Policy Brief: Vetting of Judges and Magistrates in Kenya November 2011 p 5-6.

33 Judiciary Transformation Framework <http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary's%20Transformation%20Framework-fv.pdf>. (accessed 16 June 2016).

34 Final Report of the Task Force on Judicial Reform, <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf>, (accessed 16 June 2016) See also 23 of the Sixth Schedule of the Proposed Constitution of Kenya.

The failure to enact legislation on the removal of judges had grave ramifications when in early 2016 a Supreme Court Judge, William Tunoi, was accused of corruption and a tribunal set up to undertake an inquiry under Article 168. The tribunal did not conclude its inquiry, stating as its reason for this that Justice Tunoi had retired, was no longer a judicial officer and hence not a valid subject of inquiry. Even before this premature termination, the tribunal had faced challenges to the legal scope of its inquiry. If Article 168(10) legislation had been in place, it would have provided clarity on contentious procedural matters like these, ones that ultimately doomed the inquiry.

Furthermore, even though priority legislation was enacted, in most cases it was not embedded in a policy framework that could inform it and justify the need for it. A case in point was the Vetting of Judges and Magistrates Act, where the cart was put before the horse in that the law was enacted prior to the formulation of a policy. The latter was reformulated later, though, and has proven useful in informing administrative procedures for the vetting process and subsequent amendments to the law.

#### ***4.1.4 Knowledge generation***

Generating, documenting and sharing knowledge was another important part of the CIC's work. The CIC maintained an interactive website that served as a robust knowledge resource. Through its Bill Tracker, the website issued progress updates on the status of legislation on which the CIC was working or had forwarded to other state organs. Activity schedules and dates were uploaded, along with accurate, useful information on technical matters, presented in the form of advisories. These advisories provided clarity on processes being followed and issues under debate. This was particularly evident during the review of family laws, when the subject of polygamous marriage, cohabitation, and division of matrimonial property<sup>35</sup> sparked vigorous public debate. In an advisory, the CIC stated what it considered as the correct position in this draft law.

## **4.2 Challenges to implementation**

### ***4.2.1 Problems of constitutional interpretation***

Organs of state and arms of government have a mandate to implement the Constitution in accordance with principles of constitutional interpretation and in a purposeful, accurate way. Where there is no consensus on the

35 Advisory on Media Comments on Marriage Bill, 2012, <http://www.cickenya.org/index.php/reports/itemlist/tag/News%20Bill%20of%20Rights%20and%20Citizenship> (accessed 15 June 2016).

correct position to take, parties may seek assistance from the courts, which under Article 259 are charged with interpretation in a manner that promotes the purpose of the Constitution.

Differences in viewpoint about the interpretation of legal text gave rise early on to disputes in the constitutional implementation process.<sup>36</sup> These drew the CIC into open discussions, arguments and even litigation. Among the earliest disputes were those to do with interpreting the affirmative action principle in Article 27(6) in relation to the appointment of key state officials and, later, those concerning the application of the same principle to Kenya's electoral system, as set out in Article 81(b). In the latter case, the question was whether the principle applied to the first elections of 4 March 2013. The proper date for the first general elections was itself a subject of dispute eventually resolved by the courts.

The failure to implement the 'not more than two-thirds' affirmative action principle was one of the most important challenges to the implementation of the Constitution. The interpretation of the two-thirds gender principle gave rise to differences of opinion as to its meaning and application. Despite attempts to introduce an effective mechanism through legislation, and despite litigation, the matter remains unresolved to this day. It may point to a lack of political will in effecting implementation of the Constitution on this issue; for much the same reason, it may also point to the patriarchal nature of a society that seeks to maintain the status quo in which women are significantly under-represented in politics and decision-making. The CIC was duly drawn into the fray, and made its stance known both by advisories and in litigation.

The affirmative action principle, as mentioned, is set out in Article 27. It provides that in any elective or appointive position, it is a mandatory requirement that not more than two-thirds of those appointed or elected are of the same gender. This principle is entrenched in the electoral system by dint of Article 81(b), which states that "not more than two-thirds of the members of elective public bodies shall be of the same gender". However, there is no interpretive guidance around this principle, nor a mechanism indicating how it should be actualised with regard to the election of members of the National Assembly.

Prior to the first elections, this issue led to an Advisory Opinion<sup>37</sup> by the Supreme Court at the insistence of the Attorney General. The opinion was sought owing to concerns that, should the electorate fail to deliver on the affirmative action principle in the March 2013 elections, the National Assembly could be rendered unconstitutional for failing to meet the

36 B Sihanya, "Constitutional implementation in Kenya, 2010-2015: Challenges and prospects", FES Kenya Occasional Paper No. 5, October 2011, p. 23.

37 Supreme Court Advisory Opinion No. 2 of 2012 In the matter of the Principle of Gender Representation in the National Assembly and the Senate (2012) eKLR.

constitutional threshold in its gender composition. The question the AG presented to the court was whether Article 81(b), read with Article 27, required immediate or progressive realisation and whether the same was required to apply to the first general elections of March 2013.

The CIC participated in these discussions and considered key arguments. The first, advanced by the AG, was that the principle as expressed in Article 81(b) was for progressive application. The counterargument was that the Constitution did not frame it as a principle for progressive realisation and that if this were the wish of the framers, they would have indicated so. Those opposing the AG's view held that the principle was for immediate realisation and application in the first general elections under the Constitution and the ones thereafter.

Taking into account both of these views, the CIC maintained that the affirmative action principle in Articles 27(8) and 81(b) is for immediate realisation. It argued that there are only few and very specific instances where the term "progressive" is used in the Constitution and that this was not the case in these two articles. It proposed that the process of framing the Elections Bill provided a suitable opportunity to introduce a mechanism for effecting the principle. It proposed as a further option that the mechanism provided by Article 177(1)(b) with respect to county governments be applied to elections of the National Assembly as provided in Article 97.<sup>38</sup>

Proponents of immediate realisation supported the CIC's proposals. The main benefit of the CIC's proposed solution was that it could easily be acted on by Parliament, thus dispensing with the need for the more cumbersome alternative of a constitutional referendum. This would also have avoided the looming legitimacy crisis in which the constitutionality of the National Assembly would be in question if the gender-quota threshold were not met in its elections.

Nevertheless, the majority decision of the Court's Advisory Opinion was that Article 81(b) is attainable only by progressive realisation and need not be applied strictly in the March 2013 elections. The Court held that the 'not more than two-thirds principle' would not apply to the National Assembly elections. In the light of the timelines presented in the Fifth Schedule of the Constitution, the Court gave 27 August 2015 as the final date by which the affirmative action principle would have to be given effect in legislation. The Chief Justice, however, presented a dissenting opinion that the principle was for immediate application.

This was not the first time the CIC had made known its stance on the affirmative action principle. In fact, it was consistent in its support for the

38 Advisory on Implementing the Constitutional Principles on Affirmative Action, Third Quarterly Report, July - September 2011.

principle's immediate application. In 2011 the CIC joined a suit filed by the Federation of Women Lawyers of Kenya (FIDA-K)<sup>39</sup> challenging the appointment of judges to the Supreme Court for failure to meet the 'not more than two-thirds' gender threshold. The petitioners objected to the decision of the Judicial Service Commission in nominating only one woman out of five persons to serve as judges of the Supreme Court. The CIC explained that by strictly in the suit it would assist the court in reaching a just determination:

This is a matter of national importance which will have far-reaching implications on the manner in which institutions will deal with the constitutional requirement to ensure gender equity in appointments to public offices.<sup>40</sup>

Ultimately, the CIC ended its mandate without managing to negotiate implementation of the two-thirds gender principle. It could be argued that the CIC ought to have made further or more concerted efforts to ensure compliance with the Constitution – and indeed it could have. However, the overall lesson to be drawn from the CIC's efforts is that, in the absence of a culture of constitutionalism, a special mechanism for constitutional implementation is by no means a panacea

#### ***4.2.2 Slow pace of legislative enactment: the Prevention of Torture Bill***

To uphold Kenya's international legal obligations and constitutional provisions relating to acts of torture, efforts were made to enact a Prevention of Torture bill. Under successive regimes Kenya witnessed, among other things, torture, forced disappearances, incommunicado detention of persons, extrajudicial killings, violent eviction from urban informal settlements, and sexual violence by security agents.<sup>41</sup> Although torture was not listed as a subject of priority legislation, civil society actors made a strong case for it in the light of Kenya's history and transitional justice process.

Article 29 of the Constitution prohibits acts of torture and Article 25(a) recognises freedom from torture as a non-derogable right. Torture is prohibited in various pieces of legislation, including the National Police

39 Constitutional Petition No. 102 of 2011 In the matter of the Recommendation by the Judicial Service Commission of Persons for Appointment to the Offices of Judges of the Supreme Court under the Constitution of the Republic of Kenya (between Federation of Women Lawyers of Kenya (FIDA-K) & others and the Attorney-General and others) (2011).

40 See L Onyango, "CIC picks Murgor to Argue its Case on Supreme Court Nominees", *Daily Nation*, 25 June 2011.

41 ICJ Kenya, "State of Torture and Related Human Rights Violations in Kenya: Alternative Report to the UN Committee on the Convention Against Torture", informing its review of Kenya's 2<sup>nd</sup> Periodic Report at its 50<sup>th</sup> Session (6-31 May) 2013 on the Implementation of the Convention against Torture and other cruel, inhuman and degrading treatment or punishment, p. 12.

Service Act 2011 (95), the Criminal Procedure Code, the National Intelligence Service Act 2011, the Kenya Defence Forces Act 2011, and the Children's Act. However, the provisions lack definition in national legislation. The Committee monitoring compliance with the Convention Against Torture (CAT) called for this lack of definition to be addressed.<sup>42</sup>

A Draft Prevention of Torture Bill was prepared through the joint effort of civil society, state institutions and relevant constitutional commissions. It was forwarded to the CIC, which undertook consultations and accepted memoranda by stakeholders. Civil society actors observed that the CIC seemed to have undertaken considerable lobbying with state agencies to see the Bill through the necessary stages and that during this process it was not clear who had custody of it.

The legislation is yet to be enacted and the CIC is *functus officio*. At one point the AG indicated that the Bill was ready and would be presented to Parliament,<sup>43</sup> but he is also on record as stating it had yet to be prioritised for review to check that it meets constitutional requirements. Civil society actors have spearheaded efforts to see it enacted, but the reason for the delay is unclear, particularly given that the bill is urgent and that Kenyan courts in the recent past have demonstrated a commitment to ensuring accountability for acts of torture committed under former President Moi's regime.

#### 4.2.3 Political interference, role conflation and turf wars

The CIC's efficiency in fulfilling its mandate, particularly in the first few years of its existence, gave rise to noticeable political interference from the other arms of government. In some cases, the interference came at the stage of debate on draft legislation in Parliament. In others, constitutional gains were curtailed by later amendment to legislation, such as what happened in the omnibus amendment to security legislation. The CIC engaged in the litigation that successfully challenged the Security Law Amendment Act: it joined as *amicus curiae*<sup>44</sup> and presented an objective perspective that helped the court arrive at a just conclusion.

Furthermore, differences between the AG's office and the CIC were played out in the public domain, raising concern over how they should coordinate their efforts in the implementation process. Civil society actors saw this as an attempt to overlook the mandate of the CIC and subvert the constitutional implementation process. The AG failed to adhere to Article

42 UN.Doc.ICCPR/C/KEN/CO 13 paragraph 16.

43 See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=13337> (accessed 15 June 2016).

44 Petition no. 628 of 2014 Consolidated with Petition Nos 630 of 2014 and 12 of 2015 *Coalition for Reform and Democracy-CORD & 2 others v the Attorney General & Another*. See <http://kenyalaw.org/caselaw/cases/view/106083/> (accessed 12 June 2016).

261 of the Constitution that expressly required the AG to consult the CIC in the preparation of relevant Bills for implementation of the Constitution.

In fact, when the CIC decried this lapse in consultation, the AG on several occasions publicly condemned the CIC's "lack of respect". At a press briefing in late 2011, the AG described as "unfortunate and irresponsible" the CIC Chairperson's claims that the office of the AG had failed to consult the CIC on bills before they were tabled in Parliament.<sup>45</sup> This came after a request by the CIC for an audit of various state offices regarding their progress in implementing the Constitution. The AG viewed it as an attempt by the CIC to "supervise" his office and that of other state officers.

The CIC Chairperson, in contrast, saw the request as a response to the government's attempts to delay implementation, and questioned why the AG characterised the CIC's role as intrusive when other government departments were compliant with it. He reiterated the mandate of the CIC as set out in section 5(6) of the Sixth Schedule, which includes the responsibility "to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution".

#### ***4.2.4 Non-renewability of the CIC's mandate***

The CIC's five-year term came to a close on 29 December 2015, but this did not mark the end of constitutional implementation. Legislation still needs to be enacted, including that giving effect to the affirmative action principle. Renewing the term of the CIC would have been legitimate, given that section 7 of the Sixth Schedule granted the National Assembly the power to extend the CIC's tenure in the event that the Constitution had not been fully implemented.

However, CIC commissioners did not appear keen to seek a renewal.<sup>46</sup> The CIC is not wholly to blame, as Parliament itself was divided on the matter. While the Senate had recommended that the CIC's term should be extended, the CIOC recommended its disbandment, indicating that any unfinished business would be taken over by the AG.<sup>47</sup> In view of the tense relationship between the CIC and the executive, particularly the AG, one cannot help but see political machinations behind this decision. In the end, since the mandate lay with the National Assembly, the renewal was not effected and the CIC's mandate duly lapsed.

45 See A Shiundu, "AG accuses Nyachae of disrespect", *Daily Nation*, 23 December 2011.

46 See, for instance, "I won't extend my term, Charles Nyachae says", *Daily Nation*, 1 October 2015.

47 See K Njoroge, "Nyachae team set to wind up with hefty send-off package", *Business Daily*, 27 December 2015, and O Mathenge, "MPs do not want CIC term renewed", *The Star*, 19 November 2015.



## **5 Conclusion and essential lessons from the CIC experiment**

Jurisdictions seeking to use a special commission for constitutional implementation can draw several essential lessons from Kenya's experience.

It was not always clear which constitutional commissions had the mandate to undertake certain tasks. The CIC seems to have had to negotiate its role with other commissions, causing confusion among stakeholders. For example, it appears that the CIC felt it was within its powers to report on matters relating to compliance with treaty bodies. It would have been beneficial if the Constitution and in particular the enabling CIC Act were more explicit about the exact mandate of the CIC vis-à-vis other commissions. In designing similar processes, it is necessary to spell out more precisely what is meant by "consultation". This lack of clarity led to turf wars between the office of the AG and the CIC.

Kenya's CIC was a temporary body, but the work of implementing a Constitution is ongoing. Such a body should either be made permanent or the task of constitutional implementation should be given to other institutions, such as the Law Reform Commission, the Office of the AG or the National Human Rights Commission, especially for oversight purposes. This would not only limit turf wars but ensure that the process is completed.

One of the CIC's greatest strengths was the technical knowledge and skill of its commissioners and staff. Given the CIC's temporary nature, those individuals moved on to serve in other capacities elsewhere. It would have been useful to establish a transitional mechanism that allowed a residual team to work closely with the Law Reform Commission and the AG in continuing to prioritise the implementation process.

The constitutional implementation process generated a wealth of information that could serve as a valuable repository of knowledge. It would have been advisable for the CIC to have established strategic relations with institutions in academia and civil society to store and package this information for future use.

It was necessary to entrench the CIC in Kenya's 2010 Constitution as an independent organ with a wide mandate to oversee its implementation. The Constitution was designed to help make the transition from a troubled past to a new era of faith and trust. For the most part, the CIC executed its mandate with the utmost professionalism, despite having to contend with challenges such as piecemeal interpretation of the Constitution, political tensions and executive interference. The CIC model is thus worth emulating, with modifications that speak to specific contexts.

The residual mandate of the CIC now rests with the office of the AG, the Kenya National Commission on Human Rights, the Kenya Law Reform Commission, the National Gender and Equality Commission, and will be determined by the Constitutional Implementation Oversight Committee. It remains to be seen how implementation will be prioritised and how a degree of independence will be guaranteed to the organs now tasked with the residual mandate.

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*Charles M. Fombad*

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## **1 Introduction**

In the quest to attain the political, social and economic stability which had eluded African countries since the independence period, more liberal-leaning constitutions or provisions were introduced in post-1990 constitutional reforms. However, in doing so, little attention was paid to the problem of non-implementation of constitutions.

As the different chapters in this volume clearly show, the challenges of implementing African constitutions did not start and end with the essentially imposed independence constitutions; instead they continued under the more indigenous “made-in-Africa”, post-1990 revised or new constitutions. It is a problem that manifests itself not only in fairly liberal constitutions, such as those of Kenya of 2010 and Zimbabwe of 2013, but also in illiberal constitutions such as that of Cameroon of 1996 and Swaziland of 2005. The reasons for non-implementation of constitutions are many and varied, ranging from ignorance, carelessness and indifference, on the one hand, to bad faith, mischief or deliberate inaction, on the other; likewise, the consequences of non-implementation also often differ from each other, depending on the provisions that have not been enforced.

The diversity of perspectives on this problem provides an opportunity for critical review of the issues that commonly arise and of how they can be addressed. In assessing a few of the main lessons to be drawn from these differing experiences, this chapter proceeds as follows: firstly, it examines some of the common and recurrent challenges to constitutional implementation and why implementation has to be linked to constitutionalism; secondly, it seeks to identify certain normative frameworks that can improve the generally poor record of constitutional fidelity and implementation in Africa.

## 2 Constitutional implementation and constitutionalism

It can be argued that while the duty to obey and implement all the obligations of a constitution rests on all citizens, it is particularly imperative for those in official positions, especially officials who have sworn an oath to defend the constitution. As was shown in Chapter 1, non-compliance with the terms of a constitution threatens its *raison d'être* and the fundamentals of constitutionalism. This raises two closely connected issues: one of legitimacy and the other of fidelity to the constitution.

No constitution is perfect, nor could any constitution ever secure the unanimous consent of all citizens. Nevertheless, its legitimacy lies in the fact that it incorporates and reflects the diverse desires, hopes and aspirations of a majority and is accepted as the fundamental law by all. Thus, the legal legitimacy of the constitution depends far more on its actual or presumed popular acceptance, or what Richard Fallon refers to as “sociological acceptance”, than on anything else, especially its formal ratification.<sup>1</sup> If, as noted above, post-independence constitutions were more or less imposed by the departing colonial powers irrespective of the actual needs and desires of the population, it is fairly understandable why their full and effective implementation was problematic.

On this premise, then, the presumed indigenous source of post-1990 modern African constitutions should in principle enhance their implementation. As shown in Tinashe Chigwata’s and Makanatsa Makonese’s chapters on the making of the Zimbabwean 2013 Constitution, as well as in Kamotho Waiganjo’s and Jane Serwanga’s chapters on the making of the Kenyan 2010 Constitution, one critical indication of the “indigenous” source of many African constitutions today is that there was broad popular participation in the constitution-making processes. Such popular participation gives a constitution not just legal legitimacy<sup>2</sup> but, very importantly, sociological legitimacy – that is, the people’s feeling that the document is the result of a fair process in which they participated, that they can identify with its values and principles, and that it deserves their support.

1 R Fallon, “Legitimacy and the constitution”, 118(6) *Harvard Law Review* (2005), pp. 1787-1853.

2 Legal legitimacy, which often results from approval by the legislature or at a referendum, is a much weaker basis than others for the recognition and acceptance of a constitution. For one thing, most African parliaments are controlled by dominant parties whose majority was often secured after rigged elections and therefore can hardly be considered as a fair reflection of the will of the people. Similarly, referendum results are equally questionable in many jurisdictions because of flawed voting procedures designed to ensure the approval of the position preferred by the incumbent. However, it needs to be noted that flawed elections are increasingly becoming the exception rather than the norm.

Nevertheless, a good number of post-1990 African constitutions saw little or no involvement of the population in their creation. Examples are the 2005 Constitution of Swaziland, discussed in Chapter 4 by Thulani Maseko and Lukman Abdulrauf, and the Nigerian 1999 Constitution, discussed in Nathaniel Inegbedion's chapter, where the role of the population in the process was fairly limited. As with other of the post-independence constitutions, these virtually imposed constitutions do enjoy legal legitimacy but it rests more on popular acquiescence based on habit rather than anything else. There is a presumption that, as a result of the self-identification with constitutions that arises through popular participation in the drafting process, these constitutions will be complied with by both the governed and the government.

But, as mentioned, the chapters in this volume highlight that the problem of fidelity to the constitution and commitment to its full and effective implementation has not gone away even though popularly drafted constitutions have replaced imposed constitutions. For example, Chigwata argues that the ruling ZANU-PF government in Zimbabwe has generally been reluctant to implement those aspects of the 2013 Constitution that were incorporated at the behest of the MDC opposition parties during the constitution-making process. This has affected the speed at which provisions dealing with devolution of power, elections and security-sector reforms are implemented, allowing that three years might be too short a time in which to draw any firm conclusions.

Swaziland appears to have taken the concept of "indigenous African constitution" to the extreme. Its 2005 Constitution, which, according to the preamble, is supposed to "blend the good institutions of traditional Law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development" of the country, and is purported to have been "vetted by the people at *tinkhundla* and *Sibaya* meetings", provided scarcely any opportunity for the views of the public to be expressed other than those of people carefully selected by the King. It is therefore no surprise that the Constitution has merely perpetuated an obsolete system of traditional rule in which the King is above the Constitution and constitutional implementation is entirely dependent on his goodwill.

By contrast with Anglophone Africa, the constitutional implementation record in many Francophone African countries, where the constitution-making processes, with the exception of Benin in 1990, hardly involved the active involvement of the general population, has been much poorer. For example, there was little public involvement in the drafting of the 1996 Cameroon Constitution. Until fairly recently, 24 of its

69 articles, or 35 per cent of its provisions, had not been implemented.<sup>3</sup> The same failure to fully implement constitutional provisions is true of many other Francophone African constitutions.<sup>4</sup>

Still, there does seem to be some link between the constitution-making process, the implementation of the constitution and fidelity to the constitution. If the population was not involved in the constitution-making process, there is little chance that they will know much about the constitution and therefore the sense of self-identification and commitment to its implementation will be much lower. This is particularly important because, in spite of the extensive involvement of the public in the constitution-making processes in Kenya, South Africa and Zimbabwe, ordinary citizens' level of knowledge of the constitution's content and implications in these countries is still relatively low, to the extent that most of them are unaware of which of their constitutional rights and obligations remain unfulfilled.

Although the primary enforcers of the constitution are public officials, ordinary citizens have a duty to ensure that the constitution is properly implemented. It can be argued that the legitimacy of a constitution (legally, sociologically and morally) also places a duty on citizens, albeit that it may not be a binding legal duty, to ensure that the constitution is observed. It is their sovereign constitution, reflecting their hopes and desires for the present and the future. While judges are their chosen interpreters of the constitution, it is ultimately ordinary citizens who must ensure that it reflects their lived realities.

The Kenyan 2010 Constitution underscores this point in its first articles. Article 1 makes it clear that all sovereign power under the Constitution belongs to the ordinary citizens and has been merely delegated to government officials. Article 3 states that "every person has an obligation to respect, uphold and defend" the Constitution. With such a strong constitutional foundation, citizens have no reason to be indifferent to the government's failure to implement it fully. As Gerald Caiden rightly points out, people usually get the government they deserve. If they are

3 For example, Articles 46-52 which provide for a Constitutional Council have hardly been implemented effectively, and the Supreme Court under Article 67(4) continues to discharge its functions. The Senate provided for in Articles 20-24 was established only in 2013 (17 years later!), and some degree of limited decentralisation provided in part X was partially implemented between 2004 and 2008.

4 For example, although Articles 157-179 of the 2006 Constitution of the Democratic Republic of the Congo elaborately provide for a Constitutional Court, the members of this court were appointed only in 2014 and the court itself formally inaugurated only in March 2015 (almost 10 years later). Another example is the Togolese Constitution of 1992 (as subsequently amended). A 2002 amendment provided for a senate in Articles 51-57, but this institution has never been established. Similarly, its Articles 141-142, which provide for decentralisation, have been implemented very slowly and ineffectively because of a lack of political will. For instance, it was only in 2007 that Law No. 2007-011 of 13 March 2007 was adopted just to recognise the principle of decentralisation.



diligent, demanding, inquisitive and caring, they will get a good government; if they allow themselves to be intimidated, bullied, deceived and ignored, then they get bad government that ignores its constitutional obligations or implements them at its convenience.<sup>5</sup> A constitution is only as good as the strongly manifested will of the citizens to defend it and ensure that it is fully implemented.

However, to be effective, ordinary citizens need the support of strong civil society organisations (CSOs). Wandisa Phama and Palesa Madi's chapter, along with Makanatsa Makonese's, show how CSOs in South Africa and Zimbabwe have been instrumental in the fight to ensure that several provisions of the constitutions of both countries are implemented. CSOs, particularly those dealing with human rights issues, and the bodies representing the legal profession are watchdogs for the respect of the rule of law, constitutionalism and good governance. In many African countries CSOs are beginning to fill the void left by effective and credible opposition parties because dominant parties have virtually taken control of the political space vacated by the pre-1990 single parties.

As such, constitutional implementation can be enhanced when there are vibrant CSOs that are ready to speak up and challenge the government, especially when dealing with the enforcement of constitutional rights such as the right to housing, the right to health and the right to education. As Phama and Madi show in their chapter on the South African experience, CSOs must be ready to speak on behalf of the weak, the poor and other voiceless members of society through *amicus curiae* representation in court.

Another important role CSOs can play is to combat the problem of low constitutional literacy to ensure that people have greater knowledge of their constitutional rights and how these are violated daily through action or omission. Ideally, improving constitutional literacy should be addressed by the constitution itself. For example, section 7 of the 2013 Zimbabwean Constitution specifies several ways in which public awareness of the Constitution should be promoted.<sup>6</sup> While the primary responsibility for

5 "Public Maladministration and Bureaucratic Corruption", in McKinney and Johnston (eds), *Fraud, Waste and Abuses in Government: Causes, Consequences and Cures*, Philadelphia, ISHI Publications (1986).

6 It states, "The State must promote public awareness of this Constitution, in particular –  
 (a) Translating it into all officially recognised languages and disseminating it as widely as possible;  
 (b) Requiring this Constitution to be taught in schools and as part of the curricula for the training of members of the security services, the civil service and members and employees of public institutions; and  
 (c) Encouraging all persons and organisations, including civic organisations, to disseminate awareness and knowledge of this Constitution throughout society."

doing so is imposed on the government,<sup>7</sup> CSOs need to play a more active part in this.

Indeed, one important lesson that emerges from these chapters is that leaving constitutional implementation solely or primarily in the hands of governments, as is presently the case, will not change the situation very much. Even in Kenya, where the CIC appears to have done a tremendous job to facilitate the implementation of the Constitution, once the government had an opportunity to decide its future, it did not hesitate to get rid of the CIC. On the basis of the analysis by Waiganjo and Serwanga, it can be argued that the CIC in many ways was a victim of its own success. There is thus a need to look for a sustainable method of enforcement that will not entirely depend on the goodwill of the government in power.

### **3 Towards a sustainable normative framework**

Even in countries where the democratic culture and institutions for sustaining constitutionalism are fully developed and functioning well, the process of implementing the constitution remains a challenge. While new or revised constitutions raise expectations of entrenching and promoting constitutionalism, good governance and respect for the rule of law, there remain many obstacles to making these constitutional aspirations a reality. These obstacles are mainly the work of conservative forces or opportunists who prefer to operate under the opaque systems of the past. The challenge therefore is to design a normative framework for constitutional implementation which is not vulnerable to being stalled by self-interested politicians or government officials.

Considering the experience of the countries discussed in this volume, two steps seem imperative for establishing such a normative framework. The first is to establish permanent institutions for the implementation of the constitution, much along the lines of the Chapter 9 institutions provided for under the South African Constitution and the independent commissions provided for under the Kenyan and Zimbabwean Constitutions.<sup>8</sup> The second is to impose a legal obligation on those with the specific responsibility to implement certain of the constitution's provisions. In addition to this, there is a need for an alert international community. Before examining these points, though, it is necessary to note that mechanisms for constitutional implementation ought now to be generally accepted as an integral part of any constitution-making agenda.

7 See DT Hofisi, "Bottom-up Approaches to Constitutional Implementation: A Civil Society Perspective from Zimbabwe", who points out that the Zimbabwean government has not shown any particular interest in promoting public awareness of the Constitution.

### 3.1 Specialised permanent institutions for implementation

The Kenyan 2010 Constitution is one of the few in the world to have introduced a specialised institution, the CIC, with a specific mandate to facilitate the implementation of the constitution. The designers of the constitution were probably too ambitious and a bit naïve to think that it could accomplish the task within five years, or that if it did not do so, the politicians would be willing to extend its life. This is how section 5(7) of the Sixth Schedule puts it:

The Commission for the Implementation of the Constitution shall stand dissolved five years after it is established or at the full implementation of this Constitution as determined by Parliament, whichever is sooner, but the National Assembly may, by resolution, extend its life.

As the chapters by Waiganjo and Serwanga explain, the CIC played a critical role in facilitating the implementation of many of the provisions in the Kenyan Constitution, perhaps most significantly those dealing with devolution of powers to the counties. On the other hand, because of the general tendency of most African governments to concentrate power in the centre, it is no surprise that among the most frequently neglected provisions are those dispersing powers to the regions. The example of Cameroon was mentioned earlier, and Chigwata also drew attention to this problem in his chapter on Zimbabwe. Even the elaborate provisions on decentralisation in the Ugandan 1995 Constitution, as Donald Rukare points out in Chapter 6, have not been fully implemented.

Be that as it may, a number of lessons can be learnt from the Kenyan CIC experience. The first and perhaps most important is that the CIC should have been made a permanent institution, given that constitutional implementation is not a time-bound activity but one that will extend through the life of the constitution. The second lesson is that the CIC's mandate must be spelt out clearly in such a way as to avoid conflict or overlap with the functions of other institutions and that its relationship with these institutions needs to be defined explicitly.

Finally, to ensure that the institution is genuinely independent and capable of performing its functions, it needs to be protected from political

8 See Articles 88-90 and 248-254 of the Kenyan Constitution and sections 232-257 of the Zimbabwean Constitution. For a discussion of these institutions, see CM Fombad, "The role of emerging hybrid institutions of accountability in the separation of powers scheme in Africa," in Fombad (ed), *Separation of Powers in African Constitutionalism*, Oxford, Oxford University Press (2016), pp. 325-344. See also CM Fombad, "The Diffusion of SA-Style Independent Institutions? A Study in Comparative African Constitutionalism", paper presented at the Comparative constitutional law conference on "Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence" at the Faculty of Law, University of New South Wales, Sydney, Australia, 27-28 April 2016 (forthcoming as book chapter).

manipulation and interference. In this respect, the approach adopted by the South African Constitution in dealing with the Chapter 9 institutions offers a useful starting-point. The main innovation introduced by the South African Constitution insofar as these constitutional institutions are concerned are the four “establishment and governing principles”. Section 191 provides as follows:

- (i) These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (ii) Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- (iii) No person or organ of state may interfere with the functioning of these institutions.
- (iv) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

In certifying the 1996 Constitution, the South African Constitutional Court drew particular attention to these Chapter 9 institutions and pointed out that “they perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution”.<sup>9</sup>

However, in the light of the experiences of the last two decades and the approach adopted in some of the recent constitutions, several changes need to be made to the section 191 provisions of the South African Constitution to give them more teeth.

The first concerns principle (ii.) above. In order to enhance the ability of the institution to operate independently, it is necessary to provide express recognition of and protection for its financial autonomy. The aim should be to prevent budgetary allocation from being used to thwart them from fulfilling their mandate.<sup>10</sup> A second change which is imperative is that principle (iv.) should be modified to state that quarterly reports should be submitted to a Special Parliamentary Committee on Governance and

9 See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, 1996(4) SA 744 (CC).

10 The withholding of funds has been used to undermine the work of the South African Public Protector. For example, in “Public Protector hampered by dire shortage of funds”, *Legalbrief TODAY*, Issue No. 3609 of 2 October 2014, it was reported that the South African Public Protector’s office is in dire straits and needs more money to finance operations and keep staff from leaving. The then Public Protector Thuli Madonsela said the number of cases she deals with is disproportionate to the financial and human resources available to her office, with some investigators handling up to 500 cases. She said the lack of resources caused delays in the finalisation of investigations and that this could lead to the erosion of public confidence in the institution.

Accountability, one which is constituted in such a manner as to limit the possibility of the governing party frustrating the process.<sup>11</sup>

The third change is to add two important new principles to the four principles in section 191 of the South African Constitution, which hopefully should help to address some problems of the kind South Africa has faced. In this regard, a new fifth principle should state that any legislation, action, measure or mechanism introduced to regulate any of the institutions in a manner that undermines the essential purpose of implementing the constitution shall be declared null and void by the courts. Similarly, a new sixth principle should address the critically important issue of appointments of the heads and senior officials of these institutions. Although appointments should still be made by the President, the procedure to be followed, as well as the requirements for appointment, must be stated expressly in the Constitution.

In this respect, the appointment process must be guided by three factors. Firstly, the persons to be appointed to these institutions should be non-political or, if political, should not have been actively involved in politics in the preceding five years. Secondly, all senior positions must be widely advertised, and members of the public should be encouraged to propose suitable persons. Thirdly, there should be public interviews conducted by the Special Parliamentary Committee on Governance and Accountability, which will prepare a shortlist of appropriate nominees for appointment and submit this to the President.<sup>12</sup> At the end of the interviews, at least two and not more than three nominees for each vacant position with the necessary motivation for each nomination should be spelt out. The President will make the final appointments from the list of nominees. This will reinforce the independence of the institution.

Although there is no perfect system, it can be argued that an appointment system which places the ruling party and opposition parties on par will enhance the prospects for the appointment of independently-minded persons who owe their positions to their expertise rather than of

- 11 The Special Parliamentary Committee on Governance and Accountability proposed here does not appear in any modern African constitution. It is, however, considered as an important body for receiving quarterly reports from all the hybrid independent institutions of accountability, monitoring their activities and ensuring accountability. The constitution should expressly state that it must be constituted in a manner that ensures an equal number of representatives from the ruling party and the opposition parties and be chaired by a member from the opposition parties. It should have the powers to subpoena anybody to appear before it, and should be able to co-opt such experts as it might need to assist it in discharging its functions.
- 12 It is probably only the Zimbabwe Constitution of 2013 in sections 236 and 237 that comes closest to providing an appointment procedure that could limit, though not in a highly satisfactory manner, the avenue for politically motivated appointments.

political appointees who are likely to remain beholden to those who appointed them.<sup>13</sup>

To take account of the high cost entailed in running these constitutional implementation institutions, they could be made to operate as permanent institutions for the first five critical years of the constitution's implementation and thereafter allowed to operate on an ad hoc basis throughout the life of the constitution. In this ad hoc form, the institution should meet at least twice each year or as and when the need arises, and should be composed of part-time members. Their mandate should include reviewing and recommending amendments to the constitution every five or ten years.

### **3.2 Entrenching a legal duty to implement the constitution**

Constitutionally entrenching institutions for the implementation of the constitution along with the legal duty to perform this function serves a number of purposes. Firstly, because the constitution is the supreme law of the land and is based on, as well as reflects, the sovereign will of the people, any law that violates it will be declared invalid to the extent to which it is inconsistent with the constitution. Also, as a result of their constitutional status, the basic principles defining the powers of the institution and shielding it from political interference (discussed in the preceding section) cannot be changed casually or arbitrarily by transient majorities or opportunistic leaders trying to promote their own self-interested political agendas.<sup>14</sup>

Secondly, a provision imposing a general mandatory duty to implement the constitution,<sup>15</sup> rather than leaving constitutional implementation to the discretion of the government, should be entrenched. This will open the way for an action for violation of the constitution where the alleged violation involves a failure to fulfil a constitutional obligation to implement the constitution. The effect of this is to render the duty on government to implement the constitution in the exact manner contemplated by the constitution obligatory and legally enforceable, not

13 See G Budlender, "20 Years of Democracy: The State of Human Rights in South African", who in commenting on South Africa's institutions says, "A disturbing feature of recent years has been the weakening and undermining of those institutions. We have had too many appointments in which a key qualification for appointment seems to be a willingness to protect those in power, or loyalty to a particular faction."

14 See further CM Fombad, "Some Perspectives on Durability and Change Under Modern African Constitutions", 11(2) *International Journal of Constitutional Law* (2013), pp. 382-413.

15 See an example of such an obligation in the South African Constitution of 1996, which states in section 2 that "this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" (emphasis added).

discretionary. Some constitutions even sanction non-compliance with their provisions, but the scope for this action is often limited.<sup>16</sup>

Thirdly, to strengthen the duty to implement the constitution, it may be necessary to prescribe timelines for complying with certain obligations. An obvious, but nevertheless centrally important, timeline is that for aligning all existing laws with the new constitution. As Waiganjo and Serwanga both noted in their chapters, the task of the CIC was made easier in certain cases because during the drafting of the Constitution particular timelines were specified for enacting particular pieces of legislation. The Zimbabwean 2013 Constitution, although influenced by both the Kenyan and South African Constitutions, did not apply the CIC idea. Nonetheless, its constitutional designers introduced an interesting idea in section 324, which states that “all constitutional obligations must be performed diligently and without delay”. The wording of this provision appears to be sufficiently strong to justify an action to be taken for lack of diligence and undue delay in discharging constitutional obligations.

The challenge, however, is to determine against whom such an action can be brought. One could take a leaf from the decision of the South African Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly & Others*, and *Democratic Alliance v Speaker of the National Assembly and Others*,<sup>17</sup> where the Court held, inter alia, that the failure of the National Assembly to hold the President accountable and ensure that he complied with the remedial action taken against him was also a violation of their constitutional duty under section 181(3) of the South African Constitution.<sup>18</sup> One could argue that where a failure to carry out a constitutional duty results in some deprivation, loss or suffering, then the advantage of having a section 324 is that an action can be brought against the authority that was supposed to have acted, the aim of the action being to request that the court order it to perform its duty with due diligence and undue delay.

To strengthen the possibility of an action for non-compliance with a constitutional duty or obligation, the *locus standi* rules for constitutional action can be expanded.<sup>19</sup> The right of public interest action is a necessary

16 For example, under the 2010 Kenyan Constitution this is limited to Article 158(1), which provides that the Director of Public Prosecutions may be removed from office for, inter alia, non-compliance with Chapter six of the Constitution.

17 [2016] ZACC 11 of 31 May 2016.

18 *Ibid* at paragraphs 104-105.

19 In this regard, Article 22(2) of the Kenyan 2010 Constitution states that proceedings for violation of the Constitution can be instituted by

- (a) a person acting on behalf of another person who cannot act in their own names;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

response to the growing popular disenchantment with the unwillingness of many public officials and institutions to perform their duties.<sup>20</sup> This will strengthen the hands of individuals and CSOs to actively monitor and expose public officials and institutions that are not complying with their constitutional mandate. As the discussion in Phama and Madi's chapter shows, it is the activities of individuals and CSOs that have put pressure on the South African government and some of its Chapter 9 institutions to implement the Constitution more vigorously. This move towards a self-enforcing constitution enhances each individual's right for self-government and inevitably involves the transfer of some powers from public into private hands in a manner which is likely to promote greater efficiency and efficacy in dealing with constitutional implementation.

What emerges from the relative success of the South African 1996 Constitution is that effective constitutional implementation involves a good combination of many of the factors discussed here, namely strong and assertive CSOs, constitutionally entrenched and independent institutions – especially those which, like the Chapter 9 institutions, are responsible for enforcing aspects of the constitution – and a properly functioning multiparty environment. The judicial role, although essentially reactive, is also of critical importance. Some of the cases discussed by Maseko and Abdulrauf in Chapter 6 show how the intervention of judges could make a difference between implementation and non-implementation. As the chapters in this volume clearly suggest, a passive judiciary in the face of Africa's overbearing executives and the constitutional weaknesses of the legislature, compounded by the looming phenomena of one-party domination, will certainly take Africa back to the dark days of one-party dictatorships and destroy any hopes for constitutionalism and respect for the rule of law.

African constitutions can accomplish their goal of promoting constitutionalism, democracy and respect for the rule of law only if our judges adopt a liberal, progressive, activist approach when faced with problems concerning the implementation of the constitution or have “bold

Article 22(2) goes even further to keep to a minimum formalities relating to proceedings and to provide that the court shall, “if necessary, entertain proceedings on the basis of informal documentation,” and that “no fee may be charged for commencing the proceedings”. A similar approach is provided for under section 85 of the 2013 Zimbabwe Constitution. The 2010 Angolan Constitution in Articles 73-75 also appears to broaden the rules of *locus standi*, but the language in which this is couched, along with Articles 228 and 230 which restrict access to certain specified personalities, casts serious doubts on its effectiveness.

20 There should be no requirement of a personal interest for the action to be brought. See Bamford-Addo JSC in the Ghanaian case of *Sam (No. 2) v Attorney-General* [2000] SCGLR 305 at p. 314.



spirits”, not the “timorous souls” of the passive judges of the past. This can happen in one or more of three ways.<sup>21</sup>

Firstly, judges must adopt a more principled and rights-sensitive approach to interpreting constitutions, doing so in a manner that takes account of the radical political, economic and social changes of our times and the revulsion against dictatorship.

Secondly, judges should go beyond their traditional role of interpreters of the constitution and strive to do justice by giving effect to contemporary social conditions and values. This idea of progressive judicialism, or what has been referred to in many quarters as judicial activism, has been quite successful in promoting and sustaining constitutionalism in South Africa against numerous challenges.

Finally, judges should today adopt broad interpretative techniques when interpreting constitutions – which, it can be argued, a constitution requires by its nature. Far from being a document that contains “time-worn adages or hollow shibboleths” or resembling a “lifeless museum piece”, a constitution must be regarded as a living document which is designed to serve present and future generations as well as embody and reflect the fears, hopes, aspirations and desires of the people. Nevertheless, there is an important international dimension which must not be ignored.

### **3.3 The international dimension of constitutional implementation**

Although the authorship, ownership and implementation of a constitution is essentially a national issue, the international community and regional organisations today have a legitimate interest, along with what in many respects is a duty, to bolster national efforts to implement a constitution. Governments can no longer hide behind the principle of sovereignty and non-intervention while violating their constitutions in ways that not only put the lives of their citizens at risk but also directly or indirectly threaten international peace and security.

The role of external actors in facilitating the implementation of a constitution may be limited but is highly important. A distinction should be made here between the role of the international community in general and that of regional organisations such as the African Union (AU) and Regional Economic Communities (RECs).

21 For further discussion of this, see CM Fombad, “Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects”, 59(4) *Buffalo Law Review* (2011), pp. 1007-1108.

### ***3.3.1 Options within the international community***

Actors within the international community are varied and include international non-governmental organisations, multilateral bodies such as the United Nations and the United Nations Development Programme, international financial institutions such as the World Bank and the International Monetary Fund, and bilateral donor countries. These external actors can provide assistance by supplying the funds for constitutional awareness campaigns and the publication of constitutions in local languages. They can also fund CSOs and offer them useful advocacy and constitutional implementation monitoring tools.

As pointed out above, and as Kamotho Waiganjo alluded to as one of the major challenges which the CIC faced, financing specialised institutions which have a mandate to implement, or monitor and facilitate the implementation of, the constitution is and will remain a serious problem. Often, as in the case of South Africa's Public Protector, funding is used as a strategy to limit the effectiveness of the institution. Like the Kenyan CIC, the South African Public Protector has had to rely on foreign donations to enable it to accomplish its mandate. This can be controversial, because the funding may not be entirely value-free or neutral but come with certain strings attached. While it is clear that, due to the financial crises that many African countries are undergoing, donor funds will continue to be an invaluable means of sustaining constitutional awareness and implementation measures, it is equally clear that it will be vital for national actors to seek to maintain full control of their goals and priorities.

### ***3.3.2 Options within the framework of African regional organisations***

African regional organisations, particularly the AU, have the potential to significantly influence the implementation of national constitutions. Since the AU replaced the Organisation of Africa Unity (OAU) in 2002, it has endeavoured to have its members implement a series of reforms under an agenda designed to promote constitutionalism, democracy and good governance. These reforms, if fully implemented, could have a significant positive effect on the national constitutional order of member states.<sup>22</sup>

The basic framework for promoting democracy and good governance among AU member states is laid down in the Constitutive Act of 2001, which sets up the Union, and in a number of treaties, declarations and agreements. There are five major agreements that contain the basic normative framework of the AU democracy agenda: the Constitutive Act itself; the Declaration of 2000 on the framework for an OAU (AU)

22 See generally CM Fombad, "The African Union and Democratization", in Haynes, J, *Routledge Handbook of Democratization*, London, Routledge (2012), pp. 322-336.

response to unconstitutional changes of government; the Declaration of 2002 on the principles governing the democratic elections in Africa; the Guidelines for African Union Electoral Observations and Monitoring Missions;<sup>23</sup> and the African Charter on Democracy, Elections and Governance 2007.

The most potentially significant AU agreement that could give the organisation leverage to influence its member states in the implementation of their constitutions is the African Charter on Democracy, Elections and Governance, which came into force in 2012. The scope of this Charter covers issues of democracy, the rule of law and human rights (Chapter 4), the culture of democracy and peace (Chapter 5), democratic institutions (Chapter 6), democratic elections (Chapter 7) and sanctions in cases of unconstitutional changes of government (Chapter 8). The Charter has informed the AU's firm stance against unconstitutional changes of government and its insistence that African governments respect presidential term limits.

In spite of the good intentions of the Charter and the AU, the organisation's record in sanctioning violations of unconstitutional changes of government, especially those resulting from irregular amendment of national constitutions, has not been good. In the last two years, the presidents of Burundi, Congo Brazzaville, Rwanda and, more recently, the Democratic Republic of Congo have violated in several ways the letter and/or the spirit of their constitutions in order to prolong their stay in power. In all these instances, the AU has been unable to prevent these violations of the national constitutions or of the African Charter on Democracy, Elections and Governance. At the level of the AU and possibly the RECs, there are several instruments, both binding and non-binding, that could enable these organisations to influence effective implementation of national constitutions, but it is doubtful whether there is sufficient political will to do so. This is because the AU is usually unable to garner the political support it needs for sanctions to be imposed.

## 4 Conclusion

The challenges of non-implementation will continue to undermine the standard and quality of constitutionalism, rule of law and good governance espoused by African constitutions unless serious thought is given to this issue. The ideal time for doing so is at the constitution-making stage. The chapters in this volume have illustrated the nature of the problem. It is clear that constitutional infidelity or disobedience through non-implementation is often no accident. There is thus no longer any basis for assuming that all the actors involved in implementing a constitution are

23 See [http://www.achpr.org/files/instruments/guide-elctions/au\\_instr\\_guide\\_elections\\_eng.pdf](http://www.achpr.org/files/instruments/guide-elctions/au_instr_guide_elections_eng.pdf) (accessed November 2016).

equally anxious or enthusiastic to do so. Political convenience and other forms of self-interest often eclipse constitutional imperatives. Nevertheless, non-implementation of constitutional provisions, especially over prolonged periods, clearly amounts to an illegitimate means of altering the constitution.

The main lesson that emerges from this study is that adequate measures and mechanisms must therefore be put in place to guard against the non-implementation of the constitution. The constitutional entrenchment of a permanent commission for the implementation of the constitution is the best way to limit and control the problem of non-implementation. For such a commission to be successful, it must be given a broad mandate, provided with sufficient resources, and protected from external influence and manipulation on the basis of the principles formulated above.

This would need to be reinforced by measures to raise the level of constitutional literacy and so enable people to have knowledge of their rights and how to vindicate acts of constitutional infidelity. The strength and sustainability of any system of constitutional democracy demands popular participation, not merely at the drafting stage but in the process of the constitution's implementation. Armed with a knowledge of the constitutional text, people will be able to close the gap between their constitutional aspirations and their lived reality.

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