

# **Designing Institutions and Mechanisms for the Implementation and Enforcement of the Constitution: Changing Perspectives in Africa**

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## **I. Introduction**

Constitutions are not self-implementing instruments. Hence, no matter how comprehensive their scope, without full and effective mechanisms for their enforcement and implementation they may remain nothing more than a piece of ‘printed futility’.<sup>1</sup> Until fairly recently, little attention was paid to the issue of implementing and enforcing a constitution during the constitution-making process. In spite of the radical constitutional reforms undertaken in Africa after the 1990s, it is rather surprising that concerns regarding the effective implementation and enforcement of new constitutions was not given sufficient attention. Yet, one of the root causes of the failure of post-independence constitutions was the ease with which their provisions were regularly and casually ignored or altered to suit the agenda of opportunistic politicians.

A number of recent constitutions such as the Kenyan Constitution of 2010 and, further afield, the Afghanistan Constitution of 2003 have underscored the fundamental importance of paying particular attention during the constitution-making process to the mechanisms and institutions for the constitution’s implementation and enforcement. This article, using the Kenyan example as a case study, considers some of the critical issues which must be considered in designing a constitution to enhance the prospects for its full and effective implementation and enforcement.

The discussion will proceed with section II which briefly considers the importance of and challenges in implementing and enforcing constitutions.

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<sup>1</sup> See V. K. R. Iyer, *Justice at the Crossroads* (New Delhi: Deep & Deep Publications, 1992), at p. 59.

Section III, using the evidence from recent developments in constitution-making, identifies some of the core constitutional implementation and enforcement institutions. This is followed in section IV by a case study of Kenya, which in Africa presently provides the best example of a carefully thought-out and well-designed constitutional implementation strategy. Section V then considers some of the key elements in designing an effective constitutional implementation framework. The article ends with some concluding remarks that highlight the importance of built-in and effective mechanisms for implementing and enforcing constitutions in enhancing the prospects for constitutionalism, respect for the rule of law and good governance.

## **II. Importance of and challenges in implementing constitutions**

The need to build in measures, mechanisms and institutions aimed at ensuring that the constitution will effectively be enforced at the design stage cannot be fully understood and appreciated without reference to why this is necessary and the challenges that experience shows have hindered the implementations of constitutions, especially in Africa.

There are several reasons why institutions and mechanisms for implementing the constitution should always be considered when designing a constitution. First, the constitution-making process is not a ‘one-off’ event which starts and ends with the drafting and adoption of a new constitution. Nor is the legitimacy of the process, once earned, a *carte blanche* that those involved can relax and enjoy the bliss of perfect constitutional peace and harmony. Constitutions are usually delicately negotiated compromises arrived at after hard and often protracted bargaining. They are never perfect nor can they ever satisfy everybody. They try to take account of, accommodate, reflect and incorporate the diverse and often conflicting interests, fears, concerns, hopes, aspirations and desires of all the citizens. Some of the compromises arrived at are often couched in vague and sometimes confusing language in order to accommodate as many stakeholders as possible. It is therefore inevitable that these compromises 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 with the effect that any law or any action inconsistent with it is invalid will be undermined if the constitution itself is not fully enforced.<sup>2</sup>

Second, a constitution, however elaborate and comprehensive it may purport 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 is usually couched in broad outlines, it leaves details concerning institutions and laws regulating these institutions and other matters for subsequent regulation. If there is no mechanism for ensuring

<sup>2</sup> For examples of provisions recognising the supremacy of the constitution, see, for example, 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.

that these institutions are duly established and the necessary laws enacted, the constitution will only have limited effect.<sup>3</sup> There is always a danger that individuals or some sections of the community may for personal selfish, partisan or sectarian interest block the process of implementing the constitution. It is a notorious fact that many of the laws and other institutions contemplated in many pre-1990 African constitutions hardly ever saw the light of day. This has only marginally improved under the new democratic dispensation. An excellent example of political manipulation and sabotage frustrating the implementation is the case of Cameroon's 1996 Constitution. Most of the new institutions that the government was pressurised into including in the constitution were only implemented several years later for some and not at all for others. Until fairly recently, 24 of its 69 articles, or 35 per cent of its provisions, were not implemented.<sup>4</sup> The Cameroonian experience may be extreme but is typical of African constitutions.<sup>5</sup>

Perhaps the most serious problem with constitutional implementation in Africa has been the issue of frequent and abusive changes to the constitution. In the 1990s, constitutional designers tried to entrench provisions which will limit the arbitrary changes of constitutions.<sup>6</sup> Some recent studies have shown that this has had only a limited impact in shielding constitutions from changes designed to ensure that incumbents or their parties stay in power.<sup>7</sup> One of the most significant innovations designed to facilitate the alternation of power and provide a check against dictatorship and prolonged stay in power, that is the provisions on two-term limits, were the first to be repealed in what appears to be another wave of constitution-changing fever which has raised fears of an insidious revival of the pre-1990 authoritarian practices.<sup>8</sup>

- 3 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 only provided a broad framework while the detail legislation regulating the functioning and powers of these institutions was later enacted by Parliament.
- 4 For example, Articles 46–52 which provide for a Constitutional Council has hardly been effectively implemented and the Supreme Court under Article 67(4) continues to discharge its functions. The Senate provided for in Articles 20–24 was finally only established in 2013 (17 years later!) and some degree of limited decentralisation provided in Part X was partially implemented between 2004 and 2008.
- 5 For example, although Articles 157–179 of the 2006 Constitution of DR Congo elaborately provides 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 (that is almost ten 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, because of lack of political will, been implemented very slowly and in an ineffective manner. For example, it was only in 2007 that Law No. 2007-011 of 13 March 2007 was adopted just to recognise the principle of decentralisation.
- 6 See Charles Manga Fombad, 'Some Perspectives on Durability and Change Under Modern African Constitutions', 11 (2) *International Journal of Constitutional Law* (2013): 382–413.
- 7 See Charles Manga Fombad, 'Constitution-Building in Africa: The Never-Ending Story of the Making, Unmaking and Remaking of Constitutions', 13 (4) *Africa and Asian Studies* (2014): 429–51.
- 8 See Charles Manga Fombad and Nathaniel Inegbedion, 'Presidential Term Limits and Their Impact on Constitutionalism in Africa', in Charles Fombad and Christina Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria: PULP), pp. 1–29.

It can be argued that one of the reasons for the increasing threats to Africa's transition to genuine competitive liberal democracy and constitutionalism is the problem of constitutional implementation. When governments are free to choose which constitutional provision to honour and which to ignore, the very *raison d'être* of a constitution and constitutionalism in general is called into question. Although the importance of addressing issues of constitutional implementation were recognised at the beginning of millenium, it is only fairly recently that it has been taken seriously by African constitutional designers. It is now necessary to see how this changing attitude is reflected in emerging state practice.

### III. Core constitutional implementation institutions and their roles

Generally, issues relating to constitutional implementation have been addressed in a wide variety of informal ways in constitutions. Most often, they were mentioned in transitional provisions or in a schedule (annex) to the constitution.<sup>9</sup> In some constitutions, certain matters were required to be implemented within specified deadlines.<sup>10</sup> Sometimes, these were also mentioned in provisions in the constitution and stated as principles which had to be implemented by one of the branches of government. For example, under the Ugandan Constitution of 1995 the issue of implementation appears under the heading non-justiciable 'national objectives and directive principles of state policy'. Besides this, section 1(1) only requires that the President should '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. This was always in addition to the traditional role usually reserved to courts to act as the bedrock for the protection, interpretation and application of the constitution. Nevertheless, it must, however, be pointed out that the possibility of judicial review of legislation or governmental action for conformity to the constitution only became a common feature in African civil law jurisdictions influenced by the 1958 French constitutional system in the last two decades.<sup>11</sup> Since the 1990s, a number of independent constitutional institutions and commissions with a specific mandate to enhance accountability, good governance and effective implementation of the constitution have become common. These institutions have

9 See, for example, Part XIII, transitional and final provisions of the 1996 Constitution of Cameroon; First Schedule to the 1992 Constitution of Ghana; Part III, transitional provisions and savings of the 1999 Constitution of Nigeria; and Schedule 6 of the 1996 South African Constitution.

10 For example, Article 38(2) of the 1992 Constitution of Ghana stated thus: '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 to be done in the First Schedule to the Constitution.

11 See Charles Manga Fombad, 'The Expansion of Judicial Power in Africa and Democratic Consolidation: Opportunities, Challenges and Future Prospects', in Muna Ndulo and Mamoudou Gazibo (eds), *Growing Democracy in Africa: Elections, Accountable Governance and Political Economy* (London: James Currey, 2016), pp. 325–44.

now, in the case of the 2010 Kenyan Constitution, been reinforced by special institutions with specific powers to oversee and supervise the implementation of the constitution.

Based on recent developments and practice, one could for analytical purposes place the various institutions, commissions, bodies and agencies which can play a role in facilitating the enforcement of the constitution into four main categories:

1. specially created constitutional implementation institutions or bodies;
2. judicial institutions charged with the protection, interpretation and application of the constitution;
3. independent constitutional institutions; and
4. citizens and civil society organisations.

The nature and role these institutions can play will now be briefly examined.

#### **A. Specially created constitutional implementation institutions**

Specially created constitutional institutions with responsibility to oversee and supervise the implementation of the constitution are a novelty. One early example of this was provided for under the Afghanistan Constitution of 2003.<sup>12</sup> However, the best African example of this, on which we focus in the next section, was provided for under the 2010 Kenyan Constitution. More recently, the Provisional Constitution of Somalia, approved on 1 August 2012, followed the Kenyan lead. In its Articles 133 and 134, it provided for the establishment of a Provisional Constitution Review and Implementation Oversight Committee which was supposed to act as an oversight committee over the Independent Provisional Constitution Review and Implementation Commission, which was supposed to act as a review and implementation commission.

The significance of the Afghanistan, Kenyan and Somalian institutions is the possibility for these special institutions being established and given specific responsibility for overseeing and supervising the implementation of a constitution. However, the efforts of such special institutions will still need to be complemented and supported by the activities of the more familiar independent constitutional institutions and the courts. We shall now proceed to look at these other institutions and bodies and the roles they can play, starting with the courts.

#### **B. Judicial institutions charged with the protection, interpretation and enforcement of the constitution**

Despite the emergence of special institutions for implementing and enforcing the constitution, the judiciary has and will remain at the heart of all measures aimed at protecting, interpreting and enforcing the constitution. Because it is one of the three branches of government, it enjoys a superior status to all the

<sup>12</sup> See Article 157 of the Constitution which provided for the creation of the Independent Commission for Supervision of the Implementation of the Constitution.

other constitutional implementation institutions. In this regard, the judiciary can be regarded as the promoters, protectors and defenders of the constitution and constitutionalism. They also act as guardians of and impartial enforcers of the constitution and constitutionalism. The full details of the judicial role are beyond the scope of this article.<sup>13</sup>

Be that as it may be, it can be said that the judicial role in interpreting and applying constitutions is generally discharged either by ordinary courts which have powers to deal with disputes concerning the interpretation and application of the constitution, specialised constitutional courts which have similar powers or hybrid bodies also exercising similar powers. For our purposes here, it will suffice to briefly describe the nature of these three approaches or models and their possible impact on constitutional interpretation and enforcement.

The first approach, where constitutional disputes are handled by ordinary courts is usually referred to as the decentralised, diffuse or American model.<sup>14</sup> All courts, even lower ones, have the jurisdiction to review whether an action or statutory provision violates the constitution and can therefore be declared void. Court decisions are subject to appeal, with the Supreme Court (or other superior court) having the final say. Almost all Anglophone countries follow this model because of their historical ties to the Anglo-American legal influence.

The second approach is where constitutional matters are handled by a specialised constitutional court. This is usually referred to as the centralised, concentrated or Austrian model because it is traced to the Austrian scholar, Hans Kelsen.<sup>15</sup> A separate and distinct constitutional court has exclusive jurisdiction over all constitutional matters. The most prevalent form of this model is the Constitutional Council form, developed under the French Fifth Republic Constitution of 1958 and widely replicated in Francophone Africa but with variations of this in Lusophone and Hispanophone Africa. It acts as a complement to the legislature and performs a politico-legislative role mainly because it deals mainly with abstract review. However, since the 1990 constitutional reforms in Africa, it now also deals with concrete review.<sup>16</sup> Initially, *locus standi* was limited to certain governmental actors such as the President of the Republic, the President

13 See, for example, Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-economic Rights', [http://reference.sabinet.co.za/webx/access/electronic\\_journals/ju\\_sajhr/ju\\_sajhr\\_v20\\_n3\\_a4.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/ju_sajhr/ju_sajhr_v20_n3_a4.pdf) (accessed May 2015); and Ivan Bodenstener, 'The Role of Federal Judges: Their Duty to Enforce Constitutional Rights of Individuals When the Other Branches of Government Default', 18 (1) *Valparaiso University Law Review* (1983): 1–19.

14 It is usually traced to the American case of *Marbury v. Madison* 5 US 137 1803.

15 See, in general, Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis, IN: Bobbs-Merrill, 1971), Chapters 2 and 3; Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989), Chapter 3; Arne Mavcic, *The Constitutional Review* (The Netherlands: BookWorld, 2001); and Arne Mavcic, 'Seminar on Constitutional Jurisdiction', [http://www.venice.coe.int/docs/2008/CDL-JU\(2008\)026-e.asp](http://www.venice.coe.int/docs/2008/CDL-JU(2008)026-e.asp) (accessed March 2015).

16 See, for example, Articles 114–124 of the 1990 Constitution of Benin.

of the National Assembly and a certain percentage of members of parliament but it has since the 1990s been extended to individual citizens.<sup>17</sup>

Finally, there are many countries where different elements of the decentralised and centralised models have been combined to form a hybrid model. There are many variations of this hybrid model but a good example of this is the Ethiopian system of constitutional adjudication.<sup>18</sup>

The effectiveness of intervention by the courts in constitutional matters depends on a wide variety of factors such as their ability to decide matters impartially and independently without any external pressure or influence, the scope of the powers that they have been given to deal with such matters and the provision of adequate resources and infrastructure. It is beyond the scope of this article to go into the details of this and it will suffice to add that the general standards of judicial appointment should be such that the scope for political interference or manipulation of the appointment process is minimal. Nevertheless, the role of the courts as the definitive interpreters of exactly what the constitution means cannot be underestimated, especially when it comes to enforcing vaguely worded provisions. Some constitutions have taken special measures to ensure that all individuals, government and non-government institutions and bodies comply with the decisions of the courts. The best example of this is found in the 1992 Constitution of Ghana. Article 2(1) gives the Supreme Court the powers to declare that an 'enactment or anything contained in or done under the authority of that or any other enactment' or 'any act or omission of any person' is inconsistent with the constitution and make a declaration to this effect. Article 2(4) then states that any failure to obey or carry out the terms of any such order constitutes a high crime and in the case of the 'President or the Vice-President, constitute a ground for removal from office'.

While the judiciary and, more specifically, the courts exercising constitutional jurisdiction thereby have general supervisory powers over the correct interpretation and application of the constitution, there are other institutions which have limited powers only to deal with specific aspects of the constitution. We shall now proceed to look at some of these institutions.

### **C. Independent constitutional institutions<sup>19</sup>**

Since the 1990s, there has been a remarkable increase in the number and powers of independent constitutional institutions of accountability provided to perform one

17 This is by no means the case in all Francophone Africa. For example, individuals cannot, except in cases of election petitions, approach Cameroon's Constitutional Council. See Article 47(2) of the 1996 Cameroon Constitution.

18 See Articles 83–84 of the 1995 Constitution of Ethiopia which provides for a mixed system involving the courts and the second chamber of parliament. See further, Assefa Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)', 1 *Mizan Law Review* (2007): 1–32.

19 For a detailed discussion of this, see Charles Manga Fombad, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa', in Charles Manga Fombad (ed.), *Stellenbosch Handbooks in African Constitutional Law Vol. 1: The Separation of Powers* (Oxford: Oxford University Press, 2016), pp. 325–44.

or more of the functions usually associated with the three traditional branches of government in modern African constitutions. Although this trend coincides with a global explosion of similar institutions,<sup>20</sup> it may be argued that the South African Constitution of 1996 was the first on the continent to give these institutions of accountability 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.

We will briefly, look at the nature and diverse manifestations of these independent constitutional institutions. This will be followed by an examination of the potential role and challenges faced by these institutions in dealing with issues of constitutional implementation especially in terms of ensuring accountability, respect for the rule of law and good governance. On account of their growing importance, section V considers the constitutional design patterns and options that could enhance their effectiveness.

### *1. The Nature and Diverse Forms of Independent Constitutional Institutions*

Generally, a wide variety of terms have been used in the literature to refer to these institutions. Some of them have been referred to as ‘independent accountability agencies’,<sup>21</sup> ‘independent regulatory commissions’,<sup>22</sup> ‘independent agencies’,<sup>23</sup> ‘non-majoritarian bodies’<sup>24</sup> or simply as ‘unelected bodies’.<sup>25</sup>

Under the 1996 South African Constitution, these institutions are referred to as ‘state institutions supporting constitutional democracy’, while the 2010 Kenyan Constitution refers to them in Chapter 15 as ‘commissions and independent offices’, and the 2013 Zimbabwean Constitution refers to them in Chapter 12 as ‘independent commissions supporting democracy’. The differences in

20 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 around 250 of such institutions in the United Kingdom and 200 in the US. Also see Andreas Schedler, Larry Diamond, et al., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner, 1999); Charles 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, <https://kellogg.nd.edu/faculty/research/pdfs/Kenney.pdf> (accessed March 2015); John Ackerman, ‘Independent Accountability Agencies and Democracy: A New Separation of Powers?’ Paper presented at the Workshop on Comparative Administrative Law, Yale University, 8–9 May 2009, [http://www.law.yale.edu/documents/pdf/CompAdminLaw/John\\_Ackerman\\_CompAdLaw\\_paper.pdf](http://www.law.yale.edu/documents/pdf/CompAdminLaw/John_Ackerman_CompAdLaw_paper.pdf) (accessed in March 2015); and A. Przeworski, S. Stokes, et al., *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999).

21 See Ackerman, *supra*, note 20.

22 See Sanford Berg, Ali Nawaz and Rama Skelton, ‘Designing an Independent Regulatory Commission’, [http://warrington.ufl.edu/centers/purc/purcdocs/papers/0017\\_berg\\_designing\\_an\\_independent.pdf](http://warrington.ufl.edu/centers/purc/purcdocs/papers/0017_berg_designing_an_independent.pdf) (accessed March 2015).

23 See Susan Bartlett Foote, ‘Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate’, 27 (2), *Duke Law Journal* (1988): 223–37.

24 See Mark Thatcher and Alex Sweet, ‘Theory and Practice of Delegation to Non-majoritarian Institutions’, 25 *West European Politics* (2002): 1–22.

25 See Vibert, *supra*, note 20.



nomenclature hardly reflect the incredible diversity of institutions that are supposed to be covered under these broad categorisations or their nature and mandate.

The form that these institutions may take depends on several factors, primarily their legal status, location and mandate. Generally, these institutions, especially in the West and in pre-1994 Africa, were created by ordinary legislation. This discussion, however, focuses on those institutions that are constitutionally entrenched, although the full framework and other operational details are usually spelt out in ordinary legislation.

The 1996 South African Constitution reserves its Chapter 9 for these institutions which appear to be considered so critical to ‘supporting its constitutional democracy’<sup>26</sup> that they are specially entrenched in the sense that they are expressly protected by a number of constitutional principles spelt out in section 181(2). A number of other similar institutions which also exercise important accountability functions, such as the Judicial Service Commission and the Public Service Commission,<sup>27</sup> are also provided for in the Constitution but they do not enjoy the high level of protection reserved for the Chapter 9 institutions.

A different approach is adopted by the 2010 Kenyan Constitution. Its 12 institutions, referred to as ‘commissions and independent offices’ are widely dispersed in the Constitution but are all subject to the general principles in Chapter 15, Articles 248–254.<sup>28</sup> Zimbabwe by contrast in its 2013 Constitution adopts an approach very much similar to that of South Africa. It provides for and regulates its six ‘independent commissions supporting democracy’ in Chapter 12 of the Constitution<sup>29</sup> but provisions regulating other commissions

26 This provided the basis for the setting up of six independent institutions, namely the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. The chapter actually includes a seventh institution, the Independent Broadcasting Authority, but unlike the other six, this one is established by ordinary legislation.

27 See sections 178 and 196 respectively. Other similar hybrid institutions include the National Prosecuting Authority (in sections 179–180), the Financial and Fiscal Commission (sections 220–222) and the South African Reserve Bank (sections 223–225).

28 These are the Kenya National Human Rights and Equality Commission (Article 59), the National Land Commission (Article 67), the Independent Electoral and Boundaries Commission (Article 88), the Parliamentary Service Commission (Article 127), the Judicial Service Commission (Articles 171–173), the Commission on Revenue Allocation (Article 215), the Public Service Commission (Articles 233–236), the Salaries and Remuneration Commission (Article 230), the Teachers Service Commission (Article 237) and the National Police Service Commission (Article 246). The two independent offices are the Auditor-General (Article 229) and the Controller of Budget (Article 228). What is perhaps most surprising in the Kenyan approach is the fact that Article 79 reserves the Ethics and Anti-Corruption Commission to be regulated by ordinary legislation. For reasons explained below about the importance of constitutional entrenchment, it is clear from this that there was no political will to fully commit the country to dealing with the cancer of corruption.

29 These are the Zimbabwe Electoral Commission (sections 238–241), the Zimbabwe Human Rights Commission (sections 242–244), the Zimbabwe Gender Commission (sections 245–247), the Zimbabwe Media Commission (sections 248–250) and the National Peace and Reconciliation Commission (sections 251–253). Although the Zimbabwe Anti-Corruption Commission appears

which also exercise functions relating to combating abuse of powers are widely dispersed in the Constitution.<sup>30</sup>

Outside the common law jurisdictions, there have also been some attempts to constitutionally entrench a number of institutions aimed at promoting constitutionalism and good governance, but one can argue that this has not been done with the sophisticated creativity displayed by the South African constitution maker that was copied in Kenya and Zimbabwe.<sup>31</sup>

The location of these independent constitutional institutions vis-à-vis the other three branches of government is sometimes significant and varies from one constitution to another. This ranges from those situations where the institution is independent in the sense of being located completely outside the three branches, the most frequent example in many African constitutions being the ombudsman and some of the anti-corruption agencies, and those where they operate within one of the branches of government. Under the 1996 South African Constitution, all the Chapter 9 institutions are independent and located outside the three branches of government,<sup>32</sup> while the others which are regulated by other provisions in the Constitution are located within one or the other of the three branches, most often the executive. Increasingly, the trend is in favour of locating institutions dealing with issues such as maladministration, corruption, human rights investigations, elections and minority rights outside the ordinary branches of government whereas institutions dealing with accountability issues within the public, judicial, security, military and police services, and national prosecution are often located within the government. There are, however, no fixed rules on this.

## *2. The Potential Role of Independent Constitutional Institutions*

In spite of the rising popularity of these institutions today, their importance and continuous relevance depends on how they are able to overcome a number of potential institutional and design weaknesses. The main one is that these institutions may end up as a convenient smokescreen rather than a means to counter the abuse of powers. For many years, one of the most popular constitutional institutions established by many African countries, with the prodding of international institutions and foreign donors, were anti-corruption agencies (ACAs). A number of studies of some of the African ACAs and similar institutions show that they have had rather limited success.<sup>33</sup> They have generally been plagued by a number of problems.

under Chapter 13, it is, according to section 256, subject to many of the provisions in Chapter 12 (see sections 254–257).

30 See, for example, the Judicial Service Commission (sections 189–191), the Civil Service Commission (sections 202–203), and the National Prosecuting Authority (sections 258–263).

31 For examples in non-common law countries, see Articles 268–288 of the Burundi Constitution of 2001, Articles 192–197 of the 2010 Constitution of Angola, Articles 161–166 of the 2011 Constitution of Morocco and Articles 126–130 of the 2014 Constitution of Tunisia.

32 The exception to this is the Auditor-General, who operates from within the executive.

33 See, for example, Charles Manga Fombad, 'Curbing Corruption in Africa: Some Lessons from Botswana's experience', 51 *International Social Science Journal* (1999): 241–254;

For example, because of design flaws limiting their independence, many of these institutions have been vulnerable to political control and manipulation that has severely limited their effectiveness. This has often resulted in the politicisation of the appointment of the head and other senior officials. It is therefore not surprising that many studies on South Africa's Chapter 9 institutions show that the ruling African National Congress (ANC) government has always ensured that it appoints only its sympathisers to head these institutions under its avowed policy of 'cadre deployment',<sup>34</sup> even if some of them, such as the former Public Protector (Thuli Madonsela), in contrast to her predecessor, have unusually taken a firmly independent line.<sup>35</sup>

The record of implementing the decisions taken by many African institutions is not very good, especially when it concerns top politicians. This is particularly so when it comes to reports of corruption. The experiences of the South African Public Protector after the publication of the report on the Nkandla scandal are an excellent example of the extremes to which politicians are prepared to go in order to protect each other.<sup>36</sup>

Generally, where the political stakes are very high, most of these constitutional institutions in Africa usually prefer to play safe. For example, in Botswana, although consistently rated as Africa's least corrupt country for the last decade,<sup>37</sup> its ACA, the Directorate on Corruption and Economic Crime (DCEC), is well noted for leaving the corrupt elites to swim undisturbed while it focuses on the tiddlers.<sup>38</sup> Many African ACAs have thus operated like toothless bulldogs that protect the rich, powerful and well-connected wrongdoers but raise a storm

Charles Manga Fombad and David Sebudubudu, 'The Framework for Curbing Corruption, Enhancing Accountability and Promoting Good Governance in Botswana', in Charles Manga Fombad (ed.), *Essays on the Law of Botswana* (Cape Town: Juta & Co., 2007), pp. 82–126; 'A Review of South Africa's Anti-Corruption Agencies', <http://www.psc.gov.za/documents/reports/corruption/01.pdf> (accessed August 2015) and Bill De Maria, 'African Anti-Corruption Agencies – Frolics in Failure', [http://www.benafrica.org/downloads/demaria\\_africa\\_anticorrupt.pdf](http://www.benafrica.org/downloads/demaria_africa_anticorrupt.pdf).

- 34 See Bheki Mbanjwa, 'ANC Won't Scrap Cadre Deployment', [http://www.iol.co.za/news/politics/anc-won-t-scrap-cadre-deployment-1.1721447#.VCvPd\\_mSyVM](http://www.iol.co.za/news/politics/anc-won-t-scrap-cadre-deployment-1.1721447#.VCvPd_mSyVM) (accessed August 2015), where the Deputy President of South Africa, Cyril Ramaphosa has defended the ANC's 'cadre deployment' policy, saying there was nothing wrong with the ruling party deploying its members to key positions because this was an international practice.
- 35 See the paper by Christina Murray, 'The Human Rights Commission et al.: What is the Role of South Africa's Chapter 9 Institutions', 9 (2) *PER* (2006).
- 36 In spite of overwhelming evidence that President Zuma and his family unduly benefited from the expenditure of over R246 million in his private residence under the pretext of providing security upgrades, the African National Union-dominated Parliament on 18 August 2015 voted to ignore the recommendations of the Public Protector that the President must pay back the extra expenses that had nothing to do with security upgrades. See 'Parliament Adopts Nkandla Report', <http://www.enca.com/south-africa/parliament-adopts-nkandla-report-0> (accessed August 2015), which reports on the adoption by Parliament of a report written by Zuma's police minister rejecting the recommendations of the Public Protector.
- 37 See Transparency International, Global Corruption Perception Index, <http://www.transparency.org/research/cpi/overview> (accessed August 2015).
- 38 This is discussed in Charles Manga Fombad, 'Curbing Corruption in Africa: Some Lessons from Botswana's Experience', 51 *International Social Science Journal* (1999): 241–54.

about petty offenders who should ordinarily and routinely be dealt with by the police.<sup>39</sup>

The creation of so many institutions certainly carries the risk not only of duplication but also of conflicts with the other branches of government, unnecessary bureaucracy and inefficiency due to cases falling between the cracks in turf identification wars.<sup>40</sup> For example, one may question whether Kenya and Zimbabwe need all the numerous institutions they have provided for. Would it not have been cheaper and probably more efficient to create fewer but more robust institutions? In fact, it is doubtful whether separate and distinct institutions to deal with, for example, the police, the defence force and the prison and correctional services issues in Zimbabwe or gender issues in South Africa are really necessary. Nevertheless, there are some whose existence can be justified. First, the case for distinguishing between some of these institutions and specially entrenching and protecting some, as the South African and Zimbabwean Constitutions do, is very strong. Specialised independent constitutional institutions are certainly needed to deal with some of Africa's most pernicious evils, namely maladministration, human rights violations, corruption and electoral practices. Each of these institutions therefore deal with different issues where transparency and accountability is crucial and where the traditional checks and balances have proven to be woefully ineffective. Besides electoral fraud, the misappropriation of public funds, human rights violations and maladministration need different types of intervention from those that the three traditional branches of government can offer. Thus, in certain circumstances, the best solution is the ombudsman, in other circumstances a permanent anti-corruption agency, and in yet other situations an independent electoral commission. These institutions are therefore better placed to engage and utilise experienced experts with a better knowledge, for example, in dealing with human rights or anti-corruption issues, which are skills which politicians and bureaucrats often lack. Second, the normal checks and balances that come with the traditional branches of power allocation are very formal and are not easily accessible to the poor and vulnerable. Institutions like the human rights commissions, the ombudsman and the anti-corruption agencies are often decentralised and have offices in many parts of the country where their services can easily be accessed by the poor who often lack the means to approach, for example, the ordinary courts. Perhaps the most important fact that is underscored by the South African Chapter 9 institutions are the guiding principles designed to shield and protect these institutions from manipulation by other branches of government. Without adequate and legally enforceable safeguards entrenched in the constitution to prevent any branch of government from interfering with the activities of these institutions, their establishment will serve no purpose.<sup>41</sup>

39 See Mary Revesai, 'Zimbabwe Has Leeches Not Scorpions', <http://www.newzimbabwe.com/pages/mary.15044.html> (accessed in August 2015).

40 See Paul Hoffman, 'Hawks or Eagles: What Does South Africa Deserve?' (Notes for an address to the Cape Town Press Club on 15 May 2012), [http://www.ifaisa.org/Hawks\\_or\\_Eagles\\_what\\_does\\_South\\_Africa\\_deserve.html](http://www.ifaisa.org/Hawks_or_Eagles_what_does_South_Africa_deserve.html) (accessed August 2015).

41 For examples of South African cases where the courts have intervened and relied on the 'governing principles' in Chapter 9 of the 1996 Constitution to prevent any interference with

### 3. *Enhancing the Role of Independent Constitutional Institutions*

Because of the difficult and sometimes hostile politically charged environment in which these independent constitutional institutions operate, only a carefully conceived and well-designed legal framework will give them a chance of making a meaningful contribution to promoting good governance, accountability and constitutionalism in Africa. Some of the good constitutional designs, especially in Anglophone Africa, have in an incremental manner improved on the innovations that were introduced in South Africa's 1996 Constitutions. But the steadily rising challenges of governance in South Africa, where corruption and poor service delivery is becoming endemic, suggests that in spite of its pretty robust constitutional framework, there are still some loopholes that need to be closed. In order to enhance the performance of these institutions generally, two important lessons from the South African experience can be built on: first, the idea of constitutional entrenchment and, second, the need to specially protect these institutions from the three branches of government. These two points will be discussed later. For now though, depending on a country's particular challenges and needs, there is a wide range of important institutions that are needed to enhance the prospects of an effective and successful implementation and enforcement of a constitution.<sup>42</sup>

#### **D. Citizens and Civil Society Organisations**

A constitution is only as good as the manifest will of the people to protest, protect and defend it against any actual or threatened as well as active or passive violation of its provisions. A robust citizenry and an activist civil society is of critical importance to the implementation of the constitution.

Civil society, consisting of professional or business groups and activist groups composed of urban and middle-class people, especially the media and legal

the independence of these institutions, see *Independent Electoral Commission v. Langeberg Municipality* 2001 (9) BCLR 883 (CC); *New National Party of South Africa v. Government of the Republic of South Africa and Others* 1999 (3) SA 191; and particularly *Glenister v. President of the Republic of South Africa* [2011] ZACC 6, where the Constitutional Court emphasised the meaning and importance of these institutions being independent.

42 The main ones are: Public Service Commission, Auditor-General, Public Accounts Committee of Parliament, Special Parliamentary Committee on Governance and Accountability, Public Procurement Commission, Special Investigations Unit of the Police, Commissions of Inquiry which may be established as and when the need arises, Independent Electoral Commission, Electoral Boundaries Commission, Human Rights Commission, Judicial Service Commission, Media and Access to Information Commission, Minority Rights Commission, National Prosecuting Authority or Public Prosecutor (whose functions are performed by the Attorney-General in some Anglophone countries), Ombudsman (or the more descriptive term Public Protector) and Specialised Anti-Corruption Agency. There are two further points to note. First, with regard to the Auditor-General, in Francophone Africa, some of the functions performed by the Auditor-General are performed by specialised courts called audit courts. Second, concerning the Public Procurement Commission, the majority of corruption cases arise during the award of government contracts in disregard of public procurement regulations and procedures. A Public Procurement Commission should be an independent body that will not only ensure that all public procurement regulations are followed but should deal expeditiously with all complaints of irregularities and recommend speedy action.

profession, must be ready and willing to challenge any actions that adversely threaten the proper implementation of the constitution. The legal profession in 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 they have 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 on the ruling elites. It is incumbent on CSOs to increase public awareness, especially in rural areas, about the constitutions, its contents and the rights and obligations it imposes on all persons and institutions, both public and private. The Kenyan Constitution underscores the role of the people in the whole constitutional implementation process. 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 only delegated to the three branches of government, namely the executive, the legislature and the 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. This departure from emphasis on the sovereignty of the state under the 1969 Constitution to sovereignty of the people in the 2010 Constitution is deliberate and underscores the importance of active involvement of the people in the successful and effective implementation of the constitution. This is why Article 3(1) states that: ‘Every person has an obligation to respect, uphold and defend th[e] Constitution’. A similar approach is adopted by the Ugandan 1995 Constitution. Article 3(3) and (4) states 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 makes such conduct treason. Article 4 provides for the promotion of public awareness of the Constitution. However, the Kenyan Constitution seems to have gone furthest in providing a special implementation regime which we shall now briefly examine.

#### **IV. Case study of the special implementation regime under the Kenyan 2010 Constitution**

The Kenyan Constitution, as noted above, provides a unique special framework for implementing the constitution. In this regard, it provided for the establishment of two institutions tasked with the ultimate responsibility to oversee and coordinate the implementation of the constitution, namely the Commission for the Implementation of the Constitution (CIC) and the Parliamentary Constitutional

Implementation Oversight Committee (PCIOC). We will briefly consider two main aspects of these institutions: first, the constitutional framework which provides the basis for the setting up of these institutions and defines their powers and, second, an assessment of their experiences, future prospects and the challenges they face in discharging their mandate to ensure an effective and successful implementation of the constitution.

#### **A. The constitutional framework**

Both the CIC and the PCIOC are regulated by the sixth schedule to the Constitution (Article 262) which contains the transitional and consequential provisions. According to section 5(6) of this Schedule, the functions of the CIC shall be to:

- (a) monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;
- (b) co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution;
- (c) report regularly to the Constitutional Implementation Oversight Committee on –
  - (i) progress in the implementation of this Constitution; and
  - (ii) any impediments to its implementation; and
- (d) work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected.

Although the members of the CIC are selected in accordance with section 5(1), the manner of their appointment is subject to Articles 248 to 254 of the Constitution which tries to limit the scope for the politicisation of the appointment process. The Commission, under section 7, is supposed to be automatically dissolved five years after its establishment or when the Constitution is determined by Parliament to be 'fully implemented'. However, Parliament is given the discretion to extend its life beyond five years if it considers this necessary. The weakness with making its lifespan so dependent on the good will of parliament is that the latter could for purely political reasons hastily conclude that the Commission has completed its task and should be dissolved. While an initial fixed lifespan of probably ten years (the five years provided here is close to expiring with much still left undone) is desirable, constitutional implementation is not a task which, once embarked upon, can be said to have ended in 'full implementation'. A better approach is to transform such a committee into a permanent body which meets, ideally, annually or after a specified number of years to review the implementation of the constitution.

The PCIOC for its part is regulated by section 4 of the Schedule, but unlike the CIC it is actually a select committee of Parliament and therefore not as politically independent as the CIC. The functions of this committee are listed in a non-exhaustive manner. According to it, the PCIOC:

- (a) shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning –
  - (i) the reparation of the legislation required by this Constitution and any challenges in that regard;
  - (ii) the process of establishing the new commissions;
  - (iii) the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;
  - (iv) the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and
  - (v) any impediments to the process of implementing this Constitution;
- (b) coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by this Constitution; and
- (c) take appropriate action on the reports including addressing any problems in the implementation of this Constitution.

## **B. Assessment of their experiences, future prospects and challenges**

The CIC and PCIOC have now been operating for just over five years and there have been many papers written assessing their performances.<sup>43</sup> Four main tasks appeared to have been achieved.<sup>44</sup>

The first task has been to develop enabling legislation. This is not just because the Constitution, like all constitutions, sets out general principles and leaves the details to be developed in parliamentary legislation. The Constitution in

43 See, for example, the African Centre for Open Governance (AfriCOG), 'Taking Stock: Challenges and Prospects of Implementing the Constitution of Kenya, 2010', [http://www.africog.org/reports/taking\\_stock](http://www.africog.org/reports/taking_stock) (accessed August 2015); Ben Sihanya, 'Constitutional Commissions in Kenya: Experiences, Challenges and Lessons', <http://www.fes-kenya.org/media/publications/Constitutional%20Commissions%20-%20Prof.%20Ben%20Sihanya.pdf> (accessed August 2015); Ben Sihanya, 'Constitutional Implementation in Kenya, 2010–2015: Challenges and Prospects', <http://erepository.uonbi.ac.ke:8080/xmlui/bitstream/handle/11295/38845/full%20text%20.pdf?sequence=1> (accessed August 2015); Charles Nyachae, 'Implementing Kenya's Constitution: Status, Achievements and Challenges', <http://www.cickenya.org/index.php/newsroom/speeches/item/103-implementing-kenyas-constitution-status-achievements-and-challenges#.VPghInyUcQE> (accessed August 2015); and Marlon Konchellah, 'Challenges, Impediments in the Implementation of the 2010 Kenyan Constitution', <http://mkonchellah.blogspot.com/2012/08/challenges-impediments-in.html> (accessed August 2015).

44 These are discussed in AfriCOG, *supra*, note 43.



its Fifth Schedule identified a long list of laws whose enactment is crucial to the implementation of the constitution and specified time frames within which they have to be enacted. Second, there has been the task of streamlining laws in line with the Constitution by reviewing existing legislation. In this regard, the Constitution, while preserving legal continuity, subjects all existing laws to review, rationalisation, harmonisation, interpretation and adaptation to ensure their consistency with the Constitution.<sup>45</sup> The third intervention has been to reform existing institutions to make them responsive and aligned to the Constitution. This has been achieved in some cases through legislation and sometimes merely through administrative changes in the structure and composition of the existing institutions. A fourth major intervention has been to roll out the various commissions and independent offices provided for in Article 248(2), whose existence is crucial to the new governance and accountability regime provided for under the Constitution. This has also seen the establishment of the newly devolved system of government from 2013 which completely changed the governance system, particularly the devolution of power and resources to the grassroots.

CSOs in Kenya have been particularly active in ensuring the successful and genuine implementation of the Constitution. Their intervention to prevent non-compliance with the constitution has been significant in four main ways.

1. Many suits have been brought by CSOs to challenge the constitutionality of executive and legislative acts that are contrary to the provisions and principles of the Constitution. For example, in 2011, a group of CSOs successfully challenged the unconstitutional nominations by the President of the Chief Justice, the Director of Public Prosecutions, the Attorney-General and the Controller of Budget.<sup>46</sup> Since then, there have been numerous other successful challenges brought against unconstitutional acts by the executive and legislature.<sup>47</sup>
2. On many occasions, there have been public demonstrations and agitations to protest against illegal acts. The most significant was the CSO-led public demonstrations in 2013 against the attempts by Members of Parliament to raise their salaries although this function was not vested in them under the Constitution.<sup>48</sup>

45 In fact, section 7(1) of the sixth schedule to the Constitution allows for the continued application of old laws subject to them being construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution.

46 See Constitutional Petition No. 16 of 2011.

47 See, for example, 'Kenyan Court Finds Criminalizing HIV and AIDs Transmission Unconstitutional', <http://www.reproductiverights.org/press-room/kenya-high-court-finds-criminalizing-hiv-aids-transmission-unconstitutional> (accessed August 2015); and 'Kenya – High Court Kicks out Security and Anti-terrorism Bill', <http://africajournalismtheworld.com/2015/02/24/kenya-high-court-kicks-out-security-and-anti-terrorism-bill/> (accessed August 2015).

48 See Mohammed Yusuf, 'MP Pay Raise Protests Continues in Kenya', <http://www.voanews.com/content/protest-continues-against-kenyan-mps-pay-raise/1679541.html> (accessed August 2015).

3. Mainstream and social media have regularly been used by CSO groups to champion the implementation of the Constitution. Public opinion has been mobilised by interviews on television and radio and the use of social media. CSO leaders have also written opinion pieces on different aspects dealing with the implementation of the Constitution and placed this in influential newspapers.
4. Public forums and dialogue on the Constitution and its implementation have been initiated by CSO leaders. These have been used to create more awareness about the Constitution, its contents and the importance of monitoring its proper implementation, especially in rural communities where there is little knowledge of the newly devolved governance structures and its implications.

In spite of the considerable progress made in implementing the 2010 Constitution, as compared to previous ones, there remain numerous challenges which must be overcome if the Constitution is going to be implemented in a way that will achieve its radical transformative agenda. One general issue has been that those who stand to lose under the new dispensation have usually tried to block the new changes being introduced. Be that as it may, the main challenges that have delayed the speedy implementation of the Constitution can be summarised as follows:

1. Little progress was made during the first two years because of the divisive politics under the grand coalition. For example, many of the appointments made by the then President, Mwai Kibaki were declared unconstitutional because he refused to consult with his Prime Minister, Raila Odinga, as required by the Constitution.
2. There was resistance by the central government to roll out the structures and apparatus of devolution and even when they did, they still tried, illegally, to control and manipulate the devolved units.
3. Political manipulation of the law-making process remains an acute problem. This has manifested itself in several ways. Some Bills approved by the CIC and its implementing partners were changed without reference to the CIC and ended up including provisions which violated the Constitution or omitted some that were required by the Constitution.<sup>49</sup> In some cases, there were deliberate attempts by some partners in the law-making process to bypass and not involve or consult with the CIC. In March 2013, provisions of the draft Leadership and Integrity law were adopted in an emasculated form without fully complying with the relevant chapter in the Constitution in order to prevent many Members of Parliament from being disqualified from participating in the 2013 general elections. Since the Jubilee coalition won the presidency and a majority of seats in both the Senate and the National Assembly in these elections, the implementation process has become stymied because party loyalty

<sup>49</sup> See Konchellah, *supra*, note 43.

has resulted in weak parliamentary oversight of the executive. This has further politicised the PCIOC and thus limited its ability to act in a manner that makes proper implementation of the Constitution its priority. Surprisingly, the one-party dominance has not reduced implementation problems because the two houses of Parliament have regularly been embroiled in a superiority battle.<sup>50</sup> For example, the CIC recently noted that a total of 36 laws which should have been passed by both houses of Parliament were passed exclusively by the National Assembly.<sup>51</sup>

4. Conservatism and deliberate delays have also been a problem. Anti-reformist groups in some of the institutions, whether in the legislature or the executive, deliberately slow down the process of change in order to protect their connections and lucrative positions.
5. Finally, in spite of the considerable efforts by CSOs, lack of knowledge in a majority of the population has made it possible for the culture of ignoring the Constitution or misapplying it to continue with impunity. Effective implementation requires that the majority of the population should be aware of their rights and obligations and how to enforce them. However, this is not happening fast enough, especially for people living in rural areas.

Although with respect to constitutional implementation by a special constitutional institution, the Kenyan Constitution contained many innovative design features, it is clear that there are still some weaknesses which have delayed the process. The future success will depend on how some of these weaknesses can be overcome. Nevertheless, it is still fair to say that the Kenyan Constitution provides a strong foundation for the proper and timely implementation of its provisions. It is significant for the future that serious efforts are being made, not only by CSOs but also by the Ministry of Justice, to carry out civic education on the Constitution and devolution, reaching people through the internet, television and radio.<sup>52</sup>

It is now necessary to consider some of the important features that are critical to designing institutions which will have the responsibility for implementing a constitution.

## **V. Key elements in designing independent constitutional implementation institutions**

A number of factors are critical to the effectiveness of constitutional implementation institutions. The main ones are: the constitutional entrenchment

50 For example, the dispute over whether or not Senate had a role to play in the enactment of the Division of Revenue Bill ended up in an advisory opinion being given by the courts to the effect that they indeed had a role to play. See AfriCOG, *supra*, note 43.

51 See CIC, 'Expectations Versus Progress: A Scorecard for the National Assembly', <http://www.cickenya.org/index.php/resource-center/downloads/presentations> (accessed April 2015).

52 See <https://www.facebook.com/Kenya.civic> (accessed March 2015).

of implementation institutions; the protection from political manipulation and guarantee of independence of these institutions; and the need for clear and reasonable implementation deadlines.

### A. Constitutional entrenchment

Constitutionally entrenching institutions for the implementation of the Constitution, especially the courts and independent constitutional institutions, rather than merely leaving them to be regulated by ordinary legislation has a number of advantages. First, 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 its special status, constitutions are meant to endure and are often protected from careless, casual or arbitrary amendments by transient majorities or opportunistic leaders trying to promote their own selfish political agenda.<sup>53</sup> Hence, once an institution is constitutionally entrenched, this provides it with a greater likelihood of institutional durability, certainty and predictability than one created by ordinary legislation which can be changed by parliament at the convenience of the government in power at any given moment. Second, provisions entrenching the institution should be reinforced by making their implementation mandatory,<sup>54</sup> rather than leaving their implementation to the discretion of the government. This will open the way for an action for violation of the constitution where the alleged ‘violation’ consists of a failure to fulfil a constitutional obligation. The effect of this is to render the duty on the executive and legislature to establish an institution in the exact manner contemplated by the constitution obligatory and legally enforceable and not discretionary. Some constitutions even sanction non-compliance with their provisions but the scope for this action is often limited.<sup>55</sup> It is not enough merely to state that ‘all constitutional obligations must be performed diligently and without delay’.<sup>56</sup>

To further strengthen the possibilities of action for non-compliance with constitutional duties and obligations, the *locus standi* rules for constitutional action can be expanded.<sup>57</sup> The right of public interest action is a necessary

53 See further Charles Manga Fombad, ‘Some Perspectives on Durability and Change Under Modern African Constitutions’, 11 (2) *International Journal of Constitutional Law* (2013): 382–413.

54 See an example of such an obligation in section 2 of the South African Constitution of 1996 which states 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).

55 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 6 of the Constitution.

56 This is what section 324 of the 2013 Zimbabwe Constitution states.

57 In this regard, Article 22(2) of the Kenyan 2010 Constitution states that proceedings for violation of the Constitution could 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;

response to the growing disenchantment with the ability and willingness of many public institutions, such as the prosecuting authorities and anti-corruption agencies, to secure and defend the public interest against the predatory activities of public officials.<sup>58</sup> This will strengthen the hands of those individuals and CSOs to actively monitor and expose public institutions that are not complying with their constitutional mandate. It is the activities of some individuals and CSOs that have continuously put pressure on the South African government and its anti-corruption agencies to respond to the numerous incidences of corruption that regularly make news headlines in the country.<sup>59</sup> This move towards a self-enforcing constitution enhances each individual in the society's right for self-government and inevitably involves the transfer of some powers from the public into the private hands in a manner that is likely to promote greater efficiency and efficacy in dealing with constitutional implementation.

## **B. Protection from partisan manipulation and institutional independence**

The main innovation of the South African Constitution insofar as constitutional institutions are concerned are the four 'establishment and governing principles', provided for under section 191 of Chapter 9 of the Constitution. It is worth noting that although many African constitutions, both pre- and post-1990, provide for the establishment of some of these institutions, especially ombudsman, public service commissions and judicial service commissions, they have hardly been able to operate effectively because they were exposed to easy political interference in one form or another. The four guiding principles designed to ensure that these institutions are an effective log to the constitutional wheel and not a political charade of symbolic value only are stated in section 191 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
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.

Article 22(2) even goes further to limit formalities relating to proceedings to a minimum and 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 and Articles 228 and 230 which restrict access to certain specified personalities casts serious doubts about its effectiveness.

58 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.

59 See, for example, Open Democracy Advice Centre (ODAC), the Right2Know Campaign, One Society Initiative and the Institute for Accountability in Southern Africa.

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.

Something close to these principles are referred to in some constitutions as the 'directive principles of state policy',<sup>60</sup> but these, unlike the principles in the South African Constitution, are stated in purely hortatory terms. In certifying the 1996 Constitution, the Constitutional Court had drawn particular attention to these constitutional institutions of accountability 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>61</sup>

In the light of the experiences of the last two decades and the approach adopted in some of the recent constitutions, a number of changes need to be made to the section 191 provisions of the South African Constitution to give them more teeth. The first change concerns the second principle. In order to enhance the ability of the institution to operate independently, it is necessary to expressly recognise and protect their financial autonomy. The aim should be to prevent budgetary allocation from being used to prevent them from fulfilling their mandate.<sup>62</sup> An equally important improvement to this principle should state that, in order to ensure the effectiveness of these institutions, their findings, decisions, recommendations and conclusions, although not binding, must be complied with unless there are good reasons for not doing so. There is certainly some merit in the views put forward by some who argue that the role of these institutions should lie in 'influence, not in formal power' and in 'influence rather than enforcement'.<sup>63</sup> But this cannot be enough. It makes little sense to create institutions like these and give them the powers to spend large amounts of taxpayers' money to carry out investigations if the results of these investigations will simply be ignored for political reasons by Africa's parliaments, controlled as they are by dominant parties, like South Africa's ANC has done with the Public

60 See, for example, Articles 34–41 of the Constitution of Ghana; and sections 13–24 of the Constitution of Nigeria.

61 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).

62 See the South African Constitutional Court case of *New National Party of South Africa v. Government of the Republic of South Africa and Others* 1999 (3) SA 191. More generally, see signs that holding back funds is being used to undermine the work of the South African Public Protector. See further, for example, in 'Public Protector Hampered by Dire Shortage of Funds', *Legalbrief TODAY*, 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. Madonsela says the number of cases she deals with is disproportionate to the financial and human resources available to her office. Some investigators handle up to 500 cases and 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.

63 See the paper by Christina Murray, *supra*, note 35, at pp. 132–3.

Protector's recommendations on the Nkandla scandal. This will also address the regular criticisms that these institutions are weak and ineffective because they can only bark but not bite. It is also fair to allow the persons against whom adverse findings are made, especially since most of the processes are not adversarial, to have an opportunity to challenge an outcome that is perverse and unreasonable through a process of judicial review. In other words, the recommendations must only be ignored where there are good legal reasons for doubting their fairness. A second change that is imperative is that the fourth principle should be modified to state that quarterly reports should be submitted to a Special Parliamentary Committee on Governance and Accountability which is constituted in a manner to limit the possibility of the governing party frustrating the process.<sup>64</sup> The third change is to add two important new principles to the four principles in section 191 of the South African Constitution, which should hopefully help to address some of the problems that South Africa has faced, especially after the manner in which the Public Protector's Nkandla report was casually rejected by the increasingly unruly ANC government. The new fifth principle should state that any legislation, action, measures or mechanisms introduced to regulate any of these institutions, which undermines the essential purpose of combating corruption and ensuring accountability and transparency shall be declared null and void by the courts. 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 expressly stated in the constitution. In this respect, the appointment process must be guided by three factors. First, that members 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. Second, all senior positions must be widely advertised and members of the public should be encouraged to propose suitable persons. Third, there should be public interviews conducted by the Special Parliamentary Committee on Governance and Accountability who will prepare a shortlist of appropriate nominees for appointment and submit this to the President.<sup>65</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 made. The President will make the final appointments from the list of nominees. This will reinforce the independence of the institution. While there is no perfect system, it can be argued

64 The Special Parliamentary Committee on Governance and Accountability proposed here does not appear in any modern African constitution. It is, however, considered an important body to receive quarterly reports from all the hybrid independent institutions of accountability, monitor their activities and ensure accountability. The constitution should expressly state that it should be constituted in a manner that ensures an equal number of representatives from the ruling party and from 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 discharge its functions.

65 It is probably only the Zimbabwe Constitution of 2013 which in sections 236 and 237 comes closest to providing an appointment procedure that could limit—but not in a very satisfactory manner—the avenue for politically motivated appointments.

that an appointment system which places the ruling party and opposition parties on a par will enhance the prospects for the appointment of independently minded persons who owe their positions to their expertise rather than political appointees who are likely to remain beholden to those who appointed them.<sup>66</sup>

The importance of these principles in acting as a powerful bulwark against the persistent problem of political manipulation of accountability institutions has been underlined in a number of South African cases.<sup>67</sup> Requiring that these institutions should be independent does not require complete insulation from political accountability. It rather requires insulation from a degree of management by political actors that would enable the institution to operate without fear, favour or prejudice. Where it is palpably clear that the institution being created will not be able to operate independently, then citizens have a right as well as a duty to approach the courts to intervene and invalidate the relevant piece of legislation for violating the principles which should inform the establishment of these institutions.

### C. The constitutional entrenchment of deadlines

A number of recent constitutions contain deadlines for implementing certain provisions.<sup>68</sup> As noted earlier, the 2010 Kenyan Constitution includes a number of important deadlines. One example of these is the deadlines specified in the fifth schedule within which certain pieces of legislation, one must assume, considered very crucial to the process of implementation of the Constitution, must be enacted. Another example is the lifespan given to the CIC.

Deadlines are important for, as pointed out earlier—and this point begs repetition—many African governments responded to pressure in the 1990s to adopt new or revised constitutions with many new institutions and mechanisms but hardly bothered to implement or enact the legislation needed to bring this about. Deadlines are important but they must be carefully considered and constitutionally entrenched. To be meaningful and effective, deadlines should not be too short and unrealistic because this could be used as an excuse for imposing legislation or effecting other changes without public participation in the process. On the

66 See, Geoff Budlender, '20 Years of Democracy: The State of Human Rights in South Africa', <http://blogs.sun.ac.za/law/files/2014/10/annual-human-rights-lecture-2014-adv-g-budlender-sc.pdf> (accessed March 2015) who, in commenting about 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.'

67 See Constitutional Court decisions in *Independent Electoral Commission v. Langeberg Municipality* 2001 (9) BCLR 883 (CC); *New National Party of South Africa v. Government of the Republic of South Africa and Others* 1999 (3) SA 191; *Glenister v. President of the Republic of South Africa* 2011(3) SA 347 (CC).

68 See First schedule, section 9 of the 1992 Constitution of Ghana, which provides some deadlines within which the President was required to make certain appointments. Schedule 6, section 23 of the 1996 South African Constitution also contained deadlines within which certain pieces of legislation had to be enacted. As noted earlier, it is not enough to state that constitutional obligations should be performed diligently and without delay.



other hand, they should not be unduly long as to make the process endless and provide an excuse for continuous procrastination and non-compliance or manipulation of the implementation process. Where political will is lacking or there is stalemate, strict constitutional deadlines will put pressure on the political actors to comply with the constitution. However, this will only be effective if there are penalties for not complying with the deadlines. Strict deadlines may go hand in hand with regular monitoring of constitutional implementation. In this regard, permanent apolitical special constitutional implementation institutions, which intervene immediately after the adoption of a constitution on a continuous basis for 5–10 years and thereafter annually or biannually, will make it easier for deadlines to be met.

## **VI. Conclusion**

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

Constitutional implementation must therefore be made a priority issue for any constitution-making process. Designing any constitutional framework today that will stand a good chance of being implemented in a transformative manner to 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: first, 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; second, a number of independent constitutional institutions of accountability to promote good governance and accountability; and third, the constitutionalisation of certain operational principles that will guarantee the independence of these institutions and shield them from political capture and manipulation. Ultimately, it must now be recognised that a constitution will only achieve its purpose of promoting constitutionalism, good governance and respect for the rule of law if its implementation and enforcement can be guaranteed and put beyond the good will of any individual, group of individuals or institution. One of the main lessons of the last six decades of constitutional developments in Africa is that incorporating constitutional mechanisms and institutions to oversee, supervise and monitor the implementation of the constitution is now a critical aspect of constitutionalism.