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FROM WORDS TO DEEDS
THE IMPLEMENTATION OF CONSTITUTIONS[1]

EXECUTIVE SUMMARY

Drafting a constitution is a massive and complex undertaking. And yet, it is only the first step. Many constitutions have been written that were never really implemented. Recent examples include Zimbabwe, Egypt, Libya and South Sudan.

Implementing a constitution is more than a single action performed after the constitutional text has entered into force. Drafting a text that works requires the genuine buy-in of those concerned, including elected representatives and citizens. Constitutional implementation is the process that begins with the promulgation of the text and is achieved when a 'culture of constitutionalism' has emerged. At a simplified level, it is possible to distinguish between two, often intertwined, types of implementation:

- The transitional period, which occurs after the promulgation of the constitution and aims to make it fully operational. This is marked by phasing out the old and introducing the new, and can include reviewing/repealing old laws, setting up new institutions, and vetting as well as training existing staff; and
- The day-to-day process of operating in accordance with the constitution, which is about maintaining fidelity to the text and ensuring that all organs involved in the governance process adhere to the principles of the constitution. This aspect of implementation is strengthened through compliance and enforcement procedures put in place by courts and commissions, reporting requirements or other safeguards.

The emergence of constitutionalism requires that the constitution becomes a living document in society. Continuous efforts must be made to build constitutional literacy, while citizens should have sufficient opportunities to safeguard and develop the promises enshrined in the constitution through their involvement in its reform.

A constitution that works in practice requires careful consideration of the environment that the constitution is supposed to govern. Aspects to consider include: ownership through participation; ownership generated by context-specific constitutional design; a constitutional design that corresponds to capacities; and a realistic assessment of the actors involved, their inclusion in the process and how best to accommodate their needs. Ignoring these issues at an early stage may cause severe "birth defects" in the constitution and impede its implementation. A glossy document that is full of appealing phrases but not rooted in its actual environment might be widely cited in comparative constitutional law textbooks, but does not necessarily work in practice.

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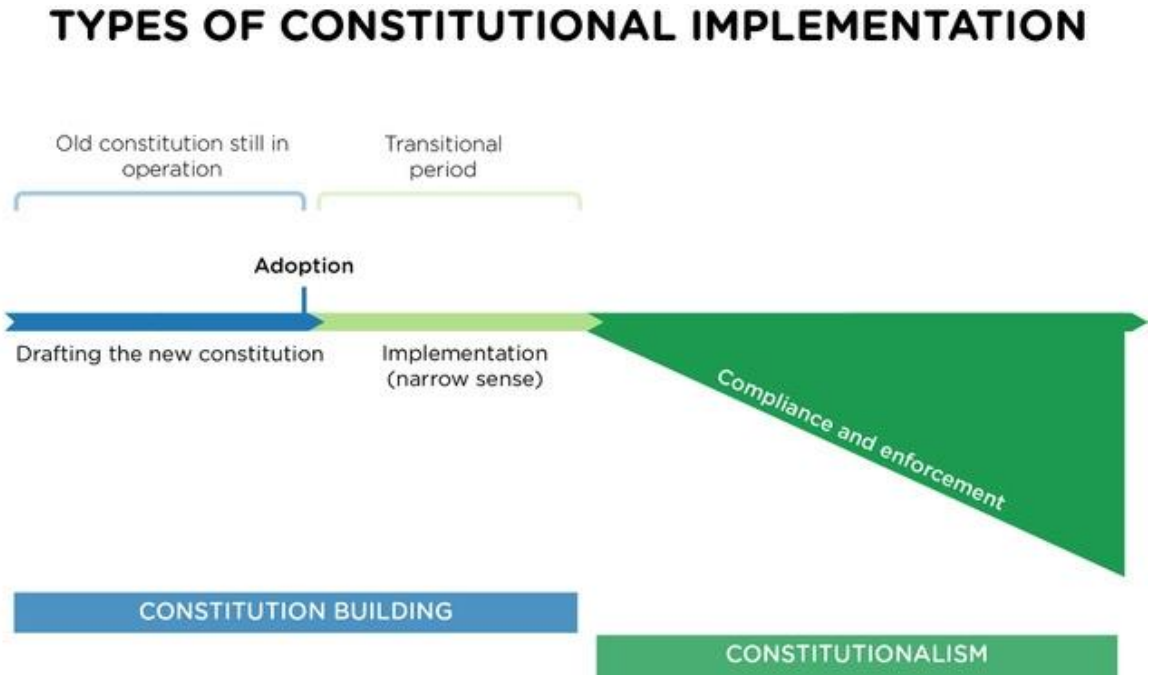

1. INTRODUCTION

Constitutions are at times emphatically described as the autobiography of a nation, defining its origin and its goals. Besides having this symbolic function, a constitution is also the fundamental and supreme law of the state. It contains the principles upon which the government is founded, regulates the division and limitation of the sovereign powers, and directs which institutions should hold each of these powers and the manner in which they are to be exercised.[2]

Understanding that a constitution has this central function in the operation of society underlines the importance of translating the constitution's promises into reality. But more often than not, new or considerably revised constitutions do not meet these promises. Lack of implementation remains a constant challenge in many countries. This paper examines and categorises the causes of inadequate implementation. Furthermore, it offers some comparative insights that may help to transform a constitutional text on paper into a normative constitution that operates effectively.

There are two explanations why a new constitution is not implemented in the way that was intended or expected. The first approach analyses why the original choices made proved unworkable, and what kind of "birth defects" contributed to the non-implementation of the constitution.[3] Often, these defects are the result of unrealistic expectations as to what a constitution can actually do. The second approach looks at actions and developments that did not take place subsequent to the creation of the constitution, even where "birth defects" were avoided. Both explanations are explored below.

Constitutions are hardly ever "complete." They do not and cannot address all contingencies and spell out how to resolve them.[4] They therefore rely on further measures, taken either by the legislature or the executive, in order to become fully operational. Metaphorically, one might think of a constitution as a building where the brickwork is finished, but the interior fittings have yet to be installed. With this in mind, it is worth distinguishing between two different types of "implementation": transitional implementation and long-term operational implementation (figure above). Constitutions often include specific chapters regulating the transitional period in which the old is phased out and the new brought in, be it with regard to laws, institutions, or personnel. The second type of implementation, which relates to the day-to-day operation of the constitution, is about maintaining fidelity to the text and spirit of the constitution and ensuring that all organs involved in the governance process adhere to it.[5] This aspect of implementation is strengthened through **compliance** and **enforcement** procedures[6] put in place by courts and commissions, reporting requirements or other safeguards.[7]

[2] Burton's Legal Thesaurus, 4E, "constitution," Copyright © 2007 by William C. Burton. <http://legal-dictionary.thefreedictionary.com/constitution> (19 December 2016)
[3] Peter Burnell, "The Relationship of Accountable Governance and Constitutional Implementation, with Reference to Africa," Journal of Politics and Law, Vol. 1, No. 3 (September 2008), 10.

[4] Rosalind Dixon and Tom Ginsberg, "Deciding Not to Decide: Deferral in Constitutional Design," *International Journal of Constitutional Law*, Vol. 9, No. 3-4 (2011), 636.
[5] Ben Sihanya, "Constitutional implementation in Kenya," *2010-2015: Challenges and prospects*
FES Kenya Occassional Paper, No. 5, 2012, p. 3.
[6] Although in this period transitional arrangements are dominant, compliance with and enforcement of the new constitution operate in parallel.
[7] There is a caveat to this distinction of two types of implementation. Occasionally negotiating parties deliberately agree on an ambiguously worded text that allows each of them to read their different understandings into the text. Such ambiguity is often labelled "constructive", since it articulates a degree of compromise: the parties agree not to agree on precise wording around a specific issue, which they each interpret differently (see Markus Böckenförde, "From Constructive Ambiguity to Harmonious Interpretation: Religion-Related Provisions in the Tunisian Constitution," American Behavioral Scientist, Vol. 60 (2016), 919). In such situations, an as yet unresolved issue is not deferred to the legislature for implementation in the transitional phase, but rather referred to the judiciary to define one distinct meaning of the text during the operational phase.

2. EXPECTATION MANAGEMENT: WHAT CAN CONSTITUTIONS DO?

Constitutions – especially if drafted after violent conflict or after the fall of an authoritarian regime – often mirror the people's aspirations and hopes for a better future. But as such, they remain words on paper that need to be implemented by the institutions they create. Setting expectations too high may quickly lead to disappointment. Or, as James Madison, one of the founding fathers of the United States Constitution, stressed: "Constitutional texts are only fragile 'parchment barriers' '[barriers on paper] against internal political resistance and external economic or strategic shocks."[8] The effectiveness of institutions, even when they have formal sanctioning power, depends to a considerable degree on their standing and support from other institutions and society at large.

Since the degree to which constitutional choices are implemented will bear some relationship to how and in what context they were made, four issues should be carefully considered:

- Ownership related to participation;
- Ownership generated by context-specific constitutional design;
- A constitutional design that corresponds to capacities; and
- A realistic assessment of the actors involved, their inclusion in the process, and how best to accommodate their needs.

2.1. OWNERSHIP RELATED TO PARTICIPATION

Besides the normative claim of participation[9] and its psychological benefits (inclusion and trust), the act of monitoring (this being a fundamental aspect of a participatory process) is key to fostering the constitution's implementation. When citizens actively take part in forming the constitution through public consultation and civic education, they learn its content more fully, including the broad parameters of accepted behaviour under the new constitution. Disrespect of the constitution by governmental officials may then be identified and challenged in relevant institutions. Where leaders are aware that citizens have the capacity to monitor them, they may be more likely to respect constitutional limitations on exercising power, anticipating that they will meet resistance if they overstep these limits.[10]

2.2. OWNERSHIP GENERATED BY CONTEXT-SPECIFIC CONSTITUTIONAL DESIGN

Constitutions literally "constitute" the legal parameters within which a society operates. Drafting a constitution that works in practice must strike a balance between the need to reform or replace existing structures (that may have caused violent conflict or permitted decades of authoritarian rule) on the one hand, and the need to accommodate existing customs on the other. Constitutional design that reconstructs a society where laws neither reflect nor derive from the prevailing cultural norms might render the constitution irrelevant and destined to fail. Or, as Ruth Gordon observed: "constitutions can flourish and succeed only if they are firmly planted in the cultural soil from which they gain legitimacy".[11] Culture in this context should not be understood in the romantic sense often referred to as "tradition", but as a "collective prism through which the constitutional and political order are understood".[12]

EXAMPLES OF RELEVANT CONTEXT

- After unilaterally declaring its independence from Somalia, Somaliland developed a new constitution including institutions and structures that reflect forms of traditional social organisation. The creation of the 82-member Guurti as a parliamentary body (upper house) formalised a centuries' old, effective mediation system used among clans and sub-clans. The Guurti is regarded as the "centre of gravity" for the successful and peaceful rebuilding of Somaliland. Recent discussions in Somaliland regarding the reform of this institution 25 years on underscore that institutional choices based on traditional experiences are not insulated from ongoing reforms.[13]

- Most countries' formal legal systems are – at least in part – informed by one of two legal families: the common law or the civil law. Although both families share many common characteristics, they have distinct features that affect the work of judicial institutions and reflect their specific design. This is particularly evident with regard to the constitutional review of laws. Specialised constitutional courts are high on the agenda of constitutional drafters and international advisors. But while they are integrated into the judicial architecture of civil law countries,

[8] Tom Ginsberg and Aziz Huq, "What Can Constitutions Do? – The Afghan Case," *Journal of Democracy*, Vol. 25, No. 1 (January 2014), 116.
[9] Philipp Dann et al, Lessons Learned from Constitution-Making: Processes with broad-based public participation. In: Democracy Reporting International, Briefing Paper No. 20, Berlin 2011, p. 3.
[10] Jennifer Widner "Constitution Writing in Post-Conflict Settings," *William & Mary Law Review*, Vol. 49 (2008), 1520. <http://scholarship.law.wm.edu/wmlr/vol49/iss4/16> (20 December 2016)

[11] Ruth Gordon "Growing Constitutions," *University of Pennsylvania Journal of Constitutional Law* Vol. 1, No.3 (1999), 530. <http://scholarship.law.upenn.edu/jcl/vol1/iss3/3> (19 December 2016)
[12] Sumit Bisarya, "Unpacking Context: What Exactly Do We Mean by Context-driven Constitutional Assistance?", *The UNConstitutional*, Issue 5 (Summer 2016), 5.
[13] IRIN, "Debating Reform of Somaliland's House of Elders," 18 July 2013. http://www.irinnews.org/news/2013/07/18/debating-reform-somaliland%E2%80%99s-house-elders (19 December 2016)

EXAMPLES OF RELEVANT CONTEXT

with their detailed codes and different court systems,[14] they might turn out to be alien in a common law context. One might therefore consider including certain desirable features of constitutional courts in a common law context, instead of importing a new institution. A number of countries have followed this path (many anglophone countries in West Africa opted for a concentrated constitutional review through a "referral procedure", but maintained the Supreme Court structure[15]).

- "Federalism" is another design option that is often debated on an abstract, political level, but rarely contextualised and therefore poorly implemented. Borrowing federal models from countries whose constitutional design aimed to bring several independent states together (as in Germany, Switzerland and the USA) might create confusion where the current aim is to identify a model that will keep a diverging country together. Similarly, in some countries demographics linked to the natural topography may inform considerations along federal lines (as in Nepal), but such considerations should not be transferred literally to different landscapes.

- Keeping in mind that constitutions are implemented by the institutions they create, the extent to which implementation succeeds also depends on the appropriate allocation of tasks to respective institutions. If a constitution aims to transform a centralised structure into one that is decentralised, relevant mechanisms should not be left in the hands of the national legislature when the intention is to transfer powers from the national level to other layers of government.

2.3. A CONSTITUTIONAL DESIGN THAT CORRESPONDS TO CAPACITIES

Drafting a new constitution is often an aspirational and envisioning process. It represents hope for a better future. Thus, the text of the constitution focuses on reflecting the society that is to be established, rather than what is required for implementation. At the same time, constitutions are negotiated compromises between different political stakeholders and interest groups. Accommodating their different preferences and demands often results in bigger government, which requires larger numbers of people and bigger budgets. Obviously, such ambitions carry a high risk when it comes to implementation. If the necessary human and financial resources are not available to run the institutions envisaged in the constitution, frustration and disappointment build up among the people, and the constitution's credibility is called into question. Or, in the words of a constitutional expert from South Africa: "We have built a Rolls Royce Constitution and forgot about the high consumption. Now we are looking for petrol to drive it."

2.4. A REALISTIC ASSESSMENT OF THE ACTORS INVOLVED, THEIR INCLUSION IN THE PROCESS AND HOW BEST TO ACCOMMODATE THEIR NEEDS

Often, the main stakeholders involved in a constitution-making process are predetermined by the context. If constitutional change evolves as part of an official reform initiative, the existing elites remain in the driving seat (as in Jordan, Morocco and Myanmar). If the constitution-making exercise is part of a peace deal reached after years of civil war, each of the relevant parties obtains a seat at the negotiating table to devise a mutually acceptable way forward (as in South Africa and Sudan). However, in revolutionary contexts, where the previous regime has been overthrown (as in Tunisia and Libya), the extent to which followers of the old regime should be involved in the process of drafting the new constitution is also relevant to its successful implementation. Groups that feel excluded might become radical opponents of the new constitution and impede its implementation.

3. TRANSITIONAL PERIOD

A new constitution may create new institutions, additional rights for citizens, measures to strengthen a government's accountability and, in the case of substantive decentralisation, additional layers of government. But although these tasks are set out in the constitution, the constitution regulates only a few of them directly and exclusively. Tasks like setting up a national human rights institution may be mandated in a new constitutional text, but the institution cannot be fully operational without enabling legislation. There are various reasons for this. First and foremost, constitutions are hardly ever "complete", meaning they do not and cannot address all contingencies and spell out how to resolve them. This sometimes reflects the extent to which the constitutional content was agreed upon; the task in question may have been deferred to the legislature owing to irreconcilable differences or lack of time. Alternatively, it may reflect the legal culture in a given country. Some civil law traditions operate with "organic laws" that specify the function of constitutional institutions. These may require, for example, special procedures, majorities, or constitutional review, and are somehow sandwiched between the constitution and ordinary statutes. Generally, the margin of discretion given to the legislature differs from case to case: in part, the constitution provides a narrow and predetermined framework; in part, the legislature is tasked to set up

[14] Arthur Chaskalson "Constitutional Courts and Supreme Courts," in *The Future of The European Judicial System in a Comparative Perspective*, eds. Ingolf Pernice, Juliane Kokott and Cheryl Saunders (Baden-Baden: Nomos, 2009), p. 100.
[15] Markus Böckenförde, Babacar Kante, Yuhniwo Ngenge, H. Kwasi Prempeh, *Judicial Review Systems in West Africa: A Comparative Analysis* (Munich: Hans Seidel Foundation/Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2016), p. 23.

institutions without any further direction under the constitution.

This period of phasing out the old and introducing the new is a transformative one. It marks the difference between constitution-making (writing and ratifying the constitutional document) and constitution-building (completing the constitutional setup in such a way that it is fully operational), and is the first litmus test of the degree to which the relevant parties are committed to the new document. At the same time, the mechanisms described below help the drafters of a constitution to ensure that future elected governments will do what is necessary to implement the new constitution, while preventing any potential abuse of powers.

3.1. IMPLEMENTATION SCHEDULE

Many constitutional provisions defer the establishment of new institutions, additional rights and so forth to the legislature or the executive. Without any further guidance it might be difficult to identify which action is best taken at which time by the relevant institution. In different countries, implementation schedules have been introduced to encourage and support implementation by indicating which laws / decrees need to be passed in what sequence, by which date and by which institution. These range from a separate chapter in the constitution (as in Afghanistan and Tunisia) to annexed tables (as in Kenya and Sudan). The Kenyan example stands out with its specific, elaborate and limited timetable for constitutional implementation. It also takes into account that the discussion and elaboration of some laws might be particularly controversial, demanding more time for negotiation. The timetable permits the legislature to extend the deadline for implementation once, if agreed by two-thirds of its members.

3.2. CREATING SPECIFIC OVERSIGHT INSTITUTIONS FOR IMPLEMENTATION

The commitment to implementation may go beyond a mere schedule; it may be underpinned by the creation of institutions specifically designed to support and monitor the implementation process. Afghanistan, Kenya and Sudan have provided for such an institution. The degree of independence of each of these institutions differs, as does their authority. In Afghanistan, the creation of the "Independent Commission for the Supervision of the Implementation of the Constitution" was delayed by six years, and its mandate has changed. As of 2010, the commission's task is no longer to supervise the implementation process, but rather to interpret the constitution at the request of the government, the National Assembly and the Supreme Court.[16] Meanwhile, Kenya's "Commission for the Implementation of the Constitution" is probably the most far-reaching institution of that kind, vested with the power to "monitor, facilitate, and oversee the development of legislation and administrative procedures as required to implement the constitution."[17] In addition, it was tasked with preparing legislation required to implement the constitution for tabling in Parliament (in coordination with the Attorney-General and the Kenya Law Reform Commission), and to cooperate with each of the other commissions to ensure that the letter and spirit of the constitution was respected.

3.3. COMPLIANCE AND SANCTION MECHANISMS

Many constitutional provisions remain dormant if the legislature fails to enact the implementing law. Implementation commissions do not have enforcement mechanisms; they have to rely on the effectiveness of their support and the soft power of the reports they produce. But a few constitutions provide additional compliance mechanisms. In South Africa, important rights provisions of the constitution (e.g. right to information, just administration) are "doubled" with fallback clauses in the case that the relevant implementation law is not enacted: there is a deadline of three years for the enactment of the implementing laws, and section 23 of Schedule 6 provides a transitional reading of the respective constitutional provisions during those three years. If the legislature fails to enact the laws during this period, the transitional reading becomes permanent.

In Papua New Guinea, courts are entrusted in a case before them to make such orders as may be necessary to fill the gap left by the absence of an implementation law. Furthermore, independent commissions in Papua New Guinea awaiting the enabling law can become operational and are entitled to the staff and facilities needed to carry out their functions.[18]

Kenya opted for a different path and introduced an escalating sanction system: if the legislature fails to enact legislation in the specified time, any person may file a petition to the High Court. The High Court, in turn, may transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice. If the legislature fails to comply with the order, the Chief Justice may ask the President to dissolve the legislature.

[16] The law establishing the commission was vetoed by the President, but the veto was overruled by a two-thirds majority in Parliament. The President argued that the authority of the commission would overlap with the Supreme Court's jurisdiction. *See* Shamshad Pasarlay, "Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?," *Int'l J. Const. L. Blog*, 18 March 2015, <http://www.iconnectblog.com/2015/03/constitutionalinterpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis/>

[17] Section 5, paragraph 6 of Schedule 5 of the Constitution of Kenya

[18] Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan, *Constitution-making and Reform – Options for the Process*, (Geneva: Interpeace, 2011), p. 225.

3.4. REVIEWING OLD LAWS

A new constitution, especially if it introduces a radical change from the past, has to decide on the status of existing laws. Often, a new constitution repeals the most repressive laws on which a former regime was based.[19]

Furthermore, a decision needs to be made as to whether the "constitutionality check" of old laws will be carried out as part of the transitional period or rather under the new constitution. The first option considers old laws as part of the past that is to be left behind. In order to qualify for the new era, these laws must pass a constitutionality screening test in the interim phase. Adopting this approach presents another issue, namely that of identifying/creating the proper institution to fulfil this task. Depending on the situation that preceded the constitutional change, there might be resistance to assigning this task to the "old judiciary". In Sudan, the authority was given to the National Constitutional Review Commission (which also had to "translate" the relevant provisions from the six peace protocols into a constitutional text).

However, there is also a further challenge: defining which laws are to be considered "old". Does "old" denote the entire corpus of existing law or only those laws passed under a certain regime during a specific period? Next, what should be screened? Should, for example, all old laws be tested against the new bill of rights *in abstracto,* at once? And if a law is declared unconstitutional, when should the new legislature revise that law, given the likelihood that they may already be overwhelmed with drafting the new laws as required by the constitution?

In view of these challenges, most constitutions abstain from calling for constitutional review to be carried out during the transitional period. Old laws that are not repealed remain in effect so long as no court finds them inconsistent with the new constitution.

3.5. VETTING

Constitutions, especially when drafted in a post-conflict or post-authoritarian setting, express commitments to a better and more peaceful future. Building trust and a common vision for the time to come cannot be achieved by the constitutional text alone; it also requires coming to terms with the recent past, including the question of whether to favour continuity or change regarding personnel. To what extent can/must one rely on the old bureaucracy or justice system when making a new start? And how far do these representatives of the "old" order support the change towards a new era? Should there be a vetting process for officers and judges during a transitional period, investigating the extent of their involvement in the previous regime? Obviously, these questions are relevant to the success of implementation and touch on the delicate and broader issue of transitional justice.

It was a different context that initiated the vetting process in Kenya. Here the judicial system was perceived as overtly corrupt ("why pay for a lawyer if you can buy a judge?"). In order to address this issue, and to strengthen the rule of law beyond institutional reforms, the constitution required the establishment of a "Judges and Magistrates Vetting Board" that would scrutinise judges' past performance as part of assessing their suitability for further employment. In such situations, however, the decision to introduce such a board should be taken only after checking the availability of qualified human resources, in case large-scale replacements are deemed necessary.

4. COMPLIANCE WITH AND SAFEGUARDING OF THE CONSTITUTION

Once the constitution is given full effect by setting up the new institutions (including e.g. personnel, resources) and making the required laws, it then needs to take root. Respect for the constitutional framework, and the commitment of relevant stakeholders to govern within this framework, are the foremost preconditions for making the constitution work and enabling the rule of law and constitutionalism to prosper. Two factors are key in this regard: a viable institutional design of "checks and balances" performed by independent and competent institutions; and the existence of an educated and vigilant professional community and wider public who know about their constitutional rights, and are given the opportunity to enforce them.

4.1. INSTITUTIONS AS GUARDIANS OF THE CONSTITUTION

A diligently designed constitution creates a network of prevention and control mechanisms among the various institutions that are exercising state authority.[20] Such a system of checks and balances, be it on a horizontal level between the different branches of government or on a vertical level between different levels of government, prevents a single institution assuming too much control and power[21] and

[19] *See e.g.*, Schedule 7 of the Constitution of South Africa 1993. In the Constitution of Cambodia, certain (property-related) laws "continue to remain in force until amended or repealed by new laws and regulations, except those provisions that are contrary to the spirit of this Constitution" (Art. 158). The Constitution of Poland provides (Art. 239) that with the entering into force of the constitution, "resolutions of the Constitutional Tribunal on interpretation of statutes shall lose their universally binding force" (with an *ex-tunc* effect, leaving existing judgments based on that interpretation intact).

[20] Juliane Kokott and Martin Kaspar, "Ensuring Constitutional Efficacy", in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), p. 796.

[21] For further detail, see Markus Böckenförde, A Practical Guide to Constitution Building: The Design of the Legislature (Stockholm: International IDEA, 2011); Markus Böckenförde, A Practical Guide to Constitution Building: The Design of the Executive Branch (Stockholm: International IDEA, 2011); and Markus Böckenförde, A Practical Guide to Constitution Building: Decentralized Forms of

thus contributes to the constitution's implementation. Judicial constitutional review institutions are often at the apex of such a network, operating as the guardian of the constitution and its final arbiter (e.g. supreme court, constitutional court, constitutional council), and are frequently supported by (sector-related) independent commissions (e.g. a human rights commission).[22] The effectiveness of a constitutional review institution (CRI) depends on three factors: its independence, its jurisdiction and its accessibility. Generally a CRI cannot take action on its own; it has to rely on relevant applications being filed in the court, or on provisions explicitly referring an issue to the court.

4.2. JUDICIAL INDEPENDENCE OF CONSITUTIONAL REVIEW INSTITUTIONS

Constitutions around the world offer a variety of provisions to guarantee judicial independence. The selection/appointment of judges, and their removal, are considered by many to be the two most important *de jure* protections in guaranteeing judicial independence in praxis.[23] In most countries, the procedure of appointing/selecting judges to a CRI differs from the procedure that is applied for other judges. Owing to the political impact of their decisions it is widely accepted that political actors from other branches of government should be involved in the selection process. This is because those who are involved might be more inclined to accept judgments rendered against them, or that run counter to their political ideas, rather than attempt to undermine them and attack the court. Basically, there are three different models used to select constitutional review court judges:

1. Selection by one institution (often the legislature, or occasionally the Head of State);
2. Selection by different actors on a sequential basis (whereby the decision is made by different actors together, often referred to as *cooperative mechanism*); and
3. Selection by different actors on a proportional basis (whereby each actor makes their appointments to the court separately, often referred to as *representative mechanism*).[24]

There is no single best model to choose. Many countries' choice is predetermined by legal culture/constitutional history (for example, the third model cited above is predominately used by francophone countries).

4.3. JURISDICTION OF AND ACCESS TO CONSTITUTIONAL REVIEW INSTITUTIONS

Generally, CRIs that are supposed to serve as an effective implementation device should be granted jurisdiction over all matters that involve a constitutional question, be it in relation to laws (before and after promulgation), executive actions, political parties, elections, rights protection, or disputes between governmental bodies over their spheres of competences. Especially from the perspective of implementation, one might also consider permitting CRIs to render advisory opinions on questions of constitutionality upon the request of government (as in Cameroon, France and Kenya).

However, as helpful as recourse to the CRI might be for government when seeking guidance on the effect or interpretation of a constitutional provision, it does not come without challenges. Since an advisory opinion is an expression of the judges' views, it is not a judgment of the court but rather an extrajudicial function of the judges. In theory, the advisory opinion neither binds the requesting institution, nor does it bind the court when the same subject matter arises in subsequent litigation.[25] In practice, the CRI might be reluctant to deviate from its judges' opinion. Thus, advisory opinions might actually undermine procedural requirements of adversary proceedings. However, a request for a binding interpretation of a law might be a suitable alternative. This does not challenge the law's constitutional validity, but is more authoritative than an advisory statement of judges. The court must decide how a law is interpreted to ensure its conformity with the constitution (as in Bulgaria, Slovakia).

However broad the CRI's jurisdiction is, its effect remains limited if access to it is very restricted. Generally, if the CRI is not accessed actively by someone, either institutionally or individually, it remains inactive (no plaintiff, no judge). Some constitutions have included exceptions to this rule by making referral to the CRI mandatory before a bill is promulgated in certain cases: France and many other francophone countries require the CRI to review all organic laws (laws that implement or give greater detail to constitutional provisions) for constitutional conformity before enactment.[26] Similarly, before the ratification of an international treaty, some CRIs have to scrutinise whether and to what extent the international agreements conform to the constitution. Exceptionally, some constitutions require the CRI to approve the constitutionality of constitutional amendments explicitly, both from a procedural and substantive perspective (as in Tunisia). Have the amendment procedures as stipulated in the constitution been adhered to, and has the constitutional hierarchy been respected? The latter question becomes relevant if the constitution contains immutable clauses

Government (Stockholm: International IDEA, 2011). All three publications have also been translated into Arabic, Myanmar and Vietnamese.

[22] For a more detailed analysis *see* DRI/Center for Constitutional Transitions at NYU Law, "Briefing Paper 40: "Constitutional Review in New Democracies".

[23] Tom Ginsberg and Aziz Huq, "What Can Constitutions Do? – The Afghan Case," *Journal of Democracy*, Vol. 25, No. 1 (January 2014), 116.

[24] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, (Cambridge: Cambridge University Press,2003), p. 43.

[25] Charles M. Carberry, "The State Advisory Opinion in Perspective," Fordham Law Review, Vol. 44, No. 1 (1975), 81. <http://ir.lawnet.fordham.edu/flr/vol44/iss1/3> (20 December 2016)

[26] DRI/Center for Constitutional Transitions at NYU Law, "Briefing Paper 40: Constitutional Review in New Democracies," p. 8.

(provisions that must not be amended or infringed upon). In very rare cases, a CRI is also empowered to decide on constitutional issues on its own initiative. In Benin, according to Art. 121, para. 2, of the Constitution, the Constitutional Court may act *ex officio* (*auto saisine*) if a law deems "to infringe on the fundamental human rights and on the public liberties."[27]

Besides the exceptions highlighted above, there are various ways of accessing the CRI:

- By referral from other courts (if a matter before an ordinary court involves a question of constitutionality, lower courts may halt the process and refer the question to the CRI); and
- By referral from members of the legislature, the prime minister or the president; or, especially with regard to the enforcement of the bill of rights, on the initiative of citizens,[28] civil society organisations (public interest litigation), or specific governmental officials / institutions (such as an ombudsman or the head of a specialised commission).

An individual complaint procedure is not only important to provide CRIs with a sufficient caseload to monitor the government's compliance with human rights effectively ("monitoring theory"[29]); it also sends an important signal to citizens that their complaints are being heard and dealt with.
Access to the CRI is not only determined by standing rules (i.e. who has the right to make a case), but also by the financial resources required to bring a case. A legal aid system supporting those that cannot otherwise afford to go to court might be very relevant with a view to advancing certain socio-economic rights. In this context, independent commissions might serve as an effective tool in bridging gaps between the people's right in theory and the capability to make that right heard and observed in practice (see below). A word of caution, though, related to managing expectations (as addressed at the beginning of this paper): allowing any citizen to bring a complaint may increase the number of cases on a CRI's docket to such an extent that the caseload becomes unmanageable despite investment in the necessary infrastructure. Accordingly, it may prove necessary to impose certain limitations, or involve intermediate actors (such as a human rights commission), to ensure the sustainability of the CRI.

[27] Kangnikoe Bado, "Verfassungsgerichtsbarkeit und Demokratisierung im frankophonen Westafrika: Länderstudie Benin," ("Judicial Review and Democratization in Francophone West Africa: Benin Country Study") Franz von Liszt Institute Working Paper 2014/05, p. 12. Adem Kassie Abebe and Charles Manga Fombad, "The Advisory Jurisdiction of Constitutional Courts in Sub-Sahara Africa," in George Washington International Law Review 46 Geo. Wash. Int'l L. Rev. 55-117, (2013), p. 68; Robert S. M. Dossou, "La Cour Constitutionnelle du Bénin: L'Influence de sa Jurisprudence sur le Constitutionnalisme et les Droits de l'Homme," paper presented at the Conférence Mondiale sur la Justice Constitutionnell», Cape Town, 23 - 24 January 2009, p. 12; Anne Rotman, "Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights,"Harvard Human Rights Journal, 281-314, (2004), p. 283.
[28] The Constitution of Colombia stands out in that it grants every citizen the right to challenge the constitutionality of laws, executive decrees and constitutional amendments.
[29] Widner, "Constitution Writing in Post-Conflict Settings," p. 1520.

4.4. NATIONAL HUMAN RIGHTS INSTITUTIONS

Next to the CRI there are other, often complementary, institutions required by the constitution that support constitutional compliance. Often they come in the form of independent commissions (for example: anti-corruption commissions (in more than 25 countries); electoral commissions (in more than 90 countries), human rights commissions (in more than 40 countries); media commissions (in more than 30 countries)[30]). With regard to respect for fundamental rights, a Human Rights Commission (HRC) or a Human Rights Ombudsperson might prove helpful, both in terms of awareness-raising among citizens and in terms of investigating relevant violations. As with CRIs, the selection process for an HRC and the authority accorded to it are key to its performance.

For both these aspects, the HRC of India is worth studying, though its establishment was not demanded by the constitution, but rather solely based on the Protection of Human Rights Act of 1993. The composition of the HRC in India is to a certain extent predetermined by the high qualification criteria required for three of its five members: the commission must be chaired by a retired chief justice of the Supreme Court, and must include a sitting or retired chief justice from a High Court and a sitting or retired judge from the Supreme Court (the two remaining candidates are to be "persons having knowledge of, or practical experience in, matters relating to human rights").[31] Relying in part on the most senior members of the judiciary is important to guarantee the commission's credibility, independence and capacity to command respect; the future career prospects of commission members do not depend on individuals whom the commission may investigate.[32] The portfolio of the commission is broad, and includes investigation of alleged human rights violations, inspection of prisons, and promotion of human rights literacy among all levels of society.

4.5. INTERNATIONAL SUPPORT FOR NATIONAL IMPLEMENTATION

Indirectly, the United Nations Human Rights Council and other bodies monitoring international treaties may also serve as an implementing tool for the national bill of rights. If a country has ratified the relevant international pacts and designed the national bill of rights accordingly, the universal periodic review and the complaint mechanism under the Council supports the implementation of the respective obligations. In addition, the respective commissions for the individual treaties may offer support. Synchronising international with

[30] Data on commissions sourced from Constitute Project, see: www.constituteproject.org (20 December 2016)
[31] The composition of India's HRC selection committee is also worth noting: besides the Prime Minister, the Speaker of the House of People, the Deputy Speaker of the Council of State, and the Minister of Home Affairs, two members are the respective opposition leaders in the two Houses.
[32] This turned out to be a major problem in other countries where members still had a (political) career to pursue after their membership in the commission had ceased.

national obligations and vice versa is important. This requires, first, that international obligations be reflected in the constitution. But it also means that where certain rights / issues in the international pacts are perceived as not reflecting or not implementable in the national context, reservations may need to be added.

5. CREATING A CULTURE OF CONSTITUTIONALISM

Next to the institutional design of the constitution itself and the way it is drafted, the success of constitutional implementation relies heavily on the courage and enthusiasm of citizens in pushing to ensure that the promises of the constitution are kept. This vision of establishing a culture of constitutionalism is reflected in a much-quoted example of civic engagement from South Africa: people used to travel with a pocket-sized version of the constitution, which they would bring out when confronted by overbearing officials. Such commitment can be constitutionally supported. First and foremost, public participation and constitutional education need to be continually encouraged beyond the constitution's drafting phase. Long-term constitutional awareness may be strengthened by translating the constitution into local languages, distributing it widely, and integrating it into school and higher education curricula.

Some constitutions include a specific dissemination provision (as in Uganda). In India, a series of booklets on "Know your Rights" has been published in different languages (Assamese, Bengali, English, Gujarati, Hindi, Kannada, Malyalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Tamil, Telugu and Urdu) in simple wording, complemented by cartoons. Others constitutions provide for a national commission for civic education to create and sustain awareness of the constitution (as in Ghana). The task of the commission is to educate and encourage citizens to defend the constitution and formulate programmes to raise awareness of civil responsibilities.[33] If equipped with sufficient resources, such a commission might make a difference. It might be more than a coincidence that in Ghana, where such a commission was established and has gained respect, the issue of amending the constitution to extend presidential term limits is unthinkable (though legally possible). An institution for democratic-constitutional education does not need to be anchored in the constitution of course. Germany's Federal Agency for Civic Education was established after the Second World War by ministerial decree in order to spread democratic values.

Creating a culture of constitutionalism also includes encouraging open discussion about the judgments of a CRI among academic circles and the interested public. Once judgments are part of the general discourse and open to scrutiny, it may compel judges to provide adequate justification. This transparency can be supported through a constitutional framework that requires a public hearing as part of a due process canon, timely decisions, and the release of judicial opinions.[34] One might also discuss in this context whether courts should be permitted to release dissenting opinions, or whether only one opinion should be published that reflects the unified judgement of the court.[35] The public communications of courts are important in this regard. They may, for example, provide an explanation of important judgments in relatively simple, non-legal terms.

Another relevant question is the extent to which a new culture of constitutionalism can emerge if based on an old judiciary that supported the former regime. This context-sensitive issue is often framed by pragmatic considerations regarding how far it is feasible to substitute large parts of the existing judiciary (taking into consideration that new, young lawyers will also have been educated through the old system).

6. SAFEGUARDS

Though not directly linked to implementation in a narrow sense, new constitutional commitments may need protection against hasty amendments and/or the erosion of the value system the constitution sought to introduce. It is a common standard in modern constitutional design to entrench those constitutional provisions that, in a given context, are deemed to be paramount, by making their amendment subject to stricter conditions (e.g. an extra large majority in Parliament; a referendum; lapses of specific periods of time) than those required to make less significant amendments. The vast majority of constitutions in civil law countries even rely on immutable clauses – provisions that cannot be changed at all. In addition, a declared state of emergency allows actions to be taken and laws to be passed that would otherwise be impermissible. Thus, emergency powers have been often abused by governments to undermine constitutional

[33] *See* Act 452 (1993), Section 2 of the Ghana National Commission for Civic Education Act: "(a) to create and sustain within the society the awareness of the principles and objectives of the Constitution as the fundamental law of the people of Ghana; (b) to educate and encourage the public to defend the Constitution at all times, against all forms of abuse and violation; (c) to formulate for the consideration of Government, from time to time, programs at the national, regional and district levels aimed at realizing the objectives of the Constitution; (d) to formulate, implement and oversee programs intended to inculcate in the citizens of Ghana awareness of their civic responsibilities and an appreciation of their rights and obligations as free people; and (e) to assess for the information of Government, the limitations to the achievement of true democracy arising from the existing inequalities between different strata of the population and make recommendations for re-dressing these inequalities".

[34] Böckenförde et al., *Judicial Review Systems in West Africa: A Comparative Analysis*, p. 138.

[35] Especially after the breakdown of an authoritarian regime, CRIs cannot rely on existing constitutional jurisprudence, but often have to build a new and coherent system. Where the court's authority and legitimacy are still weak, and before a legal culture of articulating dissent on the bench has been established, there may be reluctance to permit members of a nascent institution to issue dissenting opinions. In such a situation – and in particular with regards to specialised constitutional courts – it might be preferable for judges to present unified opinions to strengthen the judiciary's reputation and the legitimacy of the court vis-à-vis the broader legal community (*see* Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago: University of Chicago Press, 2015), p. 148). Dissenting opinions may challenge the drafters of the majority opinion to write their judgment diligently and provide comprehensive legal arguments to support their view. The process may encourage a wider debate on the majority decision and stimulate an open discourse about the judgment (*see* Böckenförde et al., *Judicial Review Systems in West Africa: A Comparative Analysis*, p. 139).

guarantees. Carefully defining the reasons for declaring emergencies, and providing for parliamentary and judicial scrutiny of the exercise of emergency powers, is fundamental.

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