



UNIVERSITEIT VAN PRETORIA  
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Faculty of Law



## CONFERENCE ON THE IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS: CHALLENGES AND PROSPECTS

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UNIVERSITY OF PRETORIA, SOUTH AFRICA

### SUMMARY REPORT



This conference organized by *the* Konrad Adenauer Stiftung under the auspices of its Rule of Law Program for Sub-Saharan Africa, in collaboration with the Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, South Africa, sought to provide a better understanding of the challenges to constitutional implementation in Africa so as to draw attention to the causes of regression in constitutionalism and endeavour to suggest solutions to the same.

The conference brought together law makers, legal practitioners, constitutional activists, judges, civil society representatives, and constitutional law scholars drawn from South Africa, Ghana, Nigeria, Kenya, Uganda, Gambia, Malawi, Zambia, Swaziland, DRC, Namibia, Botswana, Zimbabwe, Cameroon and South Sudan.

#### Opening Session

Professor André Boraine, the Dean of the Faculty of Law at the University of Pretoria, commenced the proceedings with the welcoming remarks. He pointed out

that the academia, law faculties in particular, should endeavor to teach all subjects through the lenses of the constitution as one of the ways to entrench constitutionalism. He opined that this would in effect make the constitution a living document, since the reference point of teaching would appreciate the constitutional implications that each area of law has on people's daily lives.

On his part, Dr. Arne Wulff, Director of the Rule of Law Program of the Konrad Adenauer Stiftung reiterated the importance of implementing the constitution so as to ensure that people's desires and aspirations as espoused in those constitutions are realized. He observed that a good constitution on paper without constitutionalism was in effect, worthless!

Professor Charles Fombad, set the tone of the meeting by giving an overview of the challenges facing several African countries in the implementation of their constitutions and hoped that the meeting would help in crafting solutions to reverse the situation.

## **COUNTRY EXPERIENCES**

### **I. DRC**

The implementation of the Congolese Constitution was discussed by Dr. Dunia Zongwe and Prof. Tukumbi Kasongo. It was pointed out that the DRC constitution was largely a product of consultation among foreign experts with insignificant input from the local experts which was later legitimized through a referendum. Therefore, the importance of the traditional system influencing the legal system in the DRC and its effect on the constitutional framework did not get its due acknowledgment both in the process and product known as the Constitution of DRC, 2006.

It was observed that whereas the Constitution appears progressive and in particular, in reference to its impressive Bill of Rights; limitation of state power and establishment of constitutional institutions, its implementation remains problematic. It was particularly pointed out that separation of powers is not clearly articulated in the constitution regardless of the fact that it does in fact provide for the different government institutions and their roles. In this regard, the implementation of the constitution has often faced the challenge of constant political interference.

Although sovereignty is cited a number of times in the Congolese constitution which indicates that the people should be involved and have a right to participate in the political process, this remains a mirage in the DRC's context because majority of the people do not understand the content of the constitution and therefore are unaware of their rights as enshrined in the Constitution.

It was pointed out that in order for one to understand a constitution and for it to effectively serve its purpose, one must understand the people it governs and their ideals. However, the Congolese constitution lacks the country's historical perspective thus making its implementation a power struggle among the elites only.

It was made clear that successful implementation of the Constitution of DRC hinged upon relentless civic education efforts that will enable the people understand the document itself in general, so as to equip them with the knowledge to subsequently

understand and embrace the rights and obligations therein for effective participation in its implementation.

## **II. SOUTH SUDAN**

Dr. Remember Miamingi discussed the context of constitutional implementation in South Sudan, the youngest nation in Africa. He noted that the South Sudan's experience was significantly unique from other African experiences because it lacks any history in the constitutional-making process and inevitably lacks any history and experience in its implementation. He pointed out that there are inherent normative and institutional weaknesses in the constitution-making process in South Sudan which from the onset, fails to recognize and embrace the political and popular cultures of the people of this young nation.

He lamented that there seem to be permanent transition process in South Sudan making it difficult to ascertain the actual current transitional constitution which should result into a permanent constitutional order.

He observed that the 2013 Peace Agreement that was signed by the political leaders provides that, it is superior to the transitional constitution until a permanent constitution is realized. It also provides that the citizens have a duty to resist if the constitution is abrogated.

On the current path, Dr. Remember concluded that South Sudan had set itself up for failure unless, the constitution addresses all essential aspects of the lives of the people of South Sudan and not only those of the political elite. This would not only give the constitution legitimacy, but will also lead to a more successful implementation process.

## **III. UGANDA**

Dr. Donald Rukare shared the Ugandan experience as regards the implementation of her 1995 Constitution. He underscored the dominance of the existing cultural practices and traditional views over constitutional rights. He noted that this inevitably leads to a disconnect between what the constitution provides vis-a-vis the reality on the ground.

He also pointed out that the implementation of the constitution in Uganda faces the challenge of the president being the embodiment of the state. This, in the context of constitutionalism, means that the concept of separation of powers is weak. He further noted that political imperatives undermine constitutional provisions through the ruling power and the ethnic alignment by politicians.

He submitted that the roles of the various gatekeepers of the constitution have to be strengthened to enable better implementation of the constitution in Uganda. He noted that the judiciary post-2005 has been making a 'deliberate' move to appoint biased judges which has led to a very questionable judiciary on the basis of its independence and impartiality.

As a way forward, he called for the strengthening of the civil society in order to get more Ugandans involved in governance and constitutional implementation processes; to get the media involved in constantly pushing and exposing the government, as well as to encourage the various arms of government and state agencies to play their constitutional roles effectively.

#### **IV. THE GAMBIA**

Ms. Satang Nabaneh presented on the implementation of the 1997 Gambian Constitution. She pointed out that theoretically, the constitution recognizes human rights under Chapter 4 and also recognizes sovereignty as a key aspect of constitutionalism.

However, the executive power in the Gambia is far reaching. This point was supported by the fact that there is no presidential term limit in the Gambia, and due process is rarely followed in making key decisions of national importance. This lack of respect for separation of powers has resulted into the control and use of key governance institutions such as the legislature, the judiciary and even the security forces by the president for his private benefit.

She observed that the President's ruling party wields majority power in parliament making it practically impossible to contradict the wishes of the president on any legislative agenda including arbitrary amendments to the Constitution. She pointed out that there have been many drawbacks on the enjoyment of the freedom of expression and of the media thereby curtailing any dissent voices. Further, the judiciary lacks independence with the president having complete power over the appointment and removal of the Chief Justice and judges, a situation that has often led to the dismissal of judges who deliver 'unfavorable' judgments. In addition, the office of the ombudsman is ineffective in exercising its oversight function leaving the populace under the mercies of the ruling elite.

Ms. Nabaneh concluded by underscoring the need for the key actors in the Gambia such as the law society, to take lead and play an active role in ensuring respect for the Constitution by all and active participation of the citizens in the implementation of the constitution.

#### **V. MALAWI**

Mr. Mandala Mambulasa presented on the Malawian experience. He noted that there has been failure by successive presidents to observe, preserve and defend the constitution at all times. He also lamented the absence of enabling legislation and weak institutions for effective implementation of the constitution due to inadequate resources. He observed that there have been frequent amendments to the constitution some of which have been challenged in the courts.

Overall, he underscored that the country had done fairly well although a lot remained to be done. He identified some immediate opportunities that could improve on the implementation of the Malawian constitution. First, the ruling party does not enjoy the majority in the National Assembly which prevents tyranny and manipulation by the ruling party in the legislature. Second, the president of Malawi is a lawyer well equipped to fully appreciate, accept and uphold the constitution. Third,

the prevailing atmosphere for review of the constitution is an opportunity for strengthened constitutionalism in Malawi. Fourth, Malawi enjoys the presence of an independent law society as well as an active citizenry and military which helps in the promotion and protection of the tenets of the rule of law.

Mr. Mandala made several recommendations regarding how the constitution could be implemented better. He recommended that the powers of the president should be trimmed; the institutions and oversight bodies should be adequately funded and resourced for effective fulfillment of their respective mandates; the legislature should pass enabling legislations to give effect to constitutional provisions and to ensure consistency in the laws; and finally, the review process should be completed in order to ensure harmony of the laws.

## **VI. GHANA**

Prof. Kwame Frimpong presented the Ghanaian context of constitutional implementation. He premised his presentation on the roles and effectiveness of the oversight institutions such as Parliament and other constitutional institutions. He referred to the role of the Public Protector and in particular, its steadfastness in the *Nkandla* case in South Africa as a benchmark in Africa of an effective oversight body in the promotion and protection of the constitution and the rule of law in general.

He lamented about the apparent disconnect between the culture of the people and the constitution as a great hindrance to constitutionalism in Ghana and the continent at large. He underscored the need for appreciation and consideration of the people's history and culture in the various constitution-making processes on the continent. He noted that this would enable the people to own their constitutions and therefore lead to better implementation. In fact, as per Article 4 of the Ghanaian constitution, it is provided that every Ghanaian citizen should ensure that the constitution is implemented but this he noted, was only possible if the people understand it first.

He called for change of attitude for those in power, the elite and those in key governance positions in appreciating that they are meant to serve and not lord over the people, hence the need to remain faithful to the dreams and aspirations of the people as enshrined in the various constitutional texts.

## **VII. NIGERIA**

Prof. Nathaniel Inegbedion presented the Nigerian perspective and averred that it must be appreciated from the onset that there is a political, economic as well as administrative structure of the constitution. Thus it is of utmost importance to consider the institutions in place and to determine whether they are independent or mere appendages of the government.

In his opinion, such topics of discussion are significant in determining the level of constitutional implementation in Nigeria and the challenges it faces. Prof. Inegbedion pointed out that the constitution of Nigeria is not considered as a reflection of the wishes of the people. This is due to the fact that it does not cater for the interests of the heterogeneous community in Nigeria. He suggested that a solution to the Nigerian challenge to effective implementation of the constitution lies in the making of a constitution that resonates with the people and upholds their sovereignty.

## VIII. ZIMBABWE

Dr. Tinashe Chigwata discussed the constitutional implementation from the Zimbabwean perspective. He noted that Zimbabwe is dealing with a new constitution that is currently 3 years old. He pointed out that the new constitution gives wide and far-reaching powers to the executive without due regard to the principles of separation of powers.

He observed that generally there is lack of political goodwill in the implementation of the new constitution. In particular, the military personnel in leadership positions have posed a challenge to constitutional implementation and to democracy in general.

On a brighter note, he pointed out that the constitution provides for legislative reform to align the legal framework to conform to provisions of the constitution. This has been a positive step that has led to significant legislative reforms in the country. However, he observed that there still remain some statutes that require a complete overhaul in order to be in alignment with the constitution. He attributed this challenge to the fact that the government decides arbitrarily the legislations they would like to align to the constitution which is often in its favour and not necessarily in the interest of the people.

While discussing the role of NGOs, academics and other key actors in the context of implementation of the new Zimbabwean constitution, Mrs. Makanatsa Makonese pointed out the proactive roles of these actors and the opportunities they have through litigation, advocacy and research. She noted that the Constitution of Zimbabwe has provided positive effects on *locus standi* which can now be interpreted broadly. This has enabled more activism to take place and CSOs as well as individuals can easily approach the court to uphold rights and to promote public interest litigation.

She noted that arbitrary selection of favorable amendments by the government means that the constitution cannot be successfully implemented. Many have viewed these changes by the government as inconsequential as they are only aligning legislations that have no effect on them e.g. gender parity laws have been pushed to the back as there is a perception in Zimbabwe that women issues are not serious issues.

She emphasized on the importance of an independent judiciary in the implementation process observing that the Zimbabwean judiciary is perceived to be partial and politically skewed to the ruling party. For instance, the constitutional court is clogged with applications and cases because the government bureaucrats are against these cases being heard. She also lamented about security risks facing individuals who dare to challenge the government.

She observed that the role of academics has been instrumental. For instance, a professor at the Faculty of Law at the University of Zimbabwe has done significant work on the alignment of laws to the constitution.

The opposition parties have also tried to ensure successful implementation albeit amidst a myriad of challenges.

She noted that advocacy has been a key aspect in ensuring constitutional implementation and general appreciation of the constitution. This has led to the translation of the constitution in a bid to enhance accessibility to the constitution and understanding of the same by the local communities.

## **IX. SWAZILAND**

Mr. Thulani Maseko presented on the Swaziland constitution of 1995. He noted that although the constitution provides for human rights, the major challenge to its implementation is that, the human rights as prescribed in the constitution should only operate in as far as they are not in conflict with the cultural rights of the Swazi people, which takes precedence. Thus, the absence of a balance between cultural practices and constitutional provisions had greatly hampered the implementation of the constitution with particular reference to human rights provisions.

He further underscored the need for an independent judiciary in Swaziland because the current one lacks any ounce of independence. Mr. Thulani further averred that the individuals in oversight bodies are not appointed in a constitutional manner rendering them ineffective.

Overall, he opined that the King's powers should be trimmed and the concept of separation of powers respected if Swaziland is to realize the benefits of a constitutional and democratic state.

## **X. KENYA**

The Kenyan experience was discussed by three panelists with more emphasis on the role and place of a specialized constitutional implementation body.

Mr. Kamotho Waiganjo, a former Commissioner with the Commission for the Implementation of the Constitution (CIC) presented on the mandate, practical intrigues and the work of such a commission, the first on the continent. From his perspective Mr. Waiganjo pointed out that African countries share similar problems and it is imperative to learn from each other's experiences.

He noted that the 2010 Constitution endeavoured to put in place effective mechanisms that would ensure its successful implementation. For this reason, the constitution did not give the mandate for implementation of the constitution solely to Parliament or the Executive but established *inter alia* a special implementation commission with the mandate of overseeing and monitoring implementation of the constitution by all the arms of government, namely CIC.

To ensure that the mandate was achieved successfully, the commission worked as a team and adopted consensus in all of its decision-making processes as guided by the principles, values and the spirit of the constitution. CIC also endeavoured to interpret its mandate as widely as possible and committed itself to enhancing the profile of the new constitution among the Kenyan people in all spheres of their lives.

As relates to its operations, the Commission forged a strong relationship with other key actors. It was successful in ensuring parliament legislated many of the required laws as per the schedule in the constitution. It was also able to work with the public

service to ensure that the constitution's ethos was inculcated into the bureaucracy. It also worked closely with other bodies such as the civil society on thematic areas in a bid to ensure that public's voice was heard and its participation upheld.

However, CIC also faced challenges in the fulfillment of its mandate. For instance, there were instances where it collided with other agencies such as the Office of the Attorney General and challenged certain violations of the constitution orchestrated by the government. Impunity, corruption and lack of inclusiveness also affected the work of CIC in fulfilling its mandate. Inadequate knowledge of the constitution also affected its effectiveness to a certain extent because it impacted negatively on the quality of public participation in the whole process.

Nevertheless, Mr. Waiganjo pointed out that there were many positive and progressive results out of the work of the CIC. A point of concern is that in the absence of the commission, the constitution may lose its profile in the country. However, he was ardent in pointing out that parliament and the Kenyan people should never lose the sight and momentum of implementing the constitution.

Ms. Jane Serwanga gave the perspective of an independent expert on the role of the CIC as well as civil society organizations (CSOs) in the implementation of the constitution of Kenya. She underscored the very important role that CSOs played both in the development of the new constitution and as watchdogs of the government to ensure successful implementation of the constitution.

Ms. Serwanga pointed out some of the successes of the work of CSOs as well as the opportunities that the new constitution presents to the CSOs. First, the constitution introduced a more democratic structure of inclusivity; it also provides for the devolved government system that ensures resources are shared fairly across the country; the bicameral parliamentary system has broadened the scope of representation in the various parts of the country; it introduced the Supreme Court as the apex of the judiciary while article 59 sets up the independent Kenya National Human Rights and Equality Commission; and it contains a chapter dedicated to integrity in leadership.

With regard to the effectiveness of the CIC, Ms. Serwanga rated it highly. She pointed out that the commission elevated the profile of the constitution by constantly sharing information with the CSOs and the public in general through its website and dialogue making it a one-stop shop for all matters touching on the implementation of the constitution. Furthermore, the CIC issued advisories on contentious issues such as Article 27 of the Kenyan constitution and was active in court as *amicus curiae* or interested parties to ensure accurate interpretation and implementation of the constitution.

In conclusion, Ms. Serwanga praised the CIC for a job well done and challenged Kenyans not to relent in the push for successful implementation of the constitution simply because the mandate of CIC had come to an end.

Hon. Njoroge Baiya, the Chairman of the Constitution Implementation Oversight Committee (CIOC) of the National Assembly of Kenya shared his perspective from the political and legislative perspective. He stated that the 2010 constitution

represents the aspirations of Kenyans and brought about a renewed sense of democracy, governance and respect for human rights and CIOC as the parliamentary body charged with overseeing the implementation of this constitution was committed to making sure those dreams, desires and aspirations are ultimately realized.

He pointed out that the Constitution set timelines to align legislations with its provisions and gives any Kenyan the right to go to court if Parliament fails to enact the required laws. Because of the clear timelines within which parliament was expected to enact the necessary laws, the house was always under a lot of pressure to ensure this was done and consequently enabled it to effectively exercise its powers of oversight over government actions or inactions.

Hon. Baiya pointed out that with the help of CIC; there was a lot of ground covered in implementation of the constitution by all agencies.

Hon. Baiya also shared some of the challenges that needed to be tackled in the process. First, there was the problem of inertia as many institutions with the responsibility to develop the legislations had to be pushed to do their jobs resulting into a lot of time extensions and ultimate delays; there was also resistance to implementation of the constitution as some agencies thought they were losing a lot of control on power as well as resources. As a result, they were wary of the implementation process, for example, the police and judges resisted the constitutionally-mandated vetting processes.

From the Kenyan experience, Hon Baiya opined that an independent judiciary and a specialized commission are critical and important components in the successful implementation of any constitution.

## **XI. SOUTH AFRICA**

Justice Johann Van der Westhuizen presented the South African experience in promoting and safeguarding the integrity of constitutional implementation. Justice Johann began by discussing the complex issue of determining the spirit of the constitution during the apartheid period. A contentious question during and after that period was, where the guidelines of morality were to be found!

Thus, the areas of significance in the constitution-making process were, ensuring that the constitution came from the South African people and was as inclusive as possible. In order to achieve this, there was a huge public involvement campaign. As a result, the constitution was drafted in two phases; the interim phase and the final phase. To enhance ownership and meaningful participation, the language of the constitution was intended to be plain and understandable.

The main issues at this constitutional making stage was how to achieve national unity with the apartheid past; whether there should be federal or central power; and what the relevance of human rights laws were to the common man. The apartheid past as an issue was addressed by the Truth and Reconciliation Commission during the interim stage and the question regarding the centralization of power was decided as centralized by the ANC for economics and peace purposes. The issue regarding the

importance of human rights was further deciphered as the people were more interested in socio economic rights which were included in the bill of rights with a special phraseology for maximum effect.

Justice Johann further observed that a constitution is a legal framework of how governing structures work, contains human rights, and on a moral and political level, it states the values of the society. It further outlines the principle of separation of powers, which is mentioned implicitly in the South African constitution.

It was stated that the South African constitution has certain values that must be taken into account in order to uphold the spirit as well as the letter of the constitution. They include progressive realization, reasonable measures, the independence of the judiciary, transparency and accountability, equality, dignity as well as freedom.

As far as interpretation of the constitution is concerned, Justice Johann pointed out that the idea of purposive interpretation should be followed as the constitution is better construed not as isolated provisions, but as a whole. It was emphasized that when drafting a constitution, it should be drafted as carefully as possible in order to enable added meaning to the constitution without formally amending its provisions.

Justice Johann pointed out that there have been positive steps in implementation of the constitution in South Africa which have been useful in upholding the rule of law. However, there are some areas to improve on such as legislative reform as some apartheid laws are still present in the statute book, for example, the Black Administration Act.

Ms. Palesa Madi and Ms Phephelaphi Dube discussed the role of CSOs, academics and other key actors in constitutional implementation in South Africa which are mainly fulfilled through research, advocacy and litigation.

The legal academic research through various means such as publications has shaped the discourse on law and implementation of constitutions. Advocacy campaigns have been successful in upholding various constitutional provisions especially those touching on human rights. Here, civic education has been very important as there can be no strong constitution if the people do not know what it provides.

Through litigation, CSOs have taken up public interest cases or specific cases representing individuals

Ms. Phephelaphi Dube focused on the political and electoral regime and how it impacted on the implementation of the South African Constitution. She observed that some specific provisions in the South African constitution such as section 47 (3) (c) could impair parliament's oversight mandate. She also discussed the anti-defection clause which she observed, when viewed together with the electoral system, it makes the MPs party bosses instead of the electorate. Further, it weakens parliament as a pillar of democracy and it impedes freedom of expression of MPs and limits freedom of the individual MPs to follow their personal conscience as well as their moral convictions.

## **PRESIDENTIAL TERM LIMITS IN AFRICA AND THE RULE OF (AMENDMENT) LAW**

Prof. Markus Boekenfoerde discussed the common phenomenon of extension of presidential term limits in Africa. He argued that extending the term limit is not illegal if the constitution is amended but when and why constitutions should be formally amended is critical.

According to the AFRO Barometer, majority of African citizens prefer time limits for presidents. Therefore some constitutions entrench provisions on presidential term limits and specify that this provision cannot be amended, for example, in Niger and the DRC.

On the other hand, the critics against restriction on amendment of presidential term limits posit that putting in such a provision weakens democracy. Furthermore, the phenomenon of '*pouvoir constituant*' may occur whereby the old constitution with immutable clauses may be replaced with a new one.

Prof. Boekenfoerde further posited that there may be sanctions in cases of unconstitutional changes of government otherwise known as *constitutional coup d'états*, for example, ECOWAS has sanctions in place. The African Charter on Democracy Elections and Governance does not cover the possibility of a constitutional coup as occurred in Congo.

Thus, he advised that there must be a preliminary caveat in the discussion that constitutional engineering alone is not enough to guarantee the respect for the rule of law. The importance of a vibrant civil society, judicial review mechanisms, retirement packages as well as immunity provisions was equally important when drafting provisions on presidential term limits.

## **CONCLUSION AND THE WAY FORWARD**

Justice Johann Van der Westhuizen wrapped up the conference by highlighting that democracy is from the collective human experience and is not limited to certain cultures or nations. A point of discussion during the conference that was of utmost significance was to ensure that the people, even in rural areas, understand their constitutions so that they are adequately equipped to defend and fight for their rights. He noted that this can be achieved through civic education. The important role of lawyers was emphasized as he advised them to be realistic about the winning chances of their clients' cases so as to shape and nurture the peoples' trust in the court process and the judicial system in general.

Overall, the importance of constitutionalism and constitutional implementation through an independent judiciary, the separation of powers, civic education, an active citizenry, media and civil society organizations was stressed upon. It was agreed by consensus that all these actors must work together and collaborate to ensure that the constitutions are fully implemented and work for the benefit of the people.

In conclusion, Justice Johann Van der Westhuizen was happy that the debate on constitutional implementation is fast becoming a lively one in Africa which is a positive development for constitutionalism on the continent. He noted that it was important for Africans to learn from each other and encouraged them to learn how to litigate effectively while using the judgements of others, for example the *Nkandla* judgement in South Africa to push for their own cause in their respective countries. He called for optimism that things shall work properly in Africa and urged for continuation of the struggle - *Aluta Continua!*