

Oliver C. Ruppel | Kathrin M. Scherr | Alexander D. Berndt [eds.]

Assessing Progress in the Implementation of Zimbabwe's New Constitution

National, Regional and Global Perspectives



Nomos

Recht und Verfassung in Afrika –
Law and Constitution in Africa

Band/Volume 32

Herausgeber/Editorial Board:

Ulrich Karpen, Professor of Law, University of Hamburg | Hans-Peter Schneider, Professor of Law, University of Hannover | Oliver C. Ruppel, Professor of Law, University of Stellenbosch | Hartmut Hamann, Professor of Law, Freie University Berlin & Hamann Rechtsanwälte, Stuttgart

Wissenschaftlicher Beirat/Scientific Advisory Council:

Laurie Ackermann, Justice (Emeritus), Constitutional Court of South Africa, Johannesburg | Jean-Marie Breton, Professor of Law (Emeritus), Honorary Dean, University of French West Indies and Guyana | Gerhard Erasmus, Professor of Law (Emeritus), Associate, Trade Law Centre, Stellenbosch | Norbert Kersting, Professor of Political Sciences, University of Muenster | Hans Hugo Klein, RiBVerfG a.D., Professor of Law, University of Göttingen | Salvatore Mancuso, Professor of Law, Chair Centre for Comparative Law in Africa, University of Cape Town | Yvonne Mokgoro, Justice, South African Law Reform and Development Commission, Pretoria | Lourens du Plessis, Professor of Law, Northwest University, Potchefstroom | Werner Scholtz, Professor of Law, University of the Western Cape, Bellville | Nico Steytler, Professor of Law, Int. Association of Centers for Federal Studies, Bellville | Hennie A. Strydom, Professor of Law, University of Johannesburg | Christoph Vedder, Professor of Law, University of Augsburg | Gerhard Werle, Professor of Law, Humboldt University Berlin | Johann van der Westhuizen, Justice, Constitutional Court of South Africa, Johannesburg | Reinhard Zimmermann, Professor of Law, Managing Director of the Max Planck Institute for Comparative and International Private Law, Hamburg

Oliver C. Ruppel | Kathrin M. Scherr
Alexander D. Berndt [eds.]

Assessing Progress in the Implementation of Zimbabwe's New Constitution

National, Regional and Global Perspectives



Nomos

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

ISBN 978-3-8487-4154-0 (Print)

ISBN 978-3-8452-8374-6 (ePDF)

1. Auflage 2017

© Nomos Verlagsgesellschaft, Baden-Baden 2017. Gedruckt in Deutschland. Alle Rechte, auch die des Nachdrucks von Auszügen, der fotomechanischen Wiedergabe und der Übersetzung, vorbehalten. Gedruckt auf alterungsbeständigem Papier.

Contents

Foreword, by HE Ulrich Klöckner, Former Ambassador of the Federal Republic of Germany to the Republic of Zimbabwe	7
Preface, by the Editors	9
About the Contributors	11
PART I: The Conference	
Welcome	15
<i>HE Georg Schmidt, Ambassador and Director-General, Sub-Saharan Africa and Sahel, German Federal Foreign Office</i>	
Keynote Address	18
<i>Hon. Adv. Jacob Francis Mudenda</i>	
Conference Report	25
<i>Alexander Berndt and Kathrin Maria Scherr</i>	
PART II: Constitutional Reform in Africa: Lessons from other Countries	
The Constitution-making Process in Zambia	39
<i>Hon. Justice Annel M. Silungwe</i>	
Constitutionalism and Constitutional Reform: Selected Aspects from a Regional Perspective	51
<i>Oliver C. Ruppel</i>	
The Legitimacy of Constitution-making from an International Law Perspective	84
<i>Rüdiger Wolfrum</i>	
PART III: Assessing Progress in the Implementation of Zimbabwe's Constitution	
Executive Compliance with Zimbabwe's New Constitution	101
<i>Derek Matyszak</i>	
Progress in the Implementation of the New Zimbabwean Constitution	128
<i>Irene Petras</i>	

The Role of the Church(es) in the Promotion of the Rule of Law and Democracy in Zimbabwe <i>Fr Oskar Wermter SJ</i>	136
The Judicial Enforcement of Socio-Economic Rights under Zimbabwe's 2013 Constitution: Opportunities and Challenges <i>Khulekani Moyo</i>	162
PART IV: The Independent Commissions in the New Zimbabwean Constitution	
The Role of Constitutional Commissions in Zimbabwe's New Constitution <i>Teresa P. Mugadza</i>	189
The Independent Commissions: Success or Failure? <i>V.A. Ingham-Thorpe and B.D. Crozier</i>	197
The Role of Independent Commissions with Particular Reference to the Zimbabwe Human Rights Commission <i>E.H. Mugwadi</i>	231
Appendix	
Constitution of Zimbabwe Amendment (No.20) Act, 2013	249

Foreword

HE Ulrich Klöckner

Former Ambassador of the Federal Republic of Germany to
the Republic of Zimbabwe

The Conference ‘Assessing Progress in the Implementation of Zimbabwe’s New Constitution’, jointly organized by the Max Planck Foundation, Heidelberg, SAPES Trust, Harare, and DROP, Stellenbosch, in Harare on 23 March 2015 underlined once more the urgent need to finalize one of the most important and outstanding issues on Zimbabwe’s political agenda: the adjustment of Zimbabwe’s laws to the prerogatives of the new constitution. The adoption of this constitution by an overwhelming majority of Zimbabweans in the March 2013 referendum constituted a huge step forward for democracy in Zimbabwe by providing a whole new legal framework. Significant clarifications and improvements were developed and inscribed into the constitution about issues that have been at the centre of intensive academic – and sometimes bitter political – debates for years.

The speedy and comprehensive adoption of these new constitutional provisions would foster peace and stability in Zimbabwe. Their implementation in day-to-day life would strengthen the rule of law and, thereby, have a considerable positive impact on the recovery of Zimbabwe’s economy. The new constitution also forms an indispensable framework for the European Union’s and Germany’s future relations with Zimbabwe. The conference was meant to highlight publicly this important fact once again.

The conference brought together eminent constitutional experts from Zimbabwe, many of whom had already participated in the academic and political process that eventually led to the constitution’s adoption. They were joined by external experts from the Southern African region and Germany who offered a welcome outside and peer view. As a result, an intensive and fruitful disputation and exchange ensued, identifying outstanding issues and offering advice for next steps to be taken. The conference was also graced by the presence of the Speaker of Parliament, the Honourable Jacob Mudenda, who, in his opening address, acknowledged the importance of the constitution’s implementation for the future work of Zimbabwe’s legislative body.

I am very glad that this conference brought together for the first time three strong partners to outline and organize this important event. The

Foreword

Max Planck Foundation has gained a worldwide reputation for providing assistance and expertise to many states and institutions experiencing important changes in their constitutional law. The Harare conference has been their first project in Southern Africa. Prof. Oliver Ruppel's Development and Rule of Law Programme (DROL) at the University of Stellenbosch develops and provides policy recommendations and tools that guide policy-makers in the implementation of reforms designed to strengthen the rule of law. SAPES Trust, Harare, under the leadership of Dr Ibbo Mandaza, looks back at more than twenty-five years of experience as one of the finest research and policy-study institutes in Southern Africa. SAPES Trust has also established itself as the prime venue for open and frank discussions on political, social and economic issues in Zimbabwe.

I very much hope these three partners will continue with their own resources and initiative their fruitful and successful co-operation, keep the conference's important issues high on their common agenda, and co-organize similar events in the coming years.

Harare
23 March 2015

Preface

In 2013, Zimbabwe adopted a new Constitution to replace its first ‘Lancaster House’ Constitution at independence in 1980. The new Constitution officially came into force in 2013 after being overwhelmingly approved in a referendum. Thereafter, Zimbabwean policy-makers, the judiciary, civil society organizations and other stakeholders embarked on operationalizing and implementing the new Constitution.

On 23 and 24 March 2015, a conference entitled *Assessing Progress in the Implementation of Zimbabwe’s New Constitution: National, Regional and Global Perspectives* was organized by the Max Planck Foundation for International Peace and the Rule of Law (MPFPR), Heidelberg, Germany, in collaboration with the Development and Rule of Law Programme (DROPP), University of Stellenbosch, South Africa.

The conference was funded by the German Federal Foreign Office, Berlin, Germany, and held at the premises of the Southern African Political Economy Series (SAPES) Trust in Harare, Zimbabwe. For their support in organizing the conference in Harare, a special thank you goes to Dr Ibbo Mandaza (SAPES Trust) and the German Ambassador to Zimbabwe at the time, HE Ulrich Klöckner.

Looking at current developments in Zimbabwe, the publication is a timely and careful response to some of the opportunities and challenges that the country is facing: it will serve not only as source of academic legal material. The contributions are an outflow from the dialogue that was started at the aforementioned conference and reflect insight, drawing from comparative perspectives, on the role of the civil and security services in a constitutional democracy and the role of institutions such as independent commissions and related institutions in entrenching a democratic culture.

We are particularly grateful to the contributors, who include policy-makers, members of the judiciary, and constitutional law experts, both Zimbabwean and international. The content of the articles, including any errors or omissions that may remain, is the sole responsibility of the individual contributors. The editors have made every effort to acknowledge the use of copyright material.

HE Ambassador Georg Schmidt, Director-General, Sub-Saharan Africa and Sahel, German Federal Foreign Office, needs to be thanked for his support concerning this publication.

This publication will continue to foster an open intellectual and legal dialogue on the Constitution and what it means in daily practice for the people of Zimbabwe. Constitution-building is a process that aims at constructing the foundations of democracy and the rule of law. At the same time it can contribute to international co-operation, foreign investment and economic development.

The Editors
August 2016

About the Contributors

Berndt, Alexander

Research Fellow, Max Planck Foundation for International Peace and the Rule of Law, Germany.

Crozier, Brian

Senior legal scholar, Lecturer, University of Zimbabwe

Ingham-Thorpe, Val

Director of Veritas, Harare, Zimbabwe

Matyszak, Derek

Lawyer and political commentator, Harare, Zimbabwe

Moyo, Dr Khulekani

Head of Research at the South African Human Rights Commission, Senior Researcher, Mandela Institute, University of the Witwatersrand

Mugadza, Teresa Pearl

Legal consultant, former Deputy Chair of the Zimbabwe Anti-Corruption Commission

Mugwadi, Elasto H.

Chairperson of the Zimbabwe Human Rights Commission

Petras, Irene

Executive Director, Zimbabwe Lawyers for Human Rights

Ruppel, Prof. Dr Oliver C.

Professor of Law and Director, Development and Rule of Law Programme (DROP), Faculty of Law, University of Stellenbosch, South Africa

Scherr, Dr Kathrin Maria

Head of Sub-Saharan Africa Operations, Max Planck Foundation for International Peace and the Rule of Law, Germany

Silungwe, Justice Annel Musenga

Former Chief Justice of Zambia, Chairman of the Technical Committee on Drafting the Zambian Constitution

Wermter, Fr Oskar

Pastoral Department, Communications, IMBISA, Zimbabwe

Wolfrum, Prof. Dr Rüdiger

Managing Director of the Max Planck Foundation for International Peace and the Rule of Law, Germany. Judge and former President, International Tribunal for the Law of the Sea (ITLOS)

PART I

The Conference

Welcome

HE Georg Schmidt
Ambassador and Director-General, Sub-Saharan Africa and Sahel,
German Federal Foreign Office

It is quite a privilege for me to be here today to speak in front of so many distinguished legal scholars and constitutional experts at almost the end of this two-day conference. So please allow me to make some general remarks and provide a general political perspective.

The 17th-century English writer, William Shenstone, once wrote: ‘Laws are generally found to be nets of such a texture, as the little creep through, the great break through, and the middle-sized are alone entangled in it.’ If this rings a familiar bell – and I think there are probably many places where this is the case – there remains a lot to be done – for lawyers and judges but also for politicians and societies as a whole. I think that mankind has a very strong and deep hunger not just for food but also for justice. These two are probably comparable to each other: they are basic needs. How to fulfil them is a question that has accompanied mankind from the beginning of history.

So how can we link something as abstract as a constitution to this basic need for justice? To look back at my own country, Germany, after the Second World War, the German constitution, the *Grundgesetz*, had to be approved by the Allied powers. It was regarded as being quite removed from the people at the beginning. The country was down – politically, economically and morally down. If you visit Germany today and look at Berlin, it is hard to believe what has happened since 1945. Today, I think the constitution is one of the success stories of Germany: we even talk about the constitution as one of the sources of our patriotism. This is quite an achievement.

How did we get there? It is a complicated story, but a few factors came together. One could say that it was just good luck, but in reality Germany’s rise from the ashes was the result of a lot of hard work. The economic success created an opportunity for a democratic beginning. There was a lot of assistance from the Western Allied powers, who helped those who were willing to make a new beginning and, of course, new institutions in Germany. One of them was the German Constitutional Court. Established only after the war, it has gained a very strong reputation among the German public. The court – or Karlsruhe, as we call it after its location – added a new element of power-sharing in

Germany. It is regarded as fair and independent, and, having worked for eight years in the President's office – one of the five top constitutional institutions of the Federal system – I know from personal experience the level of respect that the Constitutional Court receives.

It is clear that the German experience cannot be transferred – each country has its own unique cultural, historical, political and social circumstances – but it is good to exchange experiences and to reflect on why certain things worked. The German constitution was not just written out of the blue: a great deal of expertise went into it. It was certainly a new beginning.

Let me come closer; let me come to Africa. You see many constitutions also here as a new beginning. I have just come from Namibia, where I witnessed the swearing-in of a new president and the hand-over of power from one president to the next. As the presidents – the old and the new – sat next to each other, they symbolically changed seats. It was said: “Yes, we do that in a peaceful way; this is Namibian style.” Among the insignia of power that were transferred from one president to the other was a copy of the constitution. So it also has quite a symbolic significance for Namibia. There are other examples that I could evoke now – South Africa, for instance, or Kenya. The ‘new constitution for a united Kenya’ was a new step in the country's history.

I am therefore very happy that today there are scholars from other African countries among us whose experience is different from that of Zimbabwe, though their starting points might be a bit closer to the Zimbabwean setting than to the German one. So I would like to thank the organizers for their interregional, African approach.

Now to Zimbabwe: a constitution as a new departure for Zimbabwe. When I look at the text – and, as I have said before, I am not a constitutional expert – first of all I am happy that I can read it and understand it, which is not always the case when you read a legal text. I think there is a lot in it. It protects individual dignity, grants democratic space, social rights; it deals with the separation of powers and the often very touchy issue of term limits for presidents. I could mention a lot more, but I will leave it here. I am sure the discussions will have already shed much light on different aspects of the constitution and its complexity, as well as the challenge of constitutional alignment.

Germany is willing to accompany and support Zimbabwe in this process. I think there can be no doubt that a strenuous effort is needed in order to succeed and complete it. And it will take some time. However, I think it is the citizens of Zimbabwe who will first benefit from a clear and transparent rule of law, which should be protecting their economic and political rights. At the same time, I think a successful process of constitutional alignment and economic reform would have a tremendous impact on the improvement of our bilateral relations with Zimbabwe – and this includes economic relations

as well. Economic interaction needs legal protection. Foreign investors, in particular, need stability and clarity concerning their investments, and it is on this basis that economic stakeholders in Germany, as in other countries, will regain trust as well as interest in Zimbabwe's promising economic potential.

When I studied in China during the 1980s, it was very interesting to see that Deng Xiaoping wanted to open up the country. Thus, the Chinese sat down with foreign investors who were hugely interested in China, the sleeping giant of the East. But all the foreigners asked similar questions: If we invest, what are the rules of the game? What happens if there is a dispute? How well is my investment protected? And then they realized that China had scarcely any commercial laws, so the first step was to draft a foreign-investment-protection law. Many others were to follow. So this is not a purely European debate: it is something that is very relevant in attracting commercial interest from anywhere in the world.

Another important prerequisite for the revival of its international economic relations is, I believe, Zimbabwe's constructive collaboration with international financial institutions. In a meeting today with the Minister of Finance, we talked about the possible way forward. We see some encouraging signs in this direction – which includes Zimbabwe's performance in the Staff-Monitored Program with the IMF. Germany will watch closely the next steps taken by international financial institutions: the results of this process will be crucial for the future of our bilateral dialogue with Zimbabwe. Should the positive signals in the processes of constitutional alignment and economic reform prove to be sustainable, then Germany is prepared to enter into an open dialogue with the Zimbabwean government on ways out of the economic crisis, including the debt problem.

Ladies and Gentlemen, when the late German president, Richard von Weizsäcker, was asked to speak on the occasion of fortieth anniversary of the German constitution, he said that the most important factor in its apparent success was the commitment of the actors involved. This means, first and foremost, a strong political commitment is needed to make the constitution a success. In addition, it includes legal expertise and popular participation – and we have already talked about the referendum here in Zimbabwe. A constitution has to be regarded as something that belongs to all citizens, to all groups, in order to be accepted.

It is important not to lose optimism. Let us be realistic and work with the aim that the constitution here will lead to a legal net that treats all people the same – the little, the great and the middle-sized. And that it satisfies the human hunger for justice.

Keynote Address

Hon. Adv. Jacob Francis Mudenda

Speaker of the National Assembly of the Republic of Zimbabwe

At the outset, I would like to express my profound gratitude to the organizers of this unique conference for inviting me to deliver the keynote address to such an august assembly on the theme of Assessing Progress in the Implementation of Zimbabwe's New Constitution: National, Regional and Global Perspectives. Indeed, the theme of this conference is topical and its timing auspicious. I commend the organizers: the Max Planck Foundation for International Peace and the Rule of Law, with the assistance of the German Federal Foreign Office, the Development and Rule of Law Programme at the Faculty of Law, University of Stellenbosch, and the Southern African Political Economy Series (SAPES) Trust.

A close scrutiny of the conference's theme and the list of resource persons points to a conscious and deliberate effort to embrace all shades of domestic political opinion and international academia in order to arrive at a balanced and instructive rendition of all the thematic conversations envisaged. It is axiomatic that, when an open and candid juxtaposition of perspectives occurs, animated exchanges may arise in a manner that will facilitate the appreciation of the conference's sub-themes.

In this regard, let us not forget that Zimbabwe's new Constitution was the result of a protracted process based on an all-stakeholders approach that canvassed inputs from a broad spectrum of our body politic. While divergent actor-specific competencies and responsibilities are acknowledged in the implementation phase of the Constitution, it would be unhelpful to disrupt the all-stakeholders mindset that was engendered during the Constitution-making process. In other words, no single individual or entity can claim superior antecedents in terms of commitment to the implementation of the new Constitution or adherence to the democratic ideals that underpin it.

As we take stock of what has been achieved to date, let us reinvigorate ourselves in expediting and prioritizing the implementation matrix for the good of all our people and the nation. As we chart the implementation trajectory, let us avoid innuendo-laden outpourings that may pollute the political ambience that is critical to the realization of our set goals as a people. Regional and global perspectives emanating from such forums ought to be intellectually scintillating

and nourishing for the sake of finding common ground in assessing progress in the implementation of Zimbabwe's new Constitution.

Often, when conference delegates interact in such a forum, they fail to harness, simplify and clarify the dual movement from theory to practice and vice versa, leading to some constitutional alienation on the part of the participants. Developing constitutionalism and crafting constitutions that answer to the aspirations of the people requires deft understanding of the nexus between the body politic and the people as both subject and object of the constitutional process. By acknowledging the centrality of the people, it becomes easy to develop a constitutionalism that is anchored on and loyal to a nation's history and political economy. By describing and prescribing both the source and limits of government power, constitutionalism explicitly articulates the ideological realm of the state. It relates to the substance – that is, the values embedded in the constitutional framework. On the other hand, a constitution is the lexical rendition of a set of fundamental principles or established precedents according to which a state is governed. In other words, it refers to the form, that is, the document itself. While constitutionalism presupposes the existence of a constitution, whether codified or uncoded, the opposite is not true, as evidenced by the copious amount of commentary that indicates that a country can have the facade of a constitution without constitutionalism, thus pointing to a disjuncture between theory and practice in the body politic.

Zimbabwe is currently governed on the basis of the principles of constitutionalism. However, a diachronic analysis of constitutional development in Zimbabwe depicts three distinct phases that are marked by politically contradictory contexts, thus not complying with the evolutionary, linear progression associated with politically stable societies. The colonial dispensation was an era of pseudo-constitutionalism, as the Rhodesian constitutions were skewed and geared towards protecting the rights of the white minority at the expense of the black majority. The colonial governance architecture considered blacks to be subjects, not citizens. The protracted liberation struggle for political emancipation led to the Lancaster House Constitutional Conference that culminated in the anachronistic, compromise Lancaster House Agreement.

Although the Lancaster House Constitution ushered in a new dispensation and validated Zimbabwe's independence, it was fundamentally flawed as it retained salient features of the colonial era such as the unequal distribution of land ownership between the minority whites and the black majority. The racialized nature of the country's socio-economic order was not tampered with, thus entrenching historic white privilege. This offensive state of affairs was aptly captured by the then Prime Minister, Cde R. G. Mugabe, when he remarked:

Yes, even as I signed the document [Lancaster House Agreement] I was not a happy man at all. I felt we had been cheated ... that we had agreed to a

deal which would to some extent rob us of the victory we had hoped to have achieved in the field.

As a result, this Constitution ended up being an unwieldy patchwork of nineteen substantial amendments that sought to take remedial action and mainstream the aspirations of the whole Zimbabwean population in the context of the political dispensation. In brief, the amendments effected, in chronological order, were these:

Amendment No. 1, 1981 Reduced the qualifications of lawyers to the judiciary and the Senate Legal Committee to open various offices to black lawyers.

Amendment No. 2, 1981 Separated the Supreme Court from the High Court and adjusted qualifications of judges to allow blacks to be appointed as judges.

Amendment No. 3, 1983 Abolished dual citizenship.

Amendment No. 4, 1984 Introduced the office of Ombudsman and reconstituted the Judicial Service Commission.

Amendment No. 5, 1985 Allowed the appointment of Provincial Governors by the President.

Amendment No. 6, 1987 Abolished seats reserved for whites in Parliament.

Amendment No. 7, 1987 Abolished the office of Prime Minister and created an Executive Presidency.

Amendment No. 8, 1989 Provided for the Attorney-General becoming member of Cabinet.

Amendment No. 9, 1989 Abolished the Senate and created a unicameral Parliament.

Amendment No. 10, 1990 Created a second Vice-Presidency in response to the Unity Accord between ZANU(PF) and PF-ZAPU.

Amendment No. 11, 1990 Terminated the land provision for 'willing buyer, willing seller' in favour of the fair compensation principle.

Amendment No. 12, 1993 Reorganized the prison service, public service and armed forces.

Amendment No. 13, 1993 Reversed a Supreme Court judgment on the death penalty that delay in execution did not amount to a human rights abuse.

Amendment No. 14, 1996 Reserved a Supreme Court judgment on women marrying foreign men. Such men no longer became automatic citizens of Zimbabwe.

Amendment No. 15, 1998 Government's financial year changed to start in January.

Amendment No. 16, 2000 Transferred responsibility for compensation for the loss of land from the British government to the Zimbabwe government.

Amendment No. 17, 2005 Reintroduced the Senate. Paved the way for the government to nationalize land regained from whites.

Amendment No. 18, 2007 Harmonized the Presidential, Parliamentary and Local Authority elections. Changed the composition of Parliament. Established the Human Rights Commission.

Amendment No. 19, 2009 Implementation of the Interparty Political Agreement. Posts of Prime Minister and Deputy Prime Minister reintroduced.

In tandem with the provisions of the Global Political Agreement of the Inclusive Government era (2008–2013), Zimbabwe went through a constitution-making process, which included a successful referendum in March 2013 and the subsequent passing of the Constitution of Zimbabwe Amendment (No. 20) Act by Parliament on 20 May 2013 and assent by His Excellency the President on 22 May 2013.

The new Constitution marks a new beginning in the history of constitutional development in Zimbabwe. Finally, the sovereign people of Zimbabwe had carried out their historic duty of crafting their own governance charter after more than three decades of reliance on constitutions bequeathed to them by the colonizers.

It is pertinent to observe that, in its Preamble, the Constitution of Zimbabwe acknowledges ‘the supremacy of Almighty God, in whose hands our future lies’. The Preamble expresses and acknowledges colonial injustices, and honours the sacrifices of the men and women who fought for the freedom and liberation of Zimbabwe in order to overcome those past injustices. It also looks to the future with a resolve that Zimbabwe will be a democratic society based on the rule of law, hard work, respect for and enjoyment of fundamental rights and freedoms, unity, the reclamation of our natural resources, and the attainment of prosperity for all citizens.

In its totality, the Constitution comprises eighteen chapters that include, among others, those on Founding Provisions, National Objectives, Citizenship, Declaration of Rights, the Executive, the Legislature, the Judiciary, Independent Commissions, Elections, and Principles of Public Administration and Leadership.

The sections on Founding Provisions designate Zimbabwe as a ‘unitary, democratic and sovereign republic’ that is founded on values and principles that recognize the supremacy of the Constitution, respects the rule of law, fundamental human rights and freedoms, gender equality, and good governance.

The promotion and public awareness of the Constitution is emphasized in section 7, which means that the Constitution must be translated into all the officially recognized languages for it to be understood and appreciated by the generality of the population. In section 6, sixteen languages are recognized, including sign language.

The Constitution sets out aspirational national objectives in Chapter 2 that ‘guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society’.

The State is enjoined, within the limits of available resources, to ensure good governance, promote fundamental human rights, promote gender equality, and to recognize civil, political and socio-economic rights. The extended Declaration of Rights, which include, among others, civil, political and socio-economic rights, are anchored on the 1948 Universal Declaration of Human Rights and the African Charter on Human and People’s Rights, as well as on other related human rights conventions. Recognition of and compliance with the Declaration of Rights as enshrined in the Constitution are the cornerstone of democratic governance.

The Constitution, in its endeavour to achieve compliance in the protection of these rights, calls for the observance of the principle of the separation of powers in section 3(2)(e), which provides that the roles of the three branches of the State – executive, judiciary and legislature – must not interfere with each other but must be constitutionally complementary in enhancing democracy and the rule of law. In this regard, the executive is mandated to formulate policies of government and, in so doing, must uphold, defend, obey and respect the Constitution, and must ensure the protection of fundamental human rights and the rule of law. The judiciary, as an independent arm of the State, must ensure that the rule of law is observed as defined in the Constitution and that the Declaration of Rights remains sacrosanct.

With regard to the level at which the Constitution is being upheld by Parliament, I must state that Parliament is enjoined to pay particular attention to sections 116 to 119 of our Constitution – which provide for the nature of the legislature, the nature and extent of legislative authority, and the role of Parliament in protecting and upholding the Constitution – not forgetting section 324, which requires the State and all institutions to perform their constitutional obligations ‘diligently and without delay’. In that context, the State and all its agencies and institutions are accountable to Parliament, and this calls for Parliament to have a well-grounded understanding of the Constitution in order to carry out its constitutional role without fear or favour. To buttress the roles of the three arms of the State in upholding and ensuring compliance with the

protection of human rights and democratic governance, these constitutional obligations must be observed at all levels of government in Zimbabwe.

The Constitution also provides for Independent Commissions such as the Zimbabwe Human Rights Commission, which is responsible for promoting awareness of and respect for human rights at all levels of society, and for monitoring and ensuring the observance of human rights. The Zimbabwe Anti-Corruption Commission is essential in combating crime, considering that corruption is a threat to constitutionalism. The Zimbabwe Electoral Commission is another such Independent Commission, whose responsibility is to conduct free, fair and transparent elections in accordance with the law. I was privileged to visit Namibia during their recent elections and observed that their electoral process is now done through a biometric system, which improves transparency and accountability during the electoral process. Zimbabwe can emulate the Namibian experience. The Zimbabwe Gender Commission, the Zimbabwe Media Commission, and the National Peace and Reconciliation Commission are the other Independent Commissions defined in Chapter 12 of the Constitution. These Commissions are meant to support and enhance the democratic architecture of Zimbabwe's constitutionalism.

The alignment of existing legislation to the new Constitution is urgent in order to avoid a constitutional crisis, notwithstanding the fact that the process must be a circumspect one that demands a lot of patience from everyone. I must take this opportunity to point out that the alignment of legislation to the Constitution has already begun. A total of three hundred and ninety-two laws require tabling in Parliament as Bills for realignment. A General Laws Amendment Bill will be tabled on 5 May 2015, when Parliament resumes sitting.

An issue that has been largely ignored in the discourse of constitution-making and constitutionalism is the specific interrelationship between constitutional matters and the structure and functioning of the economy. A constitution cannot be viewed as an abstract legal document that is divorced from the political economy of a given state. The current challenges plaguing the fiscus have impacted adversely on the pace of implementation of some of the provisions of the new Constitution. Hon. Minister Chinamasa's recent clarion call triggered murmurs and misunderstandings within some sections of society, yet he was merely highlighting the need to re-prioritize the implementation sequence of the provisions stipulated in the new Constitution.

The heavy financial burden associated with the realignment process has encumbered progress and played havoc with the original work plan for the realignment of our laws to the new Constitution. Furthermore, the unavailability of competent technical and legal staff has accentuated the predicament. However, the recent appointment of the Attorney-General, Advocate P. Machaya, augurs well for the future as the Legislative Drafting Division under his auspices

is tasked with drafting the requisite legislation to undergird the realignment. I am also aware that the Ministry of Justice, Legal and Parliamentary Affairs has already established a task force whose remit is to collate and consider pieces of legislation from various ministries for alignment. As stated earlier, the General Laws Amendment Bill is now ready for tabling in Parliament. There is, indeed, a palpable sense of urgency towards expediting the alignment process.

As a sign of political goodwill, the three arms of the State have not failed to comply with the provisions of the new Constitution in spite of these onerous fiscal challenges. It is imperative that concerted efforts are made to spur the economy to sustainable growth if we are to protect the dividends of our hard-won independence. An underperforming economy is a breeding ground for misdirected political adventurism and social convulsions, which might threaten any established constitutional order.

As we juxtapose, collate and consolidate the various seminal submissions on national, regional and global perspectives in the coming two days, let us bear in mind that differences and divergences are testimony to the plurality of historical experience. Constitutionalism is not an event but a societal phenomenon that encompasses historical struggles for the political recognition of people's rights. History is replete with benchmarks, antecedents such as the Magna Carta, the French revolution, the US Bill of Rights, the Russian revolution, the Chinese revolution, and most recently the Arab Spring at the northern edge of the African continent.

All these experiences confirm the axiom that a constitutional order defines the role and stand of an individual in an ensemble of interrelated social relations within a given time in the history of a nation. The individual is central to a determination of the strength and sustainability of any constitutional order. As individuals in society respond to the constitutional demands in a society, that response may induce some need for constitutional reform. Of necessity, such constitutional reforms point to a dynamic, lived experience in the constitutional implementation process. In constitutional history, such a phenomenon has led to constitutional amendments.

In conclusion, Ladies and Gentlemen, I hope the constitutional discourses that unfold at this conference will enhance and contribute to open-mindedness and dialogue between different constitutional communities and entities at national, regional and global levels.

I wish you fruitful and constructive deliberations.

It is now my singular honour to declare this Conference on Assessing the Progress in the Implementation of Zimbabwe's New Constitution: National, Regional and Global Perspectives officially open.

Conference Report

Alexander Berndt and Kathrin Maria Scherr

On 23 and 24 March 2015, a conference entitled *Assessing Progress in the Implementation of Zimbabwe's New Constitution: National, Regional and Global Perspectives* was organized at the premises of the Southern African Political Economy Series (SAPES) Trust in Harare, Zimbabwe. In five non-public thematic panel sessions, the conference brought together twenty-five experts – mainly Zimbabwean, but also some regional and international ones – with an academic, political, administrative, legal or civil-society background. The panellists discussed important substantive aspects of the Constitution, as well as the state of, and the challenges to, its implementation, each panellist making a short presentation before taking discussion questions from the floor. These conference sessions in small groups were supplemented by two major events for the interested general public: the opening event in the morning of the first day and the Public Forum subsequent to the last panel session.

At the opening event, representatives of the three organizers welcomed guests, among whom were many Members of Parliament and representatives of the diplomatic corps. The representatives of the organizers were Prof. Rüdiger Wolfrum (MPFPR), Prof. Oliver C. Ruppel (DROP), and Dr Ibbo Mandaza (SAPES Trust). The German Ambassador, HE Ulrich Klöckner, greeted the guests before the Speaker of the National Assembly of the Zimbabwean Parliament, Hon. Adv. J.F. Mudenda, opened the conference officially with a keynote address about the Constitution of Zimbabwe.

In the Public Forum in the evening of the final day of the conference, the Director of the German Foreign Office for Sub-Saharan Africa and the Sahel Region, HE Ambassador Georg Schmidt, gave a speech on the importance of the rule of law as an indispensable basis for German-Zimbabwean relations.

Opening ceremony

The representatives of the three partner institutions that were jointly organizing the conference welcomed the guests and participants at the beginning of the event. In his welcome speech, Dr Ibbo Mandaza, Director of SAPES Trust, emphasized the objective of the conference – to bring together Zimbabwean legal experts, regardless of their political convictions, to exchange ideas and draw inspiration from regional and international experiences.

The Managing Director of the Max Planck Foundation, Prof. Rüdiger Wolfrum, in his welcome address praised the strong and progressive human rights content of the new Zimbabwean Constitution, its clearly defined separation of powers, and its definition of the competences of different levels of government. Prof. Oliver Ruppel, Director of DROP at the University of Stellenbosch, stressed that the times during which new constitutions were developed and implemented inevitably brought about great uncertainty. A constitution, once in force, had to unfold its legal effectiveness as soon as possible.

The German Ambassador, HE Ulrich Klöckner, commended the excellent reputation that SAPES Trust had acquired in Harare regarding its ability to raise constitutional debates, and stressed the good co-operation between the German Embassy and all three partners. Germany and the European Union considered respect for the new Constitution and the rule of law to be one of the conditions for the improvement of their relations with Zimbabwe.

The Speaker of the Zimbabwean National Assembly, Hon. Adv. J.F. Mudenda, referred at the beginning of his speech to the conference topic being highly ambitious and complex but potentially equally rewarding and necessary. He also commended the organizers for choosing an opportune moment for the conference and acknowledged the balanced composition of the expert panels. Nevertheless, he also noted that no single person or entity could consider itself to be 'superior' with regard to their interpretation of the implementation of the Constitution or of democracy in Zimbabwe. Each conclusion should be drawn exclusively with a view to its specifying and tackling the priorities necessary to implement the Constitution in a 'buoyant' manner.

The Speaker further noted that the Constitution had to serve only the people, who had given themselves this supreme law and were bound by it. The Constitution had to be consistent with the history and the economic system of the nation. Zimbabwe had been a state that adhered to the rule of law since it replaced the colonial government, which had systematically discriminated against the black majority in favour of a white minority. The Lancaster House Constitution, which was still in force in the first decades of independence, had emanated from a colonial spirit and had been changed a total of nineteen times since 1981 to remove provisions that discriminated against the black majority, e.g. with regard to land ownership, professional freedom and parliamentary representation. The Speaker noted that even the Preamble of the current Constitution still called for completely overcoming past injustices.

Hon. Mudenda then proceeded to deal with individual sections of the Constitution. He highlighted, *inter alia*, the extended Declaration of Rights in the Constitution and the role of the Human Rights Commission, stressing that in Zimbabwe the separation of powers was fully respected by all state bodies. As

many as 392 laws still had to be adapted to conform to the new Constitution, and a comprehensive package of proposed amendments to legislation was therefore to be tabled in Parliament on 5 May 2015. One difficulty in this context was that the Ministry of Justice did not have a sufficient number of qualified legal drafters at its disposal, while the Minister of Finance often lacked the resources needed to provide for the rights guaranteed by the Constitution. Simply, democracy was very expensive, he concluded.

Panel 1: Constitutional reform in Africa: Lessons from other countries

The first panel session of the conference started with a contribution from the former Supreme Court Judge and Chairman of the Technical Committee on Drafting the Zambian Constitution, Justice Annel Musenga Silungwe, on the constitutional reform process in his country. After independence in 1964, Zambia, in similar way to Zimbabwe, retained a constitution that largely mirrored the Westminster model. Throughout the various changes of political regime, several attempts to create a new constitutional framework without colonial remnants failed, particularly because of the resistance of the respective governments. Justice Silungwe also criticized the fact that efforts to undertake constitutional reform in Zambia had been government-centred for too long, which resulted in the people's lack of confidence in the reform process. In addition, all parties and stakeholders should have agreed on the general principles of the reform process in advance. Involving the entire population in the constitutional reform process was his highest priority as Head of the Constitutional Commission. When travelling around the country for three months with his colleagues, he was able to explore even the remotest villages, where he would find himself having interesting discussions with, and accommodating contributions from, his countrymen.

In the second presentation from the panel, Prof. Ruppel addressed the constitution-making processes in South Africa, Kenya and Namibia. He noted first that not only had inter-institutional relations in South Africa been put on a new footing with the 1994 constitution but that the new constitution had resulted in the development of an entirely new legal and constitutional culture. He added that the Truth and Reconciliation Commission, chaired by Archbishop Desmond Tutu, largely contributed to this development. The violence in Kenya that occurred in 2007/08 was attributed to the unstable constitutional framework. Part of the success of Kenya's new constitution of 2010 was the creation of several independent commissions, incorporated in an attempt to strengthen the independence of the parliament and the judiciary – which included the establishment of an independent Judicial Service Commission, which is also responsible for appointing judges – and to create a more stable constitutional framework. After the 2013 elections, however,

struggles for power erupted and political actors tended to act along ethnic lines in a manner as intensifying as in 2007. Regarding the Namibian example, Prof. Ruppel focused on discussing the guarantees for the independence of the judiciary. With respect to Zimbabwe he noted that the Constitution could build a bridge between the spheres of politics and the law, and between the past and the future; and that therefore every citizen should guard it and feel responsible for its protection.

Prof. Wolfrum gave a presentation entitled 'Reforming and Implementing Constitutions in Africa', first emphasizing the international legal principle that each state had the right to act in a sovereign fashion in designing its constitutional framework. However, the respect for the rule of law was also an important prerequisite for the peaceful design of international relations. A national constitution could always be regarded as a reflection of social, economic and political circumstances at a particular time. Prof. Wolfrum addressed basic, widely accepted international principles for the preparation and content of constitutional texts. These included the recommendation that citizens should be fully involved in the drafting process of a new constitution. However, in Prof. Wolfrum's view, this did not necessarily imply that the constitution had to be confirmed in a referendum. In a referendum, citizens should only be able to accept or reject the constitution as a whole. A referendum could only be useful if the population had been informed in advance about the detailed contents of the constitution.

Prof. Wolfrum cited the case of the Tanzanian Constitution Commission as a positive example of public outreach. The Commission had travelled throughout the country for an entire year to discuss the draft text with the population. Prof. Wolfrum noted that the majority of international principles regarding constitution-making related to the human rights catalogue to be included in a constitutional document. He further commented that the Zimbabwean constitution had incorporated this catalogue in an exemplary manner. Many African constitutions provided for a powerful presidential office, probably modelled on the US Constitution, but often without providing the American system of checks and balances. The need for a powerful president has been justified in Africa, especially in the post-independence era, during which state institutions and a functioning economic system had to be built up. However, the current international trend is shifting away from the institution of such a strong president. Prof. Wolfrum further noted as striking that few African countries had established a genuine federal system of government, probably fearing the promotion of ethnic aspirations for autonomy.

In the subsequent open discussion, the question arose as to whether it was not obvious that, with regard to human rights, legislators should always opt for the liberal or republican approach. The question was raised whether

the drafting of a constitution should to a certain extent be an elite project supported by experts. One commentator discussed the activities carried out to involve the population in the Zimbabwean constitution-making process. He considered that the crucial questions had not been addressed and that public outreach meetings had often been instrumentalized politically or disturbed by party youth organizations. Others considered that the people were able to express their opinion very clearly, but that it was very complicated to properly incorporate the views expressed in everyday language into a binding legal text.

In his response, Prof. Wolfrum stressed that citizens were quite aware of what they wanted; however, these preferences had to be translated into legal terminology. Justice Silungwe reported on his experiences from Zambia, where illiterates had been given the opportunity to share their views on the constitution actively, and it had also been possible to hand in written submissions anonymously. Moreover, separate meetings had been organized with unions, NGOs and officials to give these particular stakeholders the opportunity of individual hearings. Prof. Ruppel concluded that a constitutional evolution could be accelerated by means of lawsuits filed by directly affected persons or stakeholders representing them.

Panel 2: Progress in the implementation of the Zimbabwean Constitution

The first presentation addressed the swift constituent process in Zimbabwe, which led to the delayed application of certain constitutional provisions. This affected the contesting of the presidential election (pursuant to section 93 of the Constitution) that took place shortly after the Constitution came into effect. It became clear that the procedures dealing with elections were uncertain and inconsistent and that the deadlines provided by the Constitution were inadequate. Furthermore, there was a delay in the application of the constitutional provisions on voter registration and dual citizenship.

One participant criticized the premature conclusion of the constituent process owing to the early date of the presidential election, which had been set by the Constitutional Court. Since the legal framework had not yet been adapted to the new Constitution, the government interpreted it as a vague roadmap, subject to the preferences of the executive. Furthermore, a weak judiciary contributed to the slow and incomplete implementation of Zimbabwe's Constitution.

Another participant stressed the fact that claims brought by lawyers and human rights organizations had been disregarded by the courts, even though the protection of human rights was provided for in the Constitution. In contrast to the 1979 Lancaster House Constitution, the new Constitution potentially enabled lawsuits concerning the right to housing and the rights of access to water and education. The participant noted that there should be a

thorough analysis to ascertain in which sectors the constitutional provisions were already implemented and in which sectors this was yet to be done. The participant also stressed that there was a need for comprehensive constitutional training of state actors.

A further participant stated that Zimbabwe was afflicted with constitutionality without constitutionalism. More specifically, constitutionalism existed only as a set of rules and administrative arrangements not intended to regulate or limit excessive power but to validate the post-colonial state based on the rationale that anything legal was by definition legitimate. Parliamentarians were irritated by the government's opinion that all laws had first to be in compliance with the new Constitution. Section 324 of the Constitution states that all constitutional obligations 'must be performed diligently and without delay'. The Constitution should therefore be implemented as quickly as possible. Section 119 further contains the duty of parliamentarians to ensure compliance with constitutional provisions. In addition, the reporting obligations of the Independent Commissions (section 323) and their funding (section 325) should not be disregarded.

In the subsequent open discussion, one participant noted that the high number of provisions in the new Constitution indicated an uncertainty and a lack of confidence among the drafters: it appeared that they had intended to regulate every detail within the Constitution.

The participants cited a number of constitutional provisions that were in danger of being amended or abolished. Among these were the catalogue of human rights (particularly the right to information and political rights), the return of legislative rights to the President, decentralization, section 208 (political neutrality of all security forces), gender equality in political committees, chapter 15 (traditional leaders), the withdrawal of the power to register voters from the Zimbabwe Electoral Commission (ZEC), the separation of the Attorney-General's and the Prosecutor-General's departments, and the independence of the Judiciary. The participants pleaded in favour of legally challenging unconstitutional laws to raise the political costs of disregarding the Constitution. The Constitutional Court, however, could not modify laws but only declare them null and void. Participants said there should also be constitutional education in simple language at the local level to spread knowledge about how to recognize and report human rights violations.

Panel 3: The Zimbabwean Bill of Rights: On paper or in practice?

The keynote speaker criticised the fact that the translation of the text of the Constitution into all national languages of Zimbabwe, which was required by the Constitution, was not yet complete. Many citizens could not claim their rights because of the language barrier. The list of applicable human and civil