

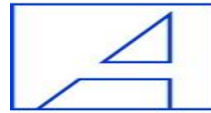
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STELLENBOSCH INSTITUTE FOR ADVANCED STUDY
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A CREATIVE SPACE FOR THE MIND

South African Research Chair
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NINTH STELLENBOSCH ANNUAL SEMINAR ON CONSTITUTIONALISM IN AFRICA (SASCA 2022) 13-16 September 2022

CALL FOR PAPERS:

CONSTITUTIONAL CHANGE AND CONSTITUTIONALISM IN AFRICA

Dear Colleagues,

The Organisers of the Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA) are pleased to announce the call for papers for the Ninth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2022) which will be held in Stellenbosch (South Africa) from Tuesday 13 September to Friday 16 September 2022. SASCA 2022 will be jointly organised by the Institute for International and Comparative Law in Africa (ICLA) of the Faculty of Law, University of Pretoria, the South African Research Chair in Multilevel Government, Law and Development (SARChI) at the Dullah Omar Institute, University of the Western Cape, and the Stellenbosch Institute for Advanced Study (STIAS) in partnership with the Konrad Adenauer Stiftung (KAS) Rule of law Programme Sub-Saharan Africa (Anglophone Countries), based in Nairobi.

The theme for this seminar is “**Constitutional change and constitutionalism in Africa**”.

A. Introduction

The moves to craft a new generation of African constitutions that began in the 1990s promised a new dawn of radical transformation of the continent’s governance landscape and a concerted attempt to eliminate the risks of coups, political instability and other social and economic problems that had plagued the continent since independence in the 1960s. It provided an opportunity for African constitution-builders and politicians to design constitutions which for the first time were supposed not only to reflect and take into account the social, economic and other contextual realities of the continent but also draw from the wealth of experience of the past decades of blunders and failures. If pre-independence constitution-making was a staged *ad hoc* event that took place in secret places and behind closed doors, this was supposed to have changed with the making of this new generation of so-called “made in Africa” constitutions.

However, the reality is that the post-1990 wave of constitutional reforms appear to have provoked a contagious fever of making, unmaking and remaking of African constitutions. The nature of these changes, their frequency and the fact that it has affected most countries in the region raises many questions of a practical and theoretical nature. It is, however, the resultant instability that threatens to undermine the few strides made to entrench a culture of constitutionalism, good governance and respect for the rule of law that is increasingly becoming a matter of great concern. The new constitutional dispensation that had seen the introduction of new constitutions or the profound revision of earlier constitutions do not appear to have provided a reliable and effective framework for managing these constitutional changes and ensuring political stability. It is therefore no surprise that there is now almost universal agreement that Africa is presently going through a severe and profound crisis of democracy and constitutionalism.¹

Revising a constitution doesn't attract as much attention as writing a new constitution. Yet it has the potential to undo much of the benefits that the constitution is supposed to have provided for. Modern African constitutions usually spell out the manner in which the constitution can be changed and the role that the different actors involved in the process can play. This usually consists of politicians (with the process being initiated by the executive and goes to parliament for approval), ordinary citizens (usually where a referendum or plebiscite is provided for) and judges (who deal with disputes regarding either procedural or substantive compliance with the relevant constitutional provisions).

In spite of the new constitutions containing many progressive ideas, these are being stealthily and steadily diluted through diverse forms of constitutional changes taking place. This seminar will try to interrogate the extent and nature of the changes that have been taking place on a rather more frequent and sometimes arbitrary basis than was expected. Amongst the main questions that will be investigated is the nature of the constitution-making process, the role of diverse actors such as the legislature, the executive and the judiciary as well as external actors such as the African Union (AU) and Regional Economic Communities (RECs) in the different processes of constitutional change taking place. There will also be case studies to identify distinct patterns of change. Ultimately, the discussions will strive to see how the processes of constitutional change, where inevitable and unavoidable or where contrived, can be undertaken in a manner that does not undermine or threaten the efforts made to entrench constitutionalism, good governance and respect for the rule of law on the continent.

B. Sub-themes

1. Constitution-building, constitution-making, constitutional change and constitutionalism

1.1 Constitution-making – new beginnings and the big event

In a number of countries, after a revolution, a constitutional crisis, or a purposeful renewal, a dedicated constitutional-making process commenced. It is a big event, signifying a new beginning which calls, among other things, for citizens' participation, consultation, and negotiations between key political forces. Different forms of law-making are envisaged; instead of a parliament adopting a new constitution, a distinct constitutional body may be established

¹ See generally, Charles Fombad and Nico Steytler (eds), *Democracy, Elections and Constitutionalism in Africa* (OUP 2021).

for that purpose, such as a constitutional assembly. To secure popular legitimacy, a referendum may follow upon the adoption of the constitution. The process of constitution-making may also differ; it may range from a constitutional commission or committee drafting the constitution for adoption by a political body, or it may be the political body that does, through negotiations, the drafting and adoption. The focus of this sub-theme is on the ways and modes of making constitutions anew.

1.2 Constitutional change

Constitution-building is not, however, a “once-off” process that starts and ends with the drafting of a constitution nor is the legitimacy of the process once earned a *carte blanche* for frequent and arbitrary alterations of the constitution. The question that arises here is whether the fever of unmaking and remaking of constitutions today reflects the way these constitutions were made and/or the mechanisms provided within them for subsequent changes. This raises issues of what triggers the process of constitutional change. There are different schools of thought with regards to the legality of certain forms/methods as well as extent of change: with distinctions being made between constitutional amendment versus constitutional replacement or constitutional revision versus constitutional dismemberment.

There are practical and theoretical issues concerning who participated in the constitution-making process, what role they played and when, whether there were any normative or procedural limits on the processes and their outcomes. Do the present challenges have to do with whether the processes were inclusive and participatory in nature? Ultimately, the question is whether there are any new and emerging trends in constitution-making that offers the prospects of constitutional stability.

2. Eternity clauses, constitutional unamendability, constitutional change and constitutionalism

Constitutional change may trigger questions of eternity clauses be they explicit or implied: are there parts of a constitution that are not amendable? Almost all civil law jurisdictions in Africa have eternity and/or unamendable provisions that purport to prohibit any changes of those provisions. In common law systems there may be similar provisions but courts may also discover deep structural features that may not be amended. The question that needs to be investigated is how these provisions have, through their use or misuse in changing the constitution, had an impact on constitutionalism.

3. The Judiciary, constitutional change and constitutionalism

The judiciary, as the guardians of the constitution, is mandated to act as the bulwark against abusive changes to the constitutions. They are tasked to ensure that all changes are carried out in conformity with the constitution. In their usual functioning as interpreters of the constitution, courts may themselves, directly or indirectly, be responsible for “judge-made constitutional change.” In most cases such change may advance constitutionalism, in others the opposite. There could be instances where judicial activism mutates into and becomes judicial populism. This is where judges adopt an interpretation of the constitution swayed by public opinion, the media or a populist government in disregard of constitutional principles and rules in a manner that changes some aspect of the constitution. Extreme judicial activism may also degenerate into judicial adventurism. What has been the record of judge-made constitutional change? To what extent has the judiciary in some or any African countries indulged in this in a manner that

impacts positively or negatively on their duty to protect and defend constitutionalism and respect for the rule of law?

4. Subnational constitutions, constitutional change and constitutionalism

The ability of subnational units in federal systems to operate effectively within their sphere of influence depends very much not only on the extent of powers they have been granted by the national constitution but also the constraints imposed on national governments in changing a subnational constitution in a manner that undermines their autonomy. Do subnational constitutions provide an opportunity to advance constitutionalism?

5. Case studies: Distinct profiles of constitutional change

Papers under this sub-theme should look at the different formal and informal forms of constitutional changes ongoing in a particular country and the impact this is having on progress to promote constitutionalism, good governance and respect for the rule of law. Examples of informal changes that have an impact on constitutionalism are unwritten constitutional conventions, usages and other aspects of the invisible constitution.

6. The AU and RECs, constitutional change and constitutionalism

Beyond the measures to deal with unconstitutional changes of government, has the AU and RECs made serious attempts to address the formal and informal constitutional changes that undermine constitutionalism, good governance and the rule of law? What is the effect of these formal and informal constitutional changes on the AU and RECs' agenda to promote constitutionalism and good governance?

C. Information on the submission of abstracts

We hereby invite all scholars and other persons interested in research in this area to submit a proposal on any of the sub-themes indicated above. The proposal should include:

- An abstract of the paper of about 1000 words (clearly indicate the sub-theme you want your abstract to be reviewed under or if it is general, then say "other").
- A c.v. of the author.

The deadline for submitting proposals is **15 January 2022**. Proposals should be sent as e-mail attachment to Dr Shehaam Johnstone at sjohnstone@uwc.ac.za and Dr. Lukman Abdulrauf, at lukmanrauf@gmail.com. and copy the two organisers, Prof. Charles M. Fombad, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, Charles.fombad@up.ac.za and Prof. Nico Steytler, SARChI Chair in Multilevel Government, Law and Development, Dullah Omar Institute, University of the Western Cape, nsteytler@uwc.ac.za Any questions on this call for papers should be directed to the addresses given above.

On acceptance of an abstract by the organisers, the author will be invited to submit a draft paper by **15 May 2022** on the basis of which a final invitation to the conference will be extended.

All authors whose papers are accepted will be provided with a return economy class air ticket, and board and lodging in Stellenbosch for the duration of the seminar.

All the papers presented during the seminar will be peer reviewed for publication in the eighth volume of the, *Stellenbosch Handbooks in African Constitutional Law*, which is published by Oxford University Press, Oxford.

Please, kindly distribute this call for papers as widely as possible to all colleagues in your faculty as well as to other interested persons such as legal practitioners and judges.

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