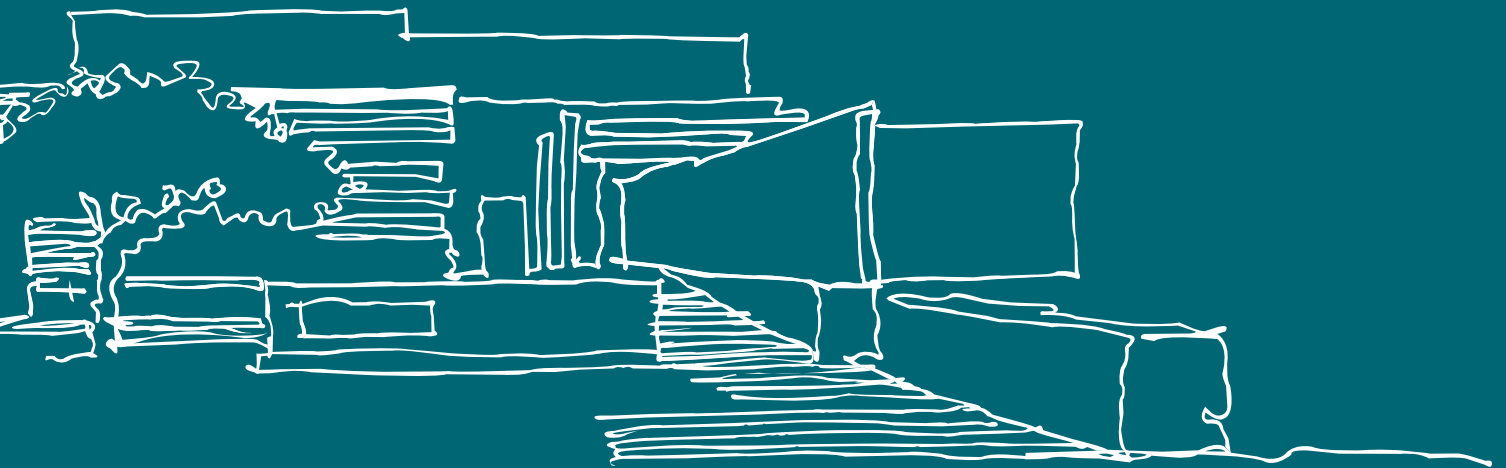


EIGHTH STELLENBOSCH ANNUAL SEMINAR
ON CONSTITUTIONALISM IN AFRICA (SASCA 2021)
CONSTITUTIONAL IDENTITY AND CONSTITUTIONALISM IN AFRICA
15-17 SEPTEMBER 2021
PROGRAMME

A CREATIVE SPACE FOR THE MIND



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

Institute for International and Comparative Law in Africa (ICLA)



DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

South African Research Chair in Multilevel Government,
Law and Development, University of the Western Cape

stias
STELLENBOSCH INSTITUTE FOR ADVANCED STUDY
STELLENBOSSE INSTITUUT VIR GEVORDERDE NAVORSING

INTRODUCTION

The eighth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2021) will take place in Stellenbosch (South Africa) from Wednesday 15 September to Friday 17 September 2021.

ORGANISERS

SASCA 2021 is 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;
- The Stellenbosch Institute for Advanced Study (STIAS);

In partnership with

- The Konrad Adenauer Stiftung Rule of Law Program for Sub-Saharan Africa.

THEME

The theme for the SASCA 2021 seminar is ***Constitutional Identity and Constitutionalism in Africa.***

CONTENTS

Africa has in modern history experienced different waves of constitutional ordering, which includes both the drafting of written constitutions and their implementation, all with the aim of regulating the exercise of state power. While the first wave was characterized by a colonialist centralist rule replacing indigenous forms of government, the second wave saw the emergence of independence constitutions largely imposed by departing colonial powers. These constitutions reflected some ideals of how new independent countries should be governed. With the so-called 'third wave' of democratization, there has been great expectation regarding the consolidation of democracy, rule of law and constitutionalism. However, the new constitutional order promised by this wave of democracy have not been realized due to several factors such as excessive reliance on Western-imposed constitutional concepts; a lack of resonance of the constitutions with indigenous culture and traditional values and structures; and the lack of alignment with the African social context which is different from the historical context in Europe and US where liberal constitutionalism emerged from.

The quest for a new constitutional ordering is emerging. Questions about the identity of African constitutions took centre stage after the "Rhodes Must Fall" (#RhodesMustFall) student protests of 2015, placing the question of constitutional decolonisation firmly on the agenda. It has raised questions about the legitimacy of recent constitutional reforms on the continent, whether these new or revised constitutions really reflect an African identity.

From the above, it is clear that each of the various waves of constitutional ordering had its own characteristics, and within each wave countries showed their own peculiarities. Each country thus had both a shared and unique 'constitutional identity'.

Our concern is, firstly, the absence of constitutionalism and continued abuse of state power in Africa. Secondly, in the face of such absence, the need for decolonisation of constitution, reflecting an African identity. Can both constitutionalism and decolonisation of constitutions produce a new African constitutional identity?

The seminar therefore addresses the following interlinked questions:

Firstly, what is the relevance of the concept of 'constitutional identity' to African constitutional orders? Is the concept of constitutional identity a useful optic to look at African constitutions?

Secondly, is there a relationship between colonial constitutional identities and path-dependency? What have been the mode and measure of path dependency in forming constitutional identities in Africa?

Thirdly, does the problem of the widening gap between the fundamental principles in most African constitutions and actual practice lie in the fact that these constitutions lack an authentic constitutional identity? Is this the reason why entrenching a culture of constitutionalism, respect for the rule of law and good governance remains a challenge?

Fourthly, are African traditional authorities and institutions part of a national constitutional identity building factor or are they just an emotional cultural relic of the past that is of little relevance today?

Fifthly, should constitutionalism form part of an African constitutional identity?

Finally, how does the pan-African ideal reflect the individual national or collective African constitutional identity?

PROCEDURES

The call for papers opened in January 2020, and targeted African legal scholars, judges and legal practitioners from Africa as well as international scholars who have researched and published on the various issues raised in the call for papers. In the first round of the two-stage selection process, abstracts were called for on the various aspects of the seminar theme. The first round ended with invitations to submit draft papers to some of the authors of the abstracts. The second round of the process ended with the extension of final invitations to participate in the seminar, issued to the authors of approved draft papers.

EXPECTED OUTCOMES

The participants will share insights on the issue of constitutional identity and institutionalism in Africa. The overall intention is to see what needs to be done to lift the continent from the present democratic doldrums. All the papers presented during the seminar will be peer-reviewed for publication in the seventh volume of the *Stellenbosch Handbooks in African Constitutional Law*, series, to be published by Oxford University Press.



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CONSTITUTIONALISM AND THE ECONOMY IN AFRICA
 15-17 SEPTEMBER 2021

PROGRAMME

Names printed in italics indicate virtual participation and will be linked to the conference by audio-visual means.

Time zones:

- UTC (Coordinated Universal time) (Greenwich Mean Time)07.00
- West African Time / London. 08.00
- Central African Time (CAT) (South Africa) / Central European Time . . . 09.00
- East African Time 10.00

DAY 1: 15 SEPTEMBER 2021		
18.00	Pre-conference dinner (venue tbc)	
DAY 2: 16 SEPTEMBER 2021		
08.30-09.00 (CAT)	Registration	
OPENING SESSION		Chair: Prof Charles Fombad, Institute for International and Comparative Law in Africa (ICLA), University of Pretoria
09.00-09.30 (CAT)	Introductory Remarks	Prof Edward Kirumira, Director STIAS Dr Stefanie Rothenberger, Director, Rule of Law Program for Anglophone Sub-Saharan Africa, Konrad Adenauer Stiftung (KAS), Nairobi, Kenya Prof Nico Steytler, South African Research Chair in Multilevel Government, Law and Development (SARChI), Dullah Omar Institute, University of the Western Cape
SESSION 1		Tributes and Keynote Addresses
09.30-10.30 (CAT)	Tribute in recognition of their lifetime contributions to constitution-making and constitutionalism in Africa Keynote Addresses	<i>Prof Ben Nwabueze</i> <i>Prof Yash Ghai</i>
10.30-11.00 (CAT)	Group photo and Refreshments	
SESSION 2		Theme: Concepts and Questions
11.00-12.30 (CAT)	1) Constitutional identity and constitutionalism in Africa: Concepts and key issues 2) Who is 'We, the people'? Pluralist constitutional identity after democratic transitions in African and European countries 3) Aspirational and representative constitutional identity in Western and non-Western perspectives to constitutionalism Discussion	Chair: Dr Michelle Maziwisa Prof Charles Fombad <i>Prof Karl Kössler</i> Dr Jan Erk
12.30-13.30 (CAT)	Lunch	
SESSION 3		Theme: Colonial constitutional identities and contested constitutional visions
13.30-15.00 (CAT)	4) African freedom charters as constitutional visions: Nigeria, Uganda and South Africa 5) The struggle for constitutional identity in Francophone Africa 6) Re-invigorative constitutionalism: A theory to assert African values in the interpretation of the Namibian Constitution Discussion	Chair: Dr Jan Erk <i>Prof Magnus Killander</i> Mr Trésor Muhindo and Prof Charles Fombad <i>Dr Ndjodi Ndeunyema</i>
15.00-15.10 (CAT)	Refreshments	

SESSION 4		Theme: Indigenous African institutions and leaders and contested constitutional identities	Chair: Prof Francois Venter
15.10-16.40 (09.10-10.40 Eastern Time US / 08.10-9.40 Wisconsin US)	7) Constitutional identity and traditional authority in the post- colony	<i>Prof Heinz Klug</i>	
	8) Constitutional checks and balances in traditional Africa	<i>Prof George Ayittey</i>	
	9) Indigenous customary institutions and new constitutional identities in Africa	<i>Prof Raymond Atuguba</i>	
	Discussion		
17.45-20.30 (CAT)	Dinner at STIAS		

DAY 3: 17 SEPTEMBER 2021

SESSION 5		Theme: Challenges of constitutional identity: Case studies	Chair: Prof Francois Venter
09.00-10.30 (CAT)	10) Taking power from the people – shifting constitutional identity in Egypt	<i>Prof Sherif Elgebeily</i>	
	11) Political changes, constitutional identities and disruptions in contemporary Ethiopia	<i>Prof Asnake Kefale</i>	
	12) Cameroon and the crisis of constitutional identity: Is Anglophone identity compatible with a Cameroonian constitutional identity?	Profs Carlson Anyangwe and Charles Fombad	
	Discussion		
10.30-10.40	Refreshments		
SESSION 6		Theme: Challenges of constitutional identity: Case studies Cont'd	Chair: Dr Shehaam Johnstone
10.40-12.10 (CAT)	13) Rooting constitutional values in African countries without pre-colonial institutional traditions, but with a national values – The Cape Verdean experience and the role of the Constitutional Court	<i>Prof Justice José Pina-Delgado</i>	
	14) The evasive search for a constitutional identity: A century of South African constitutions	Prof Nico Steytler	
	15) Culture and constitution-making in South Sudan	<i>Ambassador Francis Deng</i>	
	Discussion		
12.10-13.10	Lunch		
SESSION 7		Closing Session	Chair: Prof Charles Fombad
13.10-14.30 (CAT)	Discussion of theme for SASCA 2022	Prof Charles Fombad	
	Closing remarks	Dr Stephanie Rothenberger, KAS Prof Johann Groenewald, STIAS	
	Vote of thanks	Prof Nico Steytler	

SUMMARY OF PRESENTATIONS, SASCA 2021

16 SEPTEMBER: DAY 1

1 Constitutional Identity and Constitutionalism in Africa: Concepts and Key Issues – Charles Manga Fombad

Debates about the identity of modern constitutions are not new and for quite a while have attracted the attention of mainly Western scholars, particularly in Europe and the United States. The issue of an African constitutional identity in the post-1990 constitutional renewal and post-'Rhodes Must Fall' era raises the question of whether, at a practical level, the existing constitutional paradigms, concepts and normative ideologies are suited to developing a stable and sustainable constitutional system of governance based on the fundamental principles of modern constitutionalism. One critical question is whether the success or failure of constitutionalism in Africa depends on whether the constitutions in African states reflect a national and/or African constitutional identity. Another is whether the search for an African constitutional identity is an illusion and distraction from the fundamental issues of constitutional governance, or a worthwhile pursuit? These and many more questions are posed rather than answered. This general overview of the concept of constitutional identity and examines some of the critical issues that it raises. It tries to answer questions such as: What is constitutional identity? What are the prevailing theories of constitutional identity? What are its main characteristics and core elements? It also examines constitutional identity in the African context. Against this background, the chapter examines the link between constitutional identity and constitutionalism in Africa. In concluding, it contends that, unlike in the past, the issue of constitutional self-identification is now a critical factor that experts must take into account in the constitution-making process.

2 Who is 'We, the People'? Pluralist Constitutional Identity after Democratic Transitions in African and European Countries – Prof Karl Kössler

The chapter aims to explore how constitutions of ethnically diverse multilevel systems created a pluralist identity in their original design and it has been changed over time by political and judicial actors. The focus is thereby on pluralist identity in norms framing the image of "who the people is" as the constitutional subject. The chapter first explains the concept of pluralist constitutional identity and why the image of the "the people" is one of its core elements. It then goes on to discuss what parts of a constitution frame this image, arguing that preambles are a crucial but not the only part to look at. This forms the basis for the comparative analysis of Ethiopia, South Africa, Bosnia-Herzegovina and Spain, four countries sharing certain common features: first, a legacy of non-recognition of diversity in the context of violent conflict and/or non-democratic rule followed by a transition to constitutional democracy; secondly, their nature as multilevel systems of government so that pluralist identity may be created at two levels, often framing "the people" in contradictory ways. The chapter provides a brief introduction on how democratic transitions, creating windows of opportunity for a new pluralist identity, occurred in the national and subnational constitutional arenas. Subsequently, it compares how these countries have framed "the people" in constitutional terms in three distinct ways: first, through formulas explicitly defining the constitutional subject; secondly, through symbols as representations of "the people" in everyday life; thirdly, through backward-looking statements sustaining narratives about the constitutional subject and forward-looking statements outlining its aspirations.

3 Aspirational and Representative Constitutional Identity in Western and Non-Western Perspectives to Constitutionalism – Jan Erk

The big question this paper chapter seeks to investigate is whether a form of a compound African constitutional identity can be constructed in the service of establishing a grassroots embrace of the constitution amongst the constituent peoples, and thus, contribute to consolidating homegrown constitutionalism and ensuring longevity. In this search, Western and non-Western perspectives are jointly put to use to enrich the tools available to the field of constitutional studies. Attention is paid to not only the form of constitutions but also their function in terms of both reaching ideals (conceptualised in the positive sense of constitutional success) and staving off pitfalls (in the negative sense

of success); and whether these are best achieved through piecemeal and gradual terms or a sudden big bang of comprehensive mega reforms. In the course of the investigation two 'ideal types' marking the two ends of the spectrum of constitutional identity are proposed: an aspirational one setting goals and ideals, and a representative one which seeks to reflect a country's particular political, social, and cultural 'constitution' in the original etymological meaning of the word. What emerges as a particularly difficult challenge is how to ensure a constitution instils a sense of public ownership by becoming more representative of a country's underlying social, historical, cultural, traditional make-up while also giving voice to modern aspirations towards protecting and promoting individual human rights; and while doing so, also become self-sustaining and remain in place as the nation's foundational basic law guiding future generations. The conclusions come with both scholarly and applied insights: if constitutions need the lifeblood connecting them to a land and its peoples so that they would have the local self-sufficiency necessary to withstand and navigate the known and unknown challenges that lie ahead, we might have to temper our trust in perfectionism in the abstract.

4 Freedom charters as constitutional visions: Nigeria, Uganda and South Africa – Magnus Killander

This chapter explores three African political documents, all referred to as Freedom Charters, from Nigeria, Uganda and South Africa, and how they relate to the independence constitutions and later constitutions of Nigeria and Uganda and the interim and final constitutions of South Africa. The first document discussed is the Freedom Charter of the National Council of Nigeria and the Cameroons, adopted in April 1948. The second is the 1952 Freedom Charter and Manifesto of the Uganda National Congress. The third document is the well-known Freedom Charter of South Africa adopted by the Congress of the People at Kliptown on 26 June 1955. These documents can all be viewed as responses to the 1941 Atlantic Charter and its promise of self-determination. The chapter discusses the extent to which the three Freedom Charters can be viewed as homegrown constitutional visions and the centrality of human rights set out in these documents. It discusses the extent to which the issues raised in the Freedom Charters are reflected in constitutional texts and explores the relevance of these historical – in the case of Nigeria and Uganda almost forgotten – documents for constitutional debates in these countries today.

5 The Struggle for Constitutional Identity in Francophone Africa – Charles Manga Fombad & Trésor Makunya Muhindo

This paper discusses the extent to which constitutional reforms in francophone Africa from 1990 have, if at all, resulted in a reimagining of the constitutional identity of these countries from the inherited French 1958 Fifth Republic constitutional identity. The underlying premise of the paper is that an effective constitutional system must be able to address the peculiar problems the country is facing. Besides this, constitutions must reflect the people's culture, tradition and history. This will increase the acceptance and the legitimacy of the normative and institutional frameworks established and enhance its enforceability. All over francophone Africa, the French had handed over power only to linguistically, culturally, and religiously assimilated locals versed with the colonial system of governance, thereby creating a new social class with home-grown roots which ensured the continuation of their policies. Despite heightened awareness, not only, of the nature and complexity of the diverse social, economic and political challenges that the different African countries face, but also the variety of constitutional options available to deal with these challenges, Gaullism, with all its defects continues to reign supreme. The possible explanation of why the Gaullist constitutional model has survived and thrived is because it suits the temperament and strategic interests of francophone African leaders, the ruling elites and the French. The chapter concludes that Francophone African countries continue to remain under the spell of the Gaullist constitutional model and have been unable to creatively design distinctive principles, doctrines and institutions that could effectively address the specific challenges that these countries face.

6 Re-energizing constitutionalism: A theory to assert African values in the interpretation of the Namibian Constitution – Ndjodi Ndeunyema

This chapter advances an innovative theory of constitutional interpretation coined as re-energizing constitutionalism. Inspired by calls for decolonisation and the need to meaningfully develop its substantive manifestation in law, re-energizing constitutionalism is advanced. Re-energizing constitutionalism therefore provides an overarching theory that endeavours to facilitate an Afrocentric approach to constitutional interpretation, particularly under the Namibian Constitution, to affirm its authentically African identity. The chapter locates re-energizing constitutionalism within purposivism as the primary approach to constitutional interpretation in Namibia, alongside original intent, and textualism. Re-energizing constitutionalism is also distinguished from transformative constitutionalism which is inadequate to ensure that the Namibian Constitution is Afrocentric in its edifice. Re-energizing constitutionalism thus offers a theoretical framework for facilitating an autochthonous approach to constitutional interpretation that is responsive to the reality that African values are yet to be rigorously asserted within Namibia's legal and constitutional infrastructure. In so doing, the chapter advances re-energizing constitutionalism as an overarching paradigm that ensures that Afrocentricity permeates throughout the legal culture, particularly in pursuing redistributive socio-economic justice.

7 Constitutional Identity and traditional authority in the post-Colon – Heinz Klug

The idea of constitutional identity is often used as a means of classifying constitutions according to their different features, institutions or approach to rights and forms of constitutional review. Gary Jacobsohn (2010) argues however that constitutional identity “emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past” (2010:7). Accepting James Tully's (1995) argument for the recognition of a multiplicity of identities within modern constitutionalism and Jacobsohn's conception of the “disharmonic constitution” in which there exists both “conflicting, even radically inconsistent ideas” (2010:3), this paper will focus on the place of traditional authorities within post-colonial constitutions. By exploring the status of traditional authorities in colonial constitutional orders, the various waves of post-colonial constitutions and in relation to the different sources of identity and resistance that have struggled to reshape constitutional orders in moments of constitution-making, amendment and contestation, the paper will attempt to identify what Jacobsohn describes as a broader constitutional identity – consisting of “identifiable continuities of meaning within which dissonance and contradiction play out” (2010:4).

8 Constitutional Checks and Balances in Traditional Africa – George BN Ayittey

Much mythology, first propagated by the early Europeans, still bedevils Africa. A widespread fallacy perpetrated over the centuries was the notion that Africa had no history, nor viable institutions. Its people labored under tyrannical and despotic regimes. Thus, colonialism was good for the CCM because it liberated them from their horrible traditional rulers.

This misconception served to provide perverse justification and convenient alibi for the brutally repressive regimes that proliferated in postcolonial Africa. For decades, despotism was tolerated in and out of Africa because, it was taken to be the cultural practice -- the preferred form of governance by a people unfamiliar with democracy.

The purpose of this paper is twofold. The first is to demolish this self-serving colonial mythology by examining Africa's indigenous political systems. Four main polities can be identified. Empires, kingdoms, stateless societies, and chiefdoms. All the ancient empires were confederacies, characterized by decentralization of power and devolution of authority. Dictatorships did not exist in confederacies. Neither did they exist in African kingdoms because the African king had little or no political role. Nor in stateless societies because they had no rulers/leaders and hence, no dictators.

9 Indigenous Customary Institutions and New Constitutional Identities in Africa – Raymond A. Atuguba

This chapter discusses the critical role of indigenous institutions to the evolution of robust constitutional identities on the African continent. In other words, how do we identify, isolate and integrate productive African traditional principles and institutions to modern African constitutions, in order to give them a distinctive African identity?

Many ideas and experiments on constitutional ordering on the African continent focus on how to achieve constitutional democracy and constitutionalism. The vehicles for these ideals are often named as multiparty democracy; free and fair elections; the rule of law; separation of powers; and more recently, human rights protections; judicial independence; decentralization; participatory governance; and participatory development. With the failure of third wave democracy in Africa, and a return to authoritarianism in many African countries, mimicking a global trend of democratic reversals, many are questioning the constitutional orderings that Africans continue to imitate from their former and current colonial masters.

In this chapter, I trace the failure of constitutional orderings to produce “the Africa we want” to a disregard of indigenous customary constitutionalism and governance practices, and a corresponding increase in unconscious mimicking of extraneous constitutional learning. Using a textual analysis of a number of African constitutions, I illustrate the schizophrenia embedded in them, and conclude that only a decolonization of African constitutional law can lead to authentic African constitutional identities and “the Africa we want”.

In Africa today, democratic reversals, the narrowing of civic spaces, and in an increasing number of cases, the forceful overthrow of governments, means that a fourth wave of democracy and constitution-making is imminent and, in some cases, ongoing. This quest for new constitutional orderings on the continent must engage with design and content questions that have subsisted for the last seventy-five years: the legitimacy of extant constitutional design; the possibilities for unearthing and utilizing rehashed indigenous governance mechanisms; the propriety of options at independence that were not followed; the practicality of hybrid and variegated constitutional design; and the capacity of the new forms of constitutional design and content to deliver “the Africa we want”. This paper attempts to contribute to the first two queries: the decolonization of constitutional architectures and the construction of an indigenous African constitutional identity that reflects authentic and productive African values.

17 SEPTEMBER: DAY 2

10 Taking power from the people – shifting constitutional identity in Egypt – Sherif A. Elgebeily

The concept of a constitutional identity is contested, with little consensus over how it can be defined. This chapter focuses on Egypt, where identities are multiple and have been subject to both external and internal influences, and asks, what is the indigenous constitutional identity of Egypt? This chapter defines constitutional identity as the extent to which a constitution has been shaped, formed, and is responsive to the wider identities of a nation.

This chapter focuses on Egypt, where identities are multiple and have been subject to both external and internal influences, and asks, what is the indigenous constitutional identity of Egypt? Despite no written constitution prior to 1923, Egypt has long been influenced by Islamic, Ottoman and later British occupations and, as a result, their laws and codes. In recent years, the constitution – through a process of amendments in 2016 and 2019 – has drastically shifted the meaning and content of the Egyptian constitution, arguably away from representation of the people and towards a more autocratic direction reminiscent of the 1923 constitution of a hereditary monarchy.

This chapter will explore whether the Egyptian constitution – like a chameleon – has changed to match the environment in which it exists and what fundamental elements of the constitution have been shared throughout Egypt's history. It will explore the concept of constitutional identity through the lens of the constitutions of the 20th and 21st Centuries and will explore the reasons for its evolution.

11 Political Changes, Constitutional Identities and Disruptions in Contemporary Ethiopia – Asnake Keftale

Ethiopia has over a century history of constitution-making. It, however, continues to suffer from constitutional disruptions. The first modern constitution was introduced in 1931. The 1931 Constitution was revised in 1955. But it was suspended after the Marxist-Leninist military government (*Derg*) assumed state power following a popular revolution in 1974. The 1987 Peoples' Democratic Republic of Ethiopia (PDRE) Constitution was nullified by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) when it assumed state power following its military victory over the former in May 1991. The EPRDF led government was able to introduce its own constitution, the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) in 1995. But following the 2018 political changes that are happening in the country, the current Constitution is under stress. In the context of the ongoing political changes, there is a heated debate about the prospect of the 1995 Constitution. It is now difficult to tell whether the 1995 Constitution will be obliterated like its predecessors or gets reformed to meet the demands of the time. The main argument of this paper is that the key to the understanding of the problem of constitutional disruptions, meaning discontinuity, in Ethiopia is examining the problematic identity of the constitutions. The paper concludes that one major continuing trends in the making of constitutions in Ethiopia has been the imposition of the ideas of those who manage to control power and unless this trend is reversed, it is very difficult to imagine the invention of a more sustainable constitution.

12 Cameroon and the crisis of constitutional identity: is anglophone identity compatible with a Cameroonian constitutional identity? – Carlson Anyangwe and Charles M Fombad

This chapter, in many respects provides a context to the political crisis that is threatening to end the fragile union between the English-speaking Anglophone and French speaking francophone communities in Cameroon. On account of the distinct colonial heritage and experience, and language and culture as well as disparity in population size of the two communities, the federal arrangement that formed the basis of the union in 1961 seemed the ideal institutional framework for forging a sense of unity in diversity. This was supposed to form the foundation for a common constitutional identity emerging. However, within a few months of what turned out to be a highly centralised federation coming into existence, the francophone dominated government started to undermine and dismantle the federal system. In 1972, the federal constitution was, in violation of its amendment provisions, replaced with a unitary constitution.

The chapter looks at the historical background of the country and how the federal constitution came to be adopted and was eventually abrogated. It shows that the abrogation of this constitution in 1972 has been perceived by many Anglophones as a divorce. This is particularly so since it has been followed by policies designed to eliminate the distinctive features of the Anglophone community and the imposition of the francophone system on them under the pretext of harmonisation and national unity. At the heart of the present political crisis, which started in 2016 and the ensuing civil war that has seen the military occupation of the two Anglophone regions, is the question whether an Anglophone identity is compatible with an imposed Cameroonian constitutional identity. This is particularly so when the present constitutional framework fails to reflect the country's history and the hopes, desires, fears and aspirations of the two communities. The crisis raises serious questions about the ability of Africans in the 21st century to rise above their colonised and stereotyped mind-sets and design institutions effectively addressing their recurrent governance challenges. Constitutional identity cannot be imposed particularly in a complex society with competing identities at stake such as Cameroon. It is an illusion to expect the Anglophone community to sacrifice its distinct identity and culture in order to self-identify with the identity of the francophone community promoted as a Cameroonian constitutional identity.

13 Rooting Constitutional Identity in African Countries Without Pre-Colonial Institutional Traditions, but with National Values – The Cape Verdean Experience and the Role of the Constitutional Court – José Pina-Delgado

Constitutional identity is a broad multi-layered notion that may encompass the set of established constitutional principles, of stable normative features, and of institutional practices that characterise a certain constitutional order

in what concerns the form of the State; its relations with individuals; the system and relationships between the political branches of government and of these with the courts; the territorial distribution of power; the protection and amendment of the constitution; and, in some cases, eventually the incorporation of international law; national security; and the economic order. With this in mind, this article examines the experience of the Republic of Cape Verde's Constitutional Law in recognizing communitarian values as part of its constitutional identity. Departing from political and constitutional history and the construction of Cape Verdean national identity before independence (I), the text analyses the context of approval and the main values of the fundamental laws that marked the former (II) and actual constitutional order (III) to settle the structural traces of the latter to evaluate whether it reflects the cultural identity of the Cape Verdean people (IV); it also emphasizes the efforts recently taken by the Constitutional Court of Cape Verde (CCCV) in stressing and strengthening that connection and rooting constitutional law in the local creole identity and in certain institutional traditions developed since colonial times (V), before finishing with some final remarks (VI). The paper concludes that the process of constructing Cape Verdean constitutional identity is the result of a patchwork of norms that represent a) universal values; b) regional values – both European and African; and c) values created by the national experience of hybridization.

14 The evasive search for a constitutional identity: A century of South African Constitutions – Nico Steytler

The chapter focuses on identifying the key factors that shape constitutional identities. Constitutional identity is defined as the sum or blending of a number of characteristics which, from a political perspective(s) imbues a constitution with meaning: what it stands for, what it does, how it affects people or communities' lives. A constitution cannot self-define its identity; it is attributed to it by those affected by it. It is that image (or images) by which a constitution is recognized. South Africa's constitutional history over the past century is most instructive for this purpose. The movement from white oppression to black majority rule suggests four key factors that shaped constitutional identities and their contestation: the object of constitution-making; the constitution-making process; the content of the constitution so made; and the fundamental nature of the constitution. Collectively, these four factors give form and shape to a constitutional identity, or multiple identities, depending on the nature and impact of each factor (which are interlinked). Any identity so formed may, however, change over time, depending on socio-, economic, and political circumstances.

15 Culture and Constitution-making in South Sudan – Francis Mading Deng

It is widely recognized that African constitutions are of foreign origins and for the most part remain persistently Eurocentric. While there are universally shared structures, parameters and principles that generically characterize virtually all constitutions worldwide, every constitution is supposed to reflect the characteristics, values and norms particular to the country concerned. There is therefore a demand for African countries to reform their constitutions and contextualize them, building upon their own cultural values and norms. While there is a consensus on this vision, realizing it presents considerable challenges that can thematically be classified as conceptual and operational. The main conceptual issues relate to the role of identity as determined by a variety of factors, prominent of which are ethnicity and culture, how they play out in the context of diversity in a pluralistic State, resulting competition over power and national resources, and the ensuing threat to the peace, security and stability of the country. The operational dimensions of the challenge is how to discern the shared principles from the multiplicity of national cultures that should be constitutionally recognised and utilized, what areas of the constitutional frameworks are amenable to cultural incorporation, and how the relevant cultural values and norms can be infused in the drafting of the constitution.

How these conceptual and operational dimensions can effectively be addressed in drafting a contextualized constitutional document and application in the broader functional process of constitutionalism is the challenge facing constitutional experts and scholars and practitioners from related disciplines and professions.

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