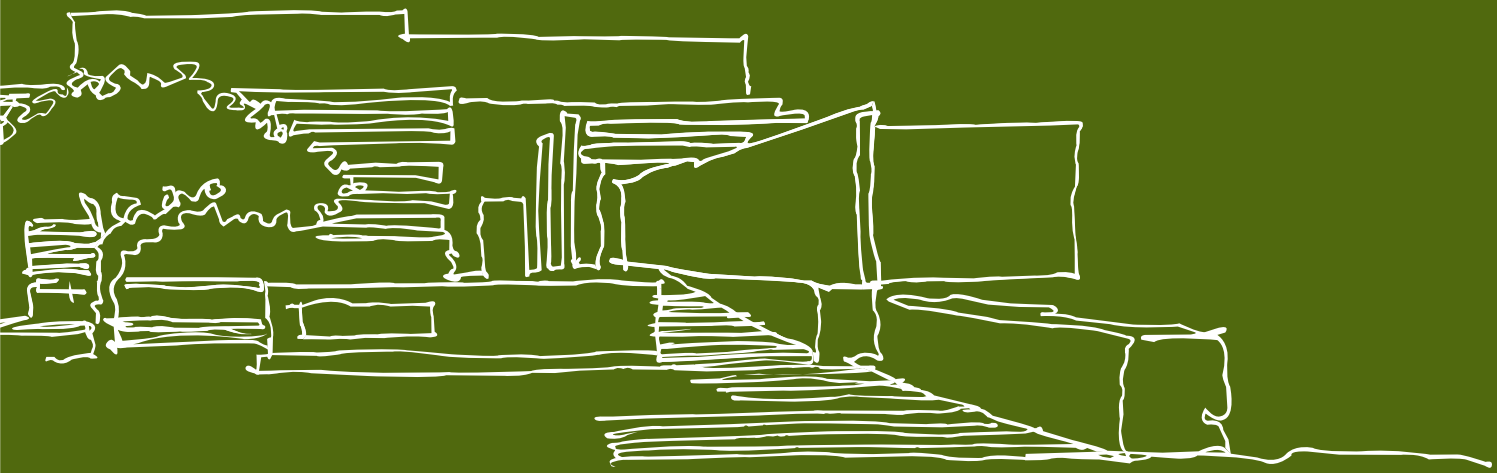
NINTH STELLENBOSCH ANNUAL SEMINAR ON CONSTITUTIONALISM IN AFRICA (SASCA 2022)

CONSTITUTIONAL CHANGE AND CONSTITUTIONALISM IN AFRICA

13-16 SEPTEMBER 2022

PROGRAMME

A CREATIVE SPACE FOR THE MIND



Konrad Adenauer Stiftung

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

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STELLENBOSCH INSTITUTE FOR ADVANCED STUDY
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INTRODUCTION

The ninth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2022) will take place in Stellenbosch (South Africa) from Tuesday 13 to Friday 16 September 2022.

ORGANISERS

SASCA 2022 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); and
- The Konrad Adenauer Stiftung (KAS) Rule of law Programme Sub-Saharan Africa (Anglophone Countries), based in Nairobi.

THEME

The theme for SASCA 2022 is ***"Constitutional change and constitutionalism in Africa".***

CONTENTS

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. The reality however is that the post-1990 wave of constitutional reforms appears 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. 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.

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.

The main sub-themes that will be examined during the seminar include the following:

- Constitution-building, constitution-making, constitutional change and constitutionalism
- Eternity clauses, constitutional unamendability, constitutional change and constitutionalism
- Judicial adventurism, judicial populism, constitutional change and constitutionalism
- Subnational constitutions, constitutional change and constitutionalism
- Case studies: Distinct Profiles of constitutional change
- The AU and RECs, constitutional change and constitutionalism

PROCEDURES

The call for papers opened in December 2021, 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 of the two-stage selection process, abstracts were selected and the authors were invited to submit draft papers. In the second round of the process the first drafts were reviewed and an invitation to submit revised papers was extended to some of those whose first drafts was approved by the organising committee.

EXPECTED OUTCOMES

As the recent Supreme Court judgment stopping sinister attempts to substantially revise the 2010 Kenyan Constitution, generally considered as one of the best on the continent shows, the dangers of frequent and arbitrary amendment of African constitutions are as present today as they were before the 1990s. The participants during this seminar will examine the complex issues that have arisen since the recent wave of reforms designed to counter these problems and see how best these can be addressed. 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* series, to be published by the Oxford University Press.

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PROGRAMME

TUESDAY, 13 SEPTEMBER 2022 – arrival of participants		
18.00	Pre-Conference dinner at the Wallenberg Research Centre, STIAS	

DAY 1: 14 SEPTEMBER 2022		
8.30-09.00	Registration	
OPENING SESSION		**Chair: Prof. Charles Fombad, Director, Institute for International and Comparative Law in Africa (ICLA), Faculty of Law, University of Pretoria**
09.00-09.30	Welcome	Prof. Edward Kirumira, Director, Stellenbosch Institute for Advanced Study (STIAS)
		Dr Stefanie Rothenberger, Director, Rule of Law Program for Anglophone Sub-Saharan, Africa, Konrad Adenauer Stiftung, Nairobi, Kenya
		Prof. Nico Steytler, South African Research Chair in Multilevel Government, Law and Development (SARChI) at the Dullah Omar Institute, University of the Western Cape
SESSION 1	**Keynote address**	**Chair Prof. Nico Steytler**
09.30-11.00	"Thirty years of constitutionalism in Africa: between myth and reality."	Prof. Babacar Kante [virtual]
		Dr Oby Ezekwesili [virtual]
	Theme: Constitution-building, constitution-making, constitutional change and constitutionalism - Overview	
	1) An overview of the legal framework provided for amending Modern African Constitutions - the diverse patterns for change	Prof. Charles Fombad
11.00-11.30	Group photo and refreshment	
SESSION 2	**Theme: Constitution-building, constitution-making, constitutional change and constitutionalism**	**Chair Prof. Nico Steytler**
11.30-13.00	2) Constitutional Change and Ethno-Political Conflicts in the Fourth Nigerian Republic	Prof. Rotimi T Suberu
	3) Between Constitutional Guardian and Constituent Power	Prof. Markus Böckenförde [virtual]
	4) Constitutions and coups	Prof. Christina Murray
13.00-14.00	Lunch	
SESSION 3	**Theme: Constitution-making, constitutional change and constitutionalism**	**Chair Prof. Charles Fombad**
14.00-15.30	5) Citizen-Soldiers and Laws: Participation of the Military in Constitution-making in Africa	Prof. Dan Kuwali
	6) Federal constitution-making and amendment	Prof. Nico Steytler, Prof. Zemelak Ayele and Dr Henry Paul Gichana
	7) Changing modes of constitution-making and constitutionalism in Africa	Heinz Klug [virtual]
15.30-16.00	Refreshments	

SESSION 4	Theme: Eternity clauses, constitutional unamendability, constitutional change and constitutionalism	Chair Prof. Charles Fombad
16.00-17.30	8) Unamendability in African Constitutionalism: Democratic Protection, Political Insurance, and Transnational Norm Building	Prof. Silvia Suteu [virtual]
	9) Eternalized core provisions in the constitutions of the Lusophone Countries in Africa and their uncertain Destinies	Prof. Andre Thomashausen
	10) Operationalising 'national consensus' as emerging standard for constitutional change in Africa: Insurance against democratic regression and encouraging democratic cooperation	Dr Adem K Abebe [virtual]
18.30-20.30	Dinner at STIAS	

DAY 2: 15 SEPTEMBER 2022		
SESSION 5	**Theme: The Judiciary, constitutional change and constitutionalism**	**Chair Prof. Andre Thomashausen**
09.00-10.30:	11) The Dangers of Judicial Amendments of the Constitution- Lessons from Ghana	Prof. Maame A.S. Mensa-Bonsu [virtual]
	12) Time to reduce judicial adventurism in South Africa – a case for amending the right to human dignity in the wake of the 'state capture reports'	Ms Lauren Kohn
10.30-11.00	Refreshment	
SESSION 6	**Theme: The Judiciary, constitutional change and constitutionalism (continued)**	**Prof. André Thomashausen**
11.00-12.30	13) Eternity clauses in CEMAC countries: Between hope and weaknesses	Dr Abdou Khadre Diop [virtual]
	14) The Basic Structure "Doctrine" and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism?	Prof. Migai Akech
12.30-13.30	Lunch	
SESSION 7	**Theme: Case studies: Distinct Profiles of constitutional change**	**Prof. Yonatan Fessha**
13.30-14:30	15) Constitutional amendments and alterations in Ethiopia	Prof. Assefa Fiseha [virtual]
	16) Governing a country beyond its constitution: reflection on informal constitutional change in DR Congo	Dr Balingene Kahombo [virtual]
15.00	Refreshments and excursion	
18.30	Dinner at the Oude Werf Hotel	

DAY 3: 16 SEPTEMBER 2022		
SESSION 8	**Theme: Case studies: Distinct Profiles of constitutional change (continued)**	**Chair: Dr Stefanie Rothenberger**
09.00-10.30	17) Citizens' activism against constitutional change and the protection of constitutionalism in Kenya: A demonsprudential analysis of the Building Bridges Initiative	Ms Marystella A Simiyu and Dr Tresor M Makunya [virtual]
	18) The complex path of constitution-building in post-conflict contexts: The case study of Libya	Prof. Rania Hussein Khafaga
	19) Arbitrary Constitutional Changes and the Failure of Constitutionalism and Rule of Law in South Sudan	Dr Joseph Akech [virtual]
10.30-11.00	Refreshment	
SESSION 9	**Theme: Case studies: Distinct Profiles of constitutional change (continued)**	**Prof. Yonatan Fessha**
11.00-12.30:	20) Constitutional change in Malawi since 1994: Dicing with stability and change	Prof. Mwiza Jo Nkhata
	21) The importance of process in constitutional reforms: The case of Lesotho	Prof. Hoolo 'Nyane
	Theme: The AU and RECs, constitutional change and constitutionalism	
	22) The tendency to undermine democracy in Africa through constitutional change. How the African Union can help in turning the tide?	Dr Cristiano d' Orsi [virtual]
12.30-13.30	Lunch	
SESSION 10	**Closing Session**	**Chair: Prof. Charles Fombad**
13.30- 14.30	Discussion of theme for SASCA 2023	
	Closing remarks	Dr Stefanie Rothenberger
		Prof. Johann Groenewald, Coordinator: Strategic Initiatives, STIAS
	Vote of thanks	Prof. Nico Steytler
15.00	Departure	

SUMMARY OF PRESENTATIONS, SASCA 2022

1 An overview of the legal framework for amending modern African constitutions – Charles Manga Fombad

In the last three decades, diverse measures have been adopted to regulate the manner in which African constitutions can be amended and thereby prevent the frequent and abusive changes to constitutions that had been a regular feature of pre-1990 African constitutional practice. This chapter provides an overview of the legal framework laid down by different African constitutions. The critical question it examines is whether these amendment procedures provide a credible framework for ensuring that the inevitable changes that constitutions undergo are made in a manner that ensures orderly change and political stability and acts as a legitimate foundation for promoting constitutionalism. In this examination, the chapter begins with a brief account of the way in which constitutional amendment is conceptualised. It then examines the different methods of amendment, both formal and informal, and the limitations that African constitutions provide for amending their provisions. The chapter then discusses the main actors in constitutional amendment, actors whose participation is essential for legitimising the process, after which it reviews ways in which compliance with the constitutional amendment requirements is ensured. In concluding, it is contended that, although the measures now entrenched in constitutions to limit abusive amendments are better than those in the pre-1990 era, there remain weaknesses that are still being exploited by unscrupulous politicians.

2 Constitutional Change and Ethno-Political Conflicts in the Fourth Nigerian Republic – Rotimi T. Suberu

Inaugurated in 1999, the Nigerian Fourth Republic has witnessed multiple alterations to its formal constitutional framework. These series of changes have focused on issues of political succession, political participation, electoral reforms, and horizontal (executive-legislative-judicial) as well as vertical (federal-state-local) inter-governmental relations, among other constitutional matters. Despite the alterations, however, agitations for further constitutional change have persisted, and even intensified, in Nigeria. These agitations have challenged not only the substantive content of the country's current constitutional framework, but also the allegedly non-inclusive procedures by which the framework has been created and altered. In essence, the politics and processes of formal constitutional reforms have underscored the unsettled nature of Nigerian constitutional identity, exposing divergent and colliding ethno-political visions regarding the content of, as well as the procedural modalities for constructing and adapting, the country's constitution. This paper will explore how contestations and conflicts among ethnic, regional and religious constituencies have shaped the politics, processes, and outcomes of formal constitutional amendments or "alterations" in the country's Fourth Republic. The paper will also discuss some of the promising ways by which the Prof.ound ethnic, regional, religious, socio-economic and class-based cleavages bedevilling Nigeria's constitutional change and politics may be more productively mediated or alleviated.

3 Between Constitutional Guardian and Constituent Power – Markus Böckenförde

Courts as guardians of the constitution are mandated to uphold the constitutional integrity and to advance constitutionalism. Their task as constituted powers is to operate within the frame designed by the constituent power. At times, the line between actively guarding the constitution and re-drafting the constitutional text is thin, especially if the judicial adventurism serves a potentially legitimate purpose. In Benin and Kenya, the respective courts have tested this line in their struggle against attempts of opportunistic constitutional amendments by the political elites. Both countries have different constitutional review approaches coined by the legal culture of their colonizers (civil law / common law) and the courts have creatively interpreted and applied the 'unconstitutional constitutional amendment' concept accordingly. While -oversimplified- the Constitutional Court in Benin extended the eternity clause, the High Court in Kenya made the procedural requirements for constitutional amendments regarding certain matters more onerous than the constitution demanded. In putting themselves above the explicit wording of the constitution they transformed from constituted guardians to the constitution making power. Despite the different legal culture, the justification for their overly creative activities were very similar, rooted in their experiences under which the recent constitutions were drafted.

The paper will introduce, analyze, and compare both, the different approaches of both countries to the 'unconstitutional constitutional amendment concept' and its application by the courts. The relevant cases reflect well the institutional structure of both approaches: Benin represents the model of concentrated constitutional review in a single court, while Kenya's decentralized structure of constitutional review involves the High Court, the Court of Appeal, and the Supreme Court. Also the stark contrast in the style and character of constitutional review judgments between Francophone and Anglophone countries in Africa are well illustrated by looking at these decisions that go to the essence of constitutional theory and the core of a constitution's existence. The three most important decisions by the Constitutional Court in Benin on this matter do not exceed 40 pages taken together but the corresponding consolidated High Court decision in Kenya covers 321 pages and the confirming decision of the Court of Appeal is over 1000 pages in total. Furthermore, the Benin Court follows the French tradition of 'viewing the judiciary as a faceless collectivity dispensing justice' (Garoupa & Ginsburg, 2008: 7). Decisions are written in a formal and characterless language and judges are prevented from writing dissenting opinions and have conceals their voting behavior from the public. In contrast, concurrent and

dissenting opinions are standard in common law judgments also expressing the linguistic style of the particular judge. Yet, more relevant than these formal differences, of course, are the distinct substantive approaches in the context of 'unconstitutional constitutional amendment' concepts. In both countries, Benin and Kenya, the point of departure was similar: how to prevent opportunistic political elites amending the constitution in their favor. Conceptually, the center of the debate in Benin was the 'eternity clause'; in Kenya, it was the 'basic structure doctrine'.

Eternity clauses introduce a normative hierarchy within the constitution, drawing an explicit distinction between amendable and immutable constitutional norms or principles. From the perspective of the institutions that are authorized to amend the constitution (like parliament or the people in a referendum in Benin), the latter are unamendable. The constitution-making power binds the constituted powers in the constitution, including those with amendment power by setting a frame of basic principles and features which determine the totality of the constitutional order and the "spirit of the constitution". These form the constitution's identity and its basic structure. Eternity clauses are common in African constitutions, albeit only in civil law countries. While almost all civil law countries do have an immutable clause (including Benin), hardly any common law countries included them in the constitution.

In some countries without an explicit eternity clause, courts with the authority of constitutional review have developed a doctrine that draws a distinction between amending and replacing the constitution. While the former task is delegated to various institutions in the constitution, most constitutions are silent about their replacement, an authority implicitly vested in the people's primary constituent power. Yet, due to the lack of an explicit textual distinction, the courts use this distinction to empower

themselves to determine what belongs to a constitution's basic structure or identity and is thus unamendable.

The respective courts in Benin and Kenya have departed from a conventional application of these two approaches. As mentioned above, while the Benin court added some provisions to the eternity clause, the Kenyan courts (so far) ignored the explicit instructions of the Kenyan constitution how its basic structure can be amended (via referendum). Both justified their decisions by referring to the constitutional moments of the creation of their current constitutions.

It not only highlights the creativity of African courts in responding to continuous challenges in their countries, but also illustrates how their decisions innovatively contribute to the further development of the concept of 'unconstitutional constitutional amendment'.

4 Constitutions and coups – Christina Murray

5 Citizens-Soldiers and Laws: Participation of the Military in Constitution-making in Africa – Dan Kuwali

Although article 13(1) of the African Charter of Human and People's Rights guarantees every citizen the right to participate in the government of their country, the military has mostly been sidelined in constitution-making processes. In most cases, constitution-making processes have been limited to involvement of politicians, ordinary citizens, and to an extent, the judiciary. As African countries are burdened by low social and economic development levels, suppression of opposition, human rights abuses, poverty, and poor social services, the military in some countries have exploited these democratic deficits to assume the status of savior and seize power without regard to democratic principles. Unless the military participates in the constitution-making processes, they may not understand, respect, support and live within the constraints of constitutional government. More so, coups are not a panacea to the inability of democracy to deliver public goods and security to the people but are the very antithesis of a democratic culture. This paper recommendations the involvement of the military in the constitution-making processes to inculcate a culture of respect for constitutionalism including the rule of law, forge stronger social contracts between citizens and the public, and to enhance trust between the military and civilians in order to curtail undemocratic constitutional changes and unconstitutional changes of government in Africa.

6 Federal constitution-making and amendment – Nico Steytler, Zemalak Ayele and Henry Paul Gichana

According to federal orthodoxy, one of the characteristics of a federation is that its constitution cannot be changed unilaterally by either federal or subnational governments. Thus, the constituent units must participate in any amendment of the constitution, or at least as far as the federal aspects are concerned. Specific rules have developed which prescribe how such participation should take place. In theory a link has been drawn between how federations are formed and the content of constitutional amendment procedures. Notably, where a federation is formed by integration of pre-existing states (a 'coming together' federation) through a foedus (a compact), the constituent units retain a key role in amending that foedus. However, some scholars decry this link when federations are formed by disaggregation, the dominant manner of federation-making since World War Two. The amendment procedures in such federations also include a strong participation role for constituent units so formed by the constitution, often very similar to those of the classic federations.

The topic of constitutional amendments in federal or hybrid-federal countries in Africa has not yet been examined in the literature. Moreover, we do not have any comparative studies on how federations have been formed, and whether the manner in which they were formed correlated in any way with the procedures for constitutional amendment.

This paper addresses two questions: First, has the manner in which African federations (or hybrid-federations) been formed – by either integration or disaggregation – had any influence on the mode of protection relating to the amendment of the constitution in general, and/or of the federal arrangements in particular. Secondly, what do the amendment rules mean in practice? Do they advance the basic principles of constitutionalism and have done so in practice? These questions will be answered with reference to South Africa, Ethiopia, Nigeria and Kenya, Somalia, Sudan and South Sudan.

7 Changing modes of constitution-making and constitutionalism in Africa – Heinz Klug

Constitution making in Africa has taken several paths, but overtime has evolved towards greater public participation and democratically elected constitution-making bodies. This paper will trace these changing forms of constitution making to explore the different factors that have produced each of these forms as well as the effect different forms of constitution making have had on constitutional resilience, if any. At this time, my assumption is that greater degrees of public participation and democratic processes have increased the resilience of constitutions across Africa. However, I also note that despite important democratic interventions, the promise of increasing democratic governance has failed to materialize in several African countries. Furthermore, the resurgence of military coups and extra-constitutional means of resolving intra-elite conflict in several countries suggests that the evolving modes of constitution making may not be advancing the struggle for constitutionalism in Africa to the extent that constitutionalists have imagined. It is hoped, that by exploring the evolution of constitution making forms across a set of African country cases, it might be possible to trace if there is any consistent or enduring relationship between modes of constitution making and efforts to achieve a sustainable African constitutionalism.

8 Unamendability in African Constitutionalism: Democratic Protection, Political Insurance, and Transnational Norm Building – Silvia Suteu

Unamendability has played out in distinctive ways in African jurisdictions. Many of these constitutional settings are transitional, fragile, and emerging from conflict and/or authoritarianism. These conditions interact in unique and at times insidious ways with unamendability. In the aftermath of periods of one-party dominance, we often find the constitutional entrenchment of multipartyism and democratic pluralism. Where the threat of executive aggrandisement and overstay has been most acute, we see eternity clauses adopted as part of the formal constitution to entrench term limits, from Algeria to Tunisia, Burkina Faso to Senegal. This form of unamendability can also play a political insurance role during constitutional drafting, allowing elites to accept the new constitutional dispensation on the understanding that they will not be locked out of power. We have also seen judicial doctrines of unconstitutional constitutional amendment developed by some African courts to capture the cumulative effect of amendments that undermine the constitutional edifice, none more recent than Kenyan courts striking down the BBI package of constitutional amendments in 2021. There are also instances where the protection of amnesties and immunities for past coups was insulated via an eternity clause, such as in Niger. Even where the unconstitutional constitutional amendment doctrine has not been fully embraced, such as in South Africa, courts have nonetheless seriously considered the notion of protecting a minimum democratic core or basic structure of the constitution.

This contribution thus casts a wide net and looks at African jurisdictions from a multitude of legal traditions and illustrating both formal and judicially created unamendability. It analyses them in a transnational context, exploring in particular the ever more sophisticated body of norms developed by regional African organisations to sanction constitutional and democratic backsliding. Finally, this contribution places the African experience in broader comparative perspective, arguing that unamendability in African constitutionalism is fertile ground for deepening our understanding of constitutional entrenchment and democracy.

9 Eternalized Core Provisions in the Constitutions of the Lusophone Countries in Africa and their uncertain Destinies – André Thomashausen

Clauses to exclude certain fundamental principles from constitutional amendment are found in all five lusophone constitutions in Africa. The "eternity clauses" in the Constitutions of Angola, Cabo Verde, Guinea Bissau, Mozambique and São Tomé e Principe were all crafted taking the eternity clause in the Constitution of Portugal of 1975/1989 as a model. In all five African lusophone jurisdictions, the view prevails that the eternity clauses may be subject to amendment even though they impose amendment prohibitions. In the case of Mozambique this is explicitly allowed, albeit subject to a referendum. Constitutional reality and case law are examined and discussed for each of the African lusophone constitutions and their efficacy in protecting constitutionalism is evaluated. The constitutional challenges posed by eternity clauses are identified and contrasted with the classic notions of the common law rule of law.

10 Emerging Standards for Constitutional Change in Africa: National Consensus through Inclusive Majoritarianism – Adem K Abebe

Constitutional amendments in Africa have been used both to advance and to undermine constitutional democracy. In view of the destabilising effects of regressive constitutional amendments, the African Union (and to a lesser extent sub-regional economic communities (RECs)) have established substantive and process standards for constitutional amendments. In addition to compliance with fundamental democratic principles, some of which were adopted outside the context of discussions on constitutional amendments, the principle of national consensus has emerged as the emblem of the continental attempt to establish and sustain legitimate constitutional frameworks. This chapter argues that the continental standards require four cumulative conditions: (1) legality (compliance with the letter and spirit of domestic constitutional requirements for amendment, and continental normative standards); (2) consultative and participatory process; (3) a free and stable political environment; and (4) inclusive majoritarianism, i.e., constitutional amendments must be supported by groups beyond the ruling party or coalition, regardless of their legislative dominance. Inclusive majoritarianism calls for the re-imagination of the traditional reliance on legislative supermajorities, referendums, unamendable provisions and judicial review of amendments that have historically attracted scholarly and political attention. Understood this way, the chapter argues that the emerging continental standards for constitutional change are appropriate and sufficient. Nevertheless, the African Union would need to engage proactively by elaborating, popularising and securing buy-in for the standards, and monitoring and identifying constitutional reform processes and providing technical support and capacity enhancement to reform processes as they happen, rather than reactively criticising reforms or subsequently challenging them in African courts.

11 The Dangers of Judicial Amendments of the Constitution- Lessons from Ghana – Maame A.S. Mensa-Bonsu

Judicial interpretation is a necessary prong of a written constitution. But interpretation is not the same as amendment. There is a line between judicial clarifications of the constitutional text and judicial changes to the constitutional text. In theory, that line is a thick predicate that is easy to locate and takes several steps to cross. In practice, the line may be quite fine. Judicial interpretation is unobjectionable. Judicial changes to the constitutional text, on the other hand, are always dangerous and should therefore be discouraged and guarded against and this is without regard to the outcome. But because the former is not always obviously distinguishable from the latter, the dangers inherent in the latter attend also the former. In this paper, I argue that judicial activism must be treated with the greatest suspicion as an impediment to the constitutionalism effort in Africa. I use Ghana as the illustrative jurisdiction and study a selection of case law from the Ghanaian Supreme Court to demonstrate why constitutional amendments should never proceed from the bench. The selection includes cases where the judiciary's intervention actually improves the text and cases where it does not. In both cases, I argue that the intervention was wrong.

I concede that the antecedents of many African constitutions make it almost inevitable that the judiciary will at some point amend the text. However, I argue that the sheer scope of power this gives the judiciary, and the amount of damage they can do with it make it unwise for us to be accepting of these acts. Rather, we- scholars, lawyers, and the wider society- should be so suspicious and critical of such adventurism- even, or perhaps, especially when the outcome is good- that when faced with invitations or opportunities to amend the constitutional text by judicial reasoning, courts, mindful of the backlash are extremely hesitant to do so. When they do feel constrained to change the text, they will do so with the greatest caution and to the smallest possible degree. To this end, I argue that we must pay close attention to the import of constitutional decisions, not merely the rhetoric of judges. Just because the judges say -and perhaps even truly believe- they are interpreting the constitution does not mean what they produce will always be an interpretation, nothing more. We must therefore be extra vigilant to patrol the borders of judicial authority. In his history of judicial review in the United States of America, Wallace Mendelsohn records how public outcry after perceived judicial overreach made that Supreme Court cautious in its use of its judicial review powers. Admittedly, the parallels are not exact; African Supreme/Constitutional Courts are often expressly empowered by their Constitutions to do what SCOTUS does by arrogated authority. Nevertheless, the American experience on the correlation between public scrutiny and judicial restraint is instructive. Judicial activism, naturally inclined to expansion, enlarges its scope dangerously in the absence of public scrutiny and suspicion.

Ghana's 1992 Constitution is one of the oldest on the continent and the oldest in the subregion. It is the country's first constitution to have lived long enough to have in its service elected officers who were born after it entered into force. What this longevity has introduced into our constitutional experience, is the increased need for the Supreme Court to provide direction as to how to comply with its provisions. With each year that the Constitution survives, new questions about what its provisions mean arise and the Supreme Court is compelled to provide the necessary guidance. In some cases, the court has successfully limited its work to interpreting the constitution. In others, it has allowed itself to be swayed by the objectively problematic or at least inconvenient situation created by the inescapable implications of some of the constitutional provisions. In yet a third line of cases, the court claims to have limited itself to interpreting specific provisions but does not appear to have appreciated how broadly it was amending the text of the constitution. Using cases such as Asare v Attorney-General (the presidential oath) case and Agyei-Twum v. Attorney-General and Akwetey [2005-2006] SCGLR 732, I will demonstrate how

the constitutionalism effort benefits from the court staying faithful to the constitutional parameters of its judicial review power. I discuss the dangers of outcome-focused judicial activism with cases like Ransford France v Attorney-General and the Election Petition case of 2013. Finally, using cases like Asare v Attorney-General (CRC) and GBA v Attorney-General (Supreme Court Judge) cases I illustrate the mutilation done to the constitution when it is interpreted without attention to the integrity of Constitution's text and spirit. The academy, in particular, and the legal world in general should take a magnifying glass to constitutional decisions so that courts do not under the guise of constitutional interpretation engage in judicial adventurism; and thereby make a mockery of the constitutional supremacy without which our constitutionalism efforts will yield little reward.

12 Time to reduce judicial adventurism in South Africa – a case for amending the right to human dignity in the wake of the 'state capture reports' – Lauren Kohn

The SASCA 2022 Call highlights the reality that 'the post-1990 wave of constitutional reforms appears to have provided a contagious fever of making, unmaking and remaking of African constitutions' and often by the unelected judiciary. This has indeed become the case, and the manner, nature and the frequency of these alterations require reflection. This is so because the sustainability of constitutionalism itself is at stake when its basic tenets – such as representative democracy, the separation of powers and the rule of law– come under inevitable strain in this regard. In the South African context of endemic corruption and state capture, in particular, the judiciary has largely been lauded for fostering what has variously been termed a 'democracy-seeking approach to the separation of powers' or 'a tactical separation of powers doctrine'. While the 'outcomes' of these politically sensitive judgments give citizen and legal scholar alike the chance to breathe the proverbial sigh of relief, the 'means' they espouse leave much to be desired. They embody a kind of 'judicial adventurism' and separation-of-powers denialism that is cause for pause. More worryingly, perhaps, these cases confront us with deeper questions about constitutionalism, and the value of honest adherence to the first-principles of a supreme Constitution. This judicial mode of constitution-making is concerning in that it may, if disingenuously, threaten the very the public interest and good governance that these judgments seek to vindicate. This has become a perennial problem and is not unique to South Africa. In turn, this raises complex debates about the implications of judicial review and notably, the judicial role within a constitutional democracy.

Against this backdrop, my contribution considers two astounding judgments of the South African Constitutional Court at the pre- and post- 'Zuma-year book-ends' of democracy to-date. The most recent judgment is that of Sonke Gender Justice NPC v President of the Republic of South Africa, which concerned a challenge to the constitutional validity of sections of the Correctional Services Act, 1998 and held that they were invalid for failing to ensure an adequate level of independence for the Judicial Inspectorate for Correctional Services ('JICS'). This judgment builds on the foundations rather stealthily (if cleverly) laid in Glenister v President of the Republic of South Africa. Ultimately, they both rely on international law, the principles of accountability and transparency, and thereby a reading-in of a general requirement of reasonableness into section 7(2) of the Constitution. The majority in Glenister draws on the constitutional 'scheme taken as a whole'; a scheme which 'takes into its very heart obligations…and makes them measures of the state's conduct in fulfilling its obligations in relation to the Bill of Rights'. It concludes that the 'statutory structure creating the DPCI offends the constitutional obligation resting on Parliament to create an independent anti-corruption entity, which is intrinsic to the Constitution itself'. Sonke picks-up where Glenister left-off and displays an even more startling trajectory of judicial reasoning. Again, what is relied upon is that which is apparently 'intrinsic' to the Constitution. Instead of considering whether the impugned legislative provisions (un/)justifiably infringed the rights of arrested, detailed and accused persons via the carefully calibrated section 36 limitations clause, the court again draws from 'the overarching standard of reasonableness imposed by section 7(2) to hold that the establishment of the JICS without an adequate level of independence did not constitute a 'reasonable step to protect the rights of incarcerated persons'. This article analyses these judgments and presents an argument for the development of clearer parameters for the judicial role as they unenviably grapple with its boundaries.

13 The eternity clause in CEMAC countries: between promises and weaknesses – Abdou Khadre DIOP

This paper reflects on the relevance of eternity clauses through a case study of the countries of the Central African Economic and Monetary Community (CEMAC). The Constitutions of all CEMAC countries include provisions that declare certain fundamental characteristics of the state, of human rights commitments and/or of executive term limits immutable. Such clauses may be read as indicators of what constitutional designers have considered to be "the public good of constitutionalism". However, beyond the promise of the so-called eternity clauses, it appears that these countries continue to be characterized by a high level of constitutional instability due to the frequency of constitutional change and coups. In this regard, this paper intends to critically examine the concept of unamendability, which is touted as a legal tool designed to entrench constitutional values and principles, in light of the practical realities of CEMAC countries. In this examination, the paper begins with an analysis of the scope of eternity clauses in the countries under study in order to shed light on how they are formulated and the areas in which they are expressed. It then confronts the concept of unamendability with the practical realities in order to identify the different ways in which political leaders seek to subvert or circumvent eternity clauses. The paper then discusses the role of the judiciary in upholding these clauses through an analysis of its competence or incompetence to deal with constitutional amendment and an analysis of case laws where courts have had to directly or indirectly interpret the eternity clauses. In concluding, it is contended that the promises of eternity clauses are not being fulfilled in reality because of weaknesses in their wording, normative value, and theoretical relevance. All this justifies the exploration of other options to better ensure constitutional stability.

14 The Basic Structure "Doctrine" and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism? – Migai Akech

This paper has two objectives. First, it evaluates the application of the basic structure doctrine by three Kenyan courts to determine the constitutionality of the Constitution of Kenya Amendment Bill 2020. It contends that while the High Court and the Court of Appeal were unduly adventurous and wrongfully asserted that the basic structure doctrine was applicable in Kenya thereby frustrating an arguably necessary process of constitutional change, the Supreme Court adopted a restrained approach that appreciated that courts should limit their role to facilitating such political processes and ensuring that they are participatory and deliberative. From this perspective, courts should only invalidate constitutional amendments where they are enacted through processes that do not adhere to a constitution's provisions on how it can be amended. Second, the paper analyzes how the three courts dealt with the question of public participation in constitutional amendment initiatives. In this respect, the paper argues that the Supreme Court's test for the adequacy of public participation in such initiatives is subjective and could be used to frustrate arguably participatory constitutional amendment processes or approve amendment processes that are not sufficiently participatory, depending on the inclination of the judges. In either case, the test, therefore, enables the courts to inappropriately approve or decline amendments to the Constitution.

15 Constitutional Amendment and Alterations in Ethiopia – Fiseha Assefa

Constitutions must stand the test of time. They have to remain stable by setting general principles but must also change with time and adapt to the new demands in society. They have to respond to changing realities without losing their basic foundations. Constitutional amendment and alterations are the means to balance the need for stability and change in constitutions. Ethiopia adopted a federal constitution in 1995 but has not formally amended its constitution despite demands to that effect. One has to ask then, how has the constitution adapted itself across time? This chapter demonstrates that although the constitution has not been formally amended, significant changes to the text have been made through policy design, decision of main political organs including the ruling party and through interpretation. There is departure from the constitutional text as it was adopted in the area of concurrent tax, the number of constituent units, term limits, federalism and self-government and all these changes have come informally through practise and interpretation. Ideology, party structure and personal rule have displaced the essential parts of the written constitution. Certainly, not all changes made to the text can be considered valid and constitutional. The power to amend is by its nature limited and cannot do away the essence of the constitution that belongs to the people. The system of constitutional review is one avenue of checking the validity of such adaptations. Yet this has not been the case in Ethiopia as the interpreter in most cases aligned itself with power holders.

16 Governing a country beyond its constitution: reflection on informal constitutional change in DR Congo – Balingene Kahombo

The 2006 constitution of the Democratic Republic of the Congo (DRC) has established a constitutional democracy and contains strong unamendable clauses under article 220 to prevent any setback towards authoritarian governance. Among others, it guarantees the separation of powers, parliamentarism, and puts in place a politically and administratively decentralized territorial organization. However, constitutional practices seem to demonstrate the extent to which the value of the formal constitution has diminished in so far as many of its provisions are not complied with, including those which are not susceptible of revision. They are rather replaced by practices that appear to shape a kind of new constitution governing the functioning of the state. In other words, this informality signals that state governance does not necessarily follow the formal constitutional provisions but conforms to practices which may be viewed as remote compared to the original constitution. It is the aim of this research project to identify and examine these practices and assess their implications on the health of democracy and constitutionalism in the DRC. In so doing, the study will provide a conceptual framework of the notion of informal constitutional change, its origin, justification and its legal limits in the context of the DRC. It will highlight the role of actors who foster practices leading to such a change. The paper will help understand why, in some instances, informal change prevails over the revision the relevant provisions of the formal constitution pursuant to the procedure it provides for, even though the said change does not imply a wide adherence or acceptance by the political class or the public opinion.

17 Citizens' activism against constitutional change and the protection of constitutionalism in Kenya: A demonsprudential analysis of the Building Bridges Initiative – Marystella Simiyu and Trésor Muhindo Makunya

Constitutional amendments are an inherently democratic process that aim to ensure that constitutions adapt to the evolving issues in society. However, this process is vulnerable to manipulation and take over by those in leadership positions to consolidate their power. This makes the checks against unconstitutional constitutional amendments enshrined in modern African constitutions ill-equipped to stop attempts to alter the constitution. One of the important safeguards that can potentially prevent amendments that violate basic principles of constitutionalism, but which has received little attention in the existing African constitutional literature, is the role of collective action by citizens, civil society organisations and social movements. By operating outside the sphere of power and controlling their own human and financial resources, they insulate themselves from political interference and strengthen their capacity to defend and protect the democratic order. Modern African constitutions have established normative and institutional frameworks that collective action can draw upon to exert maximum pressure on those who seek to change the constitution. This chapter looks at recent attempts to amend one of Africa's most progressive and transformative constitutions, the 2010 Constitution of Kenya, through the Building Bridges Initiative (BBI), to examine the impact of collective action in preventing constitutional change. Drawing on the historical events that characterised Kenya's constitution-making process and shaped the Kenyan culture of preventing opportunistic constitutional amendments, the chapter analyses the potential effects of extra-institutional mobilisation and collective action through institutional channels. The chapter concludes by noting that while amending a constitution is a natural democratic process, the will of the people must be given primary consideration to ensure that they do not undermine the principles of constitutionalism on which the constitution is based.

18 The complex path of constitution-building in post-conflict contexts: The case study of Libya – Rania Khafaga

This study addresses the important issue of constitution-building in post-conflict contexts. It highlights the close relationship between constitution building on the one hand and the broader political processes on the other hand. The study builds on the assumption that our understanding of constitutional processes in post-conflict contexts should not only look at the content of the constitution per se, but should rather take into consideration the broader process that include among other things: building consensus on the frameworks governing the process, mechanisms that are assigned the task of constitution-drafting, role of international actors, nature of public participation, and finally the adoption and enacting of the final constitution.

The importance of constitution-building in post- conflict contexts stems from the fact that the major conflict issues that parties attempt to resolve and find consensus on, are the very same issues that the new constitution should incorporate. These issues include the form of the state, type of political system, state institutions, dealing with the past, and power and wealth sharing. In this sense, the new constitution which is also a new social contract in the countries emerging from conflict plays a role as a tool in peacebuilding and sometimes conflict transformation.

Against this backdrop, this paper addresses transitional constitutionalism that highlights the specific nature of constitution building in countries emerging from conflict that differs from constitution making in stable states. It also highlights the complex links between constitutional processes on one side and peacebuilding on the other with a special reference to the Libyan Case.

The paper is organized in two main parts. The first addresses the main issues pertaining to constitution-building in post conflict contexts, mainly: the links between constitutional processes and conflict resolution and peacebuilding processes, the role of international actors, and the public participation in the process.

The second Part is dedicated to the Libyan case study as an example of constitution-building processes in post-conflict contexts, analyzing the legal frameworks that organized the process since 2011, as well as the most prominent issues that were and continue to be controversial during the constitution-building process namely federalism, state identity

and minority rights, and finally the relationship between the constitution-building process and the broader process aimed at finding a political settlement to the conflict in Libya.

19 Arbitrary Constitutional Changes and the Failure of Constitutionalism and Rule of Law in South Sudan – Joseph Geng Akech

This paper discusses implications of constitutional changes on constitutionalism and rule of law in South Sudan. It argues that the manner in which the Transitional Constitution was crafted and the provisions granting certain powers to the president to dismiss elected officials and judicial officers have a correlation with the resulting political instability and democratic backsliding. The paper recommends entrenchment of certain provisions in the 'permanent' constitution to safeguard against arbitrary constitutional changes in the future. These include making it hard for the executive to amend certain core elements of a constitution, for instance, changing the system of government, number and boundaries of sub-national units, the independence of judiciary and changes interfering with the powers of legislature. The 'permanent' constitution should also establish and entrench rule of law and oversight institutions similar to the chapter 9 institutions in the South African Constitution which are the breath and health of a functioning democracy.

20 Constitutional change in Malawi since 1994: Dicing with stability and change? – Mwiza Jo Nkhata

The Constitution of the Republic of Malawi (the Constitution) was adopted in 1994, initially for a provisional period of one year. After the lapse of the provisional period of operation, the Constitution entered into definite operation in 1995. Amendments to the Constitution can be undertaken by the National Assembly provided they comply with the stipulations in Chapter XXI. The scheme in the Constitution attempts to balance rigidity and flexibility by making some of provisions relatively easier to amend while imbuing others with a measure of rigidity. In the twenty-eight years that the Constitution has been in force, a wide range of amendments have been adopted. Many of the amendments were necessary in order to rectify clerical errors, resolve ambiguities and, generally, to improve the text of the Constitution. At the same time, however, some amendments were motivated by opportunistic tendencies. Almost universally, amendments in the latter bracket have also not been in support of democracy, constitutionalism and the rule of law. While the bulk of the constitutional amendments in Malawi have been through the legislative avenue, a few amendments can be said to have been initiated by the judiciary or even informally adopted. The practice of constitution amendments in Malawi reinforces the truism that it is on the citizenry that the ultimate responsibility for safeguarding the Constitution and constitutionalism lies. In Malawi, this is especially true given that political parties, notwithstanding their key role in relation to constitutional amendments, have proven to be duplicitous guardians of the Constitution.

21 The Importance of Process in Constitutional Reforms: The Case of Lesotho – Hoolo 'Nyane

This paper analyses the various phases of constitutional reform in Lesotho. The country is currently in a drawn-out process of constitutional reform that started in 2012. The process has been plagued by many false starts. The country is struggling to implement the constitutional changes, which are greatly anticipated locally and internationally. This struggle has many causes: a critical one is the instability of government where the country has seen no fewer than five governments in a period of ten years. Another significant challenge for the reform project is that the process is not clear. While there is some semblance of consensus about the reform areas, there is a lack of clarity and consensus about the process of implementing such thoroughgoing changes to the Constitution. The problem has also been compounded by a lack of consensus about the country's vision of the Constitution.

22 The tendency to undermine democracy in Africa through constitutional change. How the African Union can help in turning the tide? – Cristiano d'Orsi

The recent democratic openings in Africa have been supported by constitutional changes. Africa's contemporary constitutions legalize opposition parties, impose term limits on presidential tenure, grant independent courts constitutional review authority, and guarantee important civil and political liberties. In the history of postcolonial Africa, these liberal concessions are unique, and albeit they are quite young, they have already survived previous attempts at political liberalization. Notably, presidential term limits introduced in recent reforms have successfully ended the tenure of a growing number of Africa's presidents, thus helping to establish a new tradition of systematic political succession.

In spite of such progress, the general constitutional scenario in Africa is not always so positive. In this regard, I notice that one of the main themes of constitutional analysis in Africa is on the diverse forms of changes to constitutions, several being legal and several being illegal. Over the years, the African Union (AU) and the Regional Economic Communities (RECs) have, particularly after the 1990s, frowned at unconstitutional changes of government, very often when they result from coups.

A typical example of illegal changes of constitutions in Africa consists in the removal of term limits for a president, in a manner that was not contemplated by the same constitution. As such, in my work I am focusing on these changes in the constitutions in order to extend presidential terms: I am wondering how often this has happened and what has been the impact of these situations on African constitutionalism. Against this backdrop, while the AU and RECs shout when there is a coup, they have often remained silent when an incumbent president changes the constitution in an illegal manner to retain power. The core of my work is not to reflect on the issue of repeal of term limits or other changes per se; it is rather to reflect on the illegal manner in which these situations are carried out and the failure of the AU and RECs to condemn them.

This paper sheds light on the complicated relations between the AU (and its organs), the African sub-regional organizations and the African sovereign states in order to try to turn this tide of constitutional amendments to extend presidential terms.

PARTICIPANTS

Title	Last name	First name	Affiliation	Country	Participation
Dr	Abdulrauf	Lukman	University of Ilorin	Nigeria	Virtual
Dr	Abebe	Adem K	International IDEA	The Netherlands	Virtual
Prof.	Akech	Migai	University of Nairobi	Kenya	In-person
Dr	Akech	Joseph	University of Juba	South Sudan	Virtual
Dr	Ayele	Zemelak	Addis Ababa University	Ethiopia	In-person
Prof.	Böckenförde	Markus	Central European University	Austria	Virtual
Dr	Diop	Abdou Khadre	Universite Virtuelle du Senegal	Senegal	Virtual
Dr	D'Orsi	Cristiano	University of Johannesburg	South Africa	Virtual
Dr	Ezekwesili	Obiageli	Human Capital Africa	Nigeria	Virtual
Prof.	Fessha	Yonatan	University of the Western Cape	South Africa	In-person
Prof.	Fiseha	Assefa	Addis Ababa University	Ethiopia	Virtual
Prof.	Fombad	Charles	University of Pretoria	South Africa	In-person
Dr	Gichana	Henry Paul	University of the Western Cape	Kenya	In-person
Prof.	Groenewald	Johann	Stellenbosch Institute for Advanced Study	South Africa	In-person
Dr	Kahombo	Balingene	University of Goma	DRC	Virtual
Prof.	Kante	Babacar	University Gaston Berger	Senegal	Virtual
Dr	Khafaga	Rania Hussein	Cairo University	Egypt	In-person
Prof.	Kirumira	Edward	Stellenbosch Institute for Advanced Study	South Africa	In-person
Prof.	Klug	Heinz	University of Wisconsin Law School	USA	Virtual
Ms	Kohn	Lauren	University of Cape Town	South Africa	In-person
Prof.	Kuwali	Dan	Malawi University of Science and Technology	Malawi	In-person
Dr	Makunya	Trésor	University of Pretoria	RSA / DRC	Virtual
Prof.	Matlosa	Khabele	University of Johannesburg	Lesotho	Virtual
Dr	Mensa-Bonsu	Maame A.S.	The London School of Economics and Political Science	United Kingdom	Virtual
Prof.	Murray	Christina	University of Cape Town	South Africa	In-person
Prof.	Nkhata	Mwiza	University of the Free State	Malawi	In-person
Prof.	'Nyane	Hoolo	University of Limpopo	South Africa	In-person
Dr	O Drisceoil	Macdara	Irish Rule of Law International	Malawi	Virtual
Dr	Phorego	Molefhi	Nelson Mandela University	South Africa	In-person
Dr	Rothenberger	Stefanie	Konrad Adenauer Foundation	Kenya	In-person
Ms	Simiyu	Marystella A	University of Pretoria	South Africa	In-person
Dr	Socher	Johannes	University of Pretoria	South Africa	In-person
Dr	Solomon	Dionne	University of Pretoria	Botswana	In-person
Prof.	Steytler	Nico	University of the Western Cape	South Africa	In-person
Prof.	Suberu	Rotimi T	Bennington College	USA	In-person
Prof.	Suteu	Silvia	University College London	United Kingdom	Virtual
Prof.	Thomashausen	André	UNISA	South Africa	In-person