

Syllabus

for the

CEU Summer Course on Constitution Building in Africa

Faculty:

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CEU Legal Studies

June 30- July 11, 2014
Budapest

The readings indicated in the syllabus as well as recommended primary texts are to be accessed through the
CEU - Summer University E-learning center at <http://sunlearning.ceu.hu/> .

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History has seen several waves of constitution-building in the 20th century with an unparalleled boom starting in the 1990ies after the fall of the Berlin wall. Africa was as strongly affected by this as anywhere else but, by the mid-1990s, real constitutional change was proving more difficult to secure than had originally been hoped. Nonetheless, civil society activists, politicians and international actors in Africa have continued to pursue constitutional reform and constitution building as a means of securing democracy and human rights. In 2011, the 'Arab Spring' extended these initiatives into North Africa. Over the last 25 years, the successes and failures of constitution-building processes have given rise to a range of new ideas about the nature and purpose of constitutions and constitution-making, constitutional solutions to contemporary problems, and the proper role of international actors.

The two-week course intends to tackle complex social, political and legal problems in constitution-building from an interdisciplinary perspective, informed by academic excellence and field experience. We seek to combine different disciplines (mostly comparative law and political science) and perspectives (comparative governmental systems; electoral systems; decentralization; human rights; comparative constitutional law; good governance; etc) to offer new insights on a classic subject of the highest academic and practical relevance.

The course has four distinct parts: I. Discussion and analysis of relevant issues from an academic perspective; II. Practical work on real and hypothetical examples; III. A two days conference also open to former course participants and the interested public; the conference does not follow the classic panel design, but relies rather on an interactive debate and exchange of views; IV. Two sessions dealing in depth with selected issues.

The course will address the subject from different angles, all of them related to specific challenges in Africa. The first one highlights constitutionalism in Africa in general, the different roles and meanings of a constitution, and the merits and risks of constitutional borrowing. The second angle discusses relevant questions on identifying an adequate process in which constitutions are built: New constitutions often follow conflict, loaded with the expectation to herald a new era of peace and democracy, leaving behind authoritarianism, despotism; political upheaval or even civil war. How to sufficiently acknowledge the challenges deriving from specific contexts in the process? This angle will also discuss the role of external/international influence in constitution building processes. The third angle of the course addresses how constitutional designs respond to competing claims, be they religious, ethnic, linguistic, and how they accommodate different stakeholders, how they tame the executive, introducing instruments of checks and balances, establishing judicial review, and how constitutions aspire to prevent stalemates and promote gender equality. Finally, taking in to account the fact that the management of constitutional change and maintenance of constitutional stability are ongoing problems, the course will explore the issue of transitional arrangements, constitutional implementation, and review as part of the constitutional building process.

The course is designed to be a forum for exchange and mutual learning for scholars and practitioners from the civil sector, from public administration, from regional and international institutions. A participant who has successfully completed this course should

- Understand the roles that new Constitutions may play in a variety of national circumstances in Africa;
- Understand the implications of the contexts in which constitution-building occurs, for both process and substance;
- Understand the phases of constitution-building, the issues likely to require resolution in each phase, and the options for dealing with them;
- Be able to assess the principal options available to any state building a new Constitution, in terms of both process and substance;
- Understand and be able to assess the implications of internationalisation in all its forms for constitution-building and having an informed view on the difficulties of transferring the constitutional experience of one state to another, both generally and in the context of constitution-building;
- Be familiar with the constitution-building experiences of various African countries and be able to assess their significance for the subject as a whole;

Monday, 30th of June 2014

| Session 1: Putting Constitution Building in Context | | |
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| SESSION | ACTIVITY | COMMENTS |
| 09:00 – 10:15 1.0 | Welcome remarks; introduction of participants; sharing of expectations; introduction to the course; | As part of their individual introduction, participants are asked to name one ongoing CBP process they are most aware of and to identify the biggest challenge in that process. |
| 10:30 – 12:15 1.1 Format: Lecture + Plenary Discussion | <p>Constitution Building in Africa: From Decolonialization to Conflict Resolution</p> <p>HK Prempeh, Africa’s “Constitutional Revival”: False Start or New Dawn? 5 International Journal of Constitutional Law 1 (2007)</p> <p>A Sajo: Limiting Government (1999), Ch.1: The Constitution as Fear and Acceptance (pp. 1 -49);</p> <p>Background reading:</p> <p>H.W.O. Okoth-Ogendo, Constitutions without Constitutionalism: Reflections on an African Political Paradox. In: D. Greenburg et. al., Constitutionalism for Democracy – Transition in the Contemporary World, OUP 1993</p> | <p>In Africa, the process and timing of constitution building differed considerably depending on the former colonial masters. Thus, the first part of the lecture briefly highlights the dynamics in the former British, French, and Portuguese colonies and identifies respective commonalities in those groups of countries.</p> <p>Participants will consider whether or not African countries kept the constitutional patterns / governmental systems of their colonizers and why. They will realize that almost all former British colonies departed from their Westminster style Lancaster Constitutions, whereas most former French / Portuguese colonies cleaved to the patterns of their former colonizers. However, hardly any of the African countries have changed their legal system despite of religion driven adjustments.</p> <p>The second part of the lecture focuses on the challenge of African countries to establish a constitutional setting within territorial boundaries that had been artificially drawn by the colonial masters. But it also highlights the nature of “home-grown” conflicts</p> <p>Discussion points: +What –according to the authors- caused the initial choice of authoritarianism over constitutionalism in postcolonial Africa?</p> |

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| | | <p>+ What are the constitutional achievements of the reform processes starting from 1990ies according to HK Prempeh? And what elements of the old regimes survived?</p> <p>+ What are the reasons –according to HK Prempeh- for the partial survival of those structures?</p> <p>+ From your own experience: Can you agree with the findings of the author? Where do you disagree?</p> <p>+ In how far are the fears of post-communist countries described by A. Sajo also valid for some African countries and in how far they are different?</p> |
| <p>13:45 – 15:00</p> <p>1.2</p> <p>Format: Plenary Discussion</p> | <p>"How (Not) to Write an African Constitution: Reflections on Ghana's Current Constitutional Review"</p> <p>Video of panel at National Endowment for Democracy (NED) on "How (Not) to Write an African Constitution: Reflections on Ghana's Current Constitutional Review" on June 8, 2011 with Kwasi Prempeh, Larry Dimond and Marc Plattner, at http://vimeo.com/album/1619135.</p> | <p>Yash Ghai will comment on statements made in the movie before question and answers are raised.</p> |
| <p>1.3</p> <p>Format: Small Working Groups</p> | <p>Mapping Constitution-Building Processes in Africa</p> <p>Participants identify on-going constitution-building processes in Africa and determine their cause</p> <p>Groups along countries with CBP processes Preparation of a questionnaire to be filled by students, asking specific questions on process. Reconvening in plenary and sharing the experiences from questionnaire</p> | <p>Participants will be encouraged to highlight each other's attention to key themes or characteristic processes in national settings they are most familiar with.</p> <p>We expect to use knowledge generated in the mapping exercise to serve as a backdrop for group exercises in the course of the week.</p> |

Tuesday, 1st of July 2014

| Session 1 (cont'd): Putting Constitution Building in Context | | |
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| SESSION | ACTIVITY | COMMENTS |
| 09:00 – 12:30 1.4 | Debriefing the Constitution Mapping Exercise | <p>Participants will present their findings of the mapping exercise and discuss the various.</p> <p>Participants will also discuss in how far the five sources of variation in constitution-building processes as identified by H. Kluge in</p> <p>H Klug: South Africa's Experience in Constitution-Building, Univ. of Wisconsin Legal Studies Research Paper No. 1157 (2011), 18-44.</p> <p>were relevant in the respective case studies.</p> |

Session 2: Constitution Building Processes

| SESSION | ACTIVITY | COMMENTS |
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| <p>14:00 – 15:15</p> <p>2.1</p> <p>Format: Lecture + Plenary Discussion</p> | <p>Tasks in Constitution Building Processes</p> <p>Participants will be encouraged to share examples and experiences, enriching the lessons from the mapping exercise.</p> <p>Y Ghai - G Galli: Constitution Building Processes and Democratization, in: International IDEA's handbook Democracy, Conflict and Human Security: Further Readings (2006), pp. 1 – 24</p> <p>C Murray, C Kirkby, Constitution-Making in Anglophone Africa: We the People?. pp. 1-17</p> <p>D Horowitz, Conciliatory Institutions and Constitutional Processes in Post-Conflict States, 49 William and Mary Law Review (2008), 1213-1248</p> <p>Background Reading: J Elster, Forces and Mechanisms in the Constitution-Making Process, 45 Duke L.J. 1995-1996, pp. 364-396</p> <p>M Brand et al., Constitution making and Reform: Options for the Process (2011) (pp. 13-30)</p> <p>J Gluck, B Ballou, New Technologies in Constitution Making, USIP Special Report, April 2014</p> | <p>Revising a constitution or drafting a new one is a difficult task putting different questions on the table, such as:</p> <ul style="list-style-type: none"> + What are the potential sources of constitutional legitimacy? + On what sources of legitimacy does each of the case studies rely? + The relevance of constitutional continuity for this purpose + To what extent is the approval of the 'people' essential and how might it be manifested? + When does a Constitution-making process begin? + What were the parameters of the Constitution-making process in each of the case studies? + How were these parameters set? + By whom were they set? + To what extent were the answers to these questions dictated by practical circumstances? + To what extent are such parameters binding, legally or in practice? + What kind of modern technologies may support constitution building processes? What are potential challenges? |

| Session 2 (cont'd): Constitution Building Processes | | |
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| SESSION | ACTIVITY | COMMENTS |
| <p>15:40 – 17:30</p> <p>2.2</p> <p>Format: Lecture + Plenary Discussion</p> <p>Participants share their own experiences in short 5 minutes statements</p> | <p>External Impacts I: The influence / impact of the international community in constitution building processes</p> <p>Participants shall exchange views in how far external institutions participated / dominated the constitution-building process in their countries and whether it had a positive / negative impact.</p> <p>Ph. Dann – Z. Al-Ali, The Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor, Max Planck Yearbook of UN Law (2006) 423 – 463.</p> <p>S. Chesterman, Imposed Constitutions, Imposed Constitutionalism, and Ownership, Conn. L. Rev. 947 2004-2005</p> <p>S Kendall, Constitutional Technicity”: Displacing Politics through Expert Knowledge, Law, Culture and the Humanities 2013, 1-15.</p> | <p>Every constitution making process is influenced in some way by the international community. In Africa this influence is often very strong as governments and other actors rely on international donors to fund their constitution making activities, and foreign donors seek to pursue a variety of interests through their role. When constitution-building follows conflict, international organizations may also play a significant role, in determining both processes and outcomes. Gaining an understanding of potentially positive and negative aspects of international involvement and sharing experiences is an important prerequisite to understand the challenges of constitution building in the region.</p> <p>Discussion points (also with reference to the case studies):</p> <ul style="list-style-type: none"> + At what points and in what ways might the international community affect the process of constitution-making? + Who is the ‘international community’ for this purpose? + Is the phenomenon new or different in contemporary constitution-making experience? + What forms of external influence affected the constitution-making process in each of the case studies? + What is the effect of international involvement on concepts of constitutional legitimacy? |

| Session 2 (cont'd): Constitution Building Processes | | |
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| SESSION | ACTIVITY | COMMENTS |
| <p>09:00 – 10:15 2.3</p> <p>Format: Lecture + Plenary Discussion</p> | <p>External Impacts II: Merits and Challenges of Constitutional Borrowing</p> <p>‘Borrowing’ and ‘migration’ are just two metaphors used in the literature to describe trends in constitution building. These key notions will be discussed in light of experience from practice.</p> <p>M Tushnet, Some Scepticism about Normative Constitutional Advice (2008) 49 <i>William and Mary Law Review</i> 1473</p> <p>T Fleiner and C Saunders, Constitutions embedded in different legal systems, M Tushnet et al., Routledge Handbook of Constitutional Law, 21-32</p> <p>SC Justice RB Ginsburg to Egypt: I would not look to US Constitution http://www.youtube.com/watch?v=KuMXqcK4Nrg</p> <p>T Ginsburg, S Chernykh & Z Elkins, Commitment and Diffusion: How and Why National Constitutions Incorporate International Law, <i>University of Illinois Law Review</i> (2008), 201</p> <p>Background reading: G Frankenberg, Comparing Constitutions: Ideas, ideals, and ideology – toward a layered narrative (2006) 3 <i>International Journal of Constitutional Law</i> 439</p> | <p>A central element of the course is the comparison of different constitutional options selected by different countries. As stimulating those comparisons might be in an academic sphere, if it comes to constitution building one should reflect the different effects that imported option from other countries may have. For instance, civil law institutions like a constitutional court might not fit well into the system of a country based on common law doctrine. In short: this session should highlight the importance of context in constitution building.</p> <p>Discussion points:</p> <ul style="list-style-type: none"> + In what ways might international law influence the process or substance of constitution-making? + What difficulties do these two readings suggest for the role of foreign experts in constitution-making processes? + Is the substance of constitutions tending to converge as a result of globalisation? + If there are (still) significant differences between constitutional systems, what conclusions can be drawn for the way in which international assistance should be provided? + How does transnational constitutional influence work? |

Session 2 (cont'd): Constitution Building Processes

| SESSION | ACTIVITY | COMMENTS |
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| <p>10:30 – 12:30</p> <p>2.4</p> <p>Format: Lecture + Plenary Discussion</p> | <p>Public Participation in Constitution Building Processes</p> <p>Background reading: A Banks, Expanding Participation in Constitution Making: Challenges and Opportunities, 49 Wm. & Mary L. Rev. 1043 (2008)</p> <p>D Moehler, Distrusting democrats: outcomes of participatory constitution making, University of Michigan Press 2008, chapter 6 (Participation, constitution-making, and democracy), 221- 240</p> <p>Y Ghai - G Galli / C Murray-C Kirby (see above under 2.1)</p> | <p>This part discusses the different ways, options, and challenges of including “the people” into the process of constitution building. It considers the need for participation to increase legitimacy, the relationship between public participation and elite deals, the dangers of public participation processes being misused, and the challenge to keep the participation focused on the actual constitutional issues. In addition, the question of how to manage the outcomes of public consultation processes will be considered.</p> <p>Key questions to be addressed are:</p> <ul style="list-style-type: none"> + At what point(s) were/are the public involved in the constitution-making processes in the case studies? + What lessons can be drawn from these experiences? + What is the rationale for public involvement, from an internal point of view? + Is there a (human) right to public participation in democratic, including constitution-making processes? + How can public participation best be structured to ensure credibility? + What are the limits and pitfalls to public participation? |

| Session 2 (cont'd): Constitution Building Processes | | |
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| SESSION | ACTIVITY | COMMENTS |
| 14:00 – 15:15 2.5 Format: Lecture + Plenary Discussion | Does Process matter? T. Ginsburg et al., Does the Process of Constitution-Making Matter? , Annu. Rev. Law Soc. Sci. 2009. 5:201–23 J Weatley, Constitution-Making in West Africa: Keeping the President in Check , in: J Weatley and F Mendez, Patterns of constitutional design: the role of citizens and elites in constitution-making, Ashgate, Farnham 2013, 69 -87. | There is much speculation but relatively little evidence about the impact of different design processes on constitutional outcomes. In the first part of this sub-session, the central findings of T. Ginsburg's paper are identified and analyzed. In the second part, participants discuss in depth the actual relevance of process design for the strength and viability of a constitution, also making reference to the article of Weatley. |
| 15:45 – 17:00 2.6 Format: Movie + Plenary Discussion | Movie: Elections in Africa | Watching the movie followed by discussion |

| Session 3: Interim Constitutional Arrangements | | |
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| SESSION | ACTIVITY | COMMENTS |
| <p>09:00 – 10:15</p> <p>3.1</p> <p>Format: small group work + debriefing in the plenary</p> | <p>M Brand et al., Interim Constitutional Arrangements, in: <i>ibid.</i>, Constitution making and Reform: Options for the Process (2011) (pp. 67-74).</p> <p>Implementation Schedule of the Power Sharing Agreement of the Comprehensive Peaceagreement, Sudan</p> <p>B Sihanya, Constitutional Implementation in Kenya, 2010-2015: Prospects and Challenges, Occasional Paper Series FES 2011</p> <p>Background Reading:</p> <p>A Arato, Interim Imposition, Ethics & International Affairs 18, no. 3 (2004)</p> | <p>Often, post-conflict constitutional developments do not end in a final constitutional document, but follow a two or even more steps approach.</p> <p>Participants will identify the different <i>models</i> that are available, their respective purposes, and the kind of challenges they are facing.</p> <ul style="list-style-type: none"> + What types of transitional agreements can be identified? + What are their merits & challenges in the African context (South Africa, Egypt, Sudan, Somalia)? + When does a Constitution-making process begin? + In what ways might preliminary decisions be influenced by action at the international level? + What are the legal constraints on international actors during these phases? |
| <p>10:45 – 12:30</p> <p>3.2</p> <p>Format: Lecture + Plenary Discussion</p> | <p>N Cheeseman and B Tendi, Power-sharing in comparative perspective: the dynamics of ‘unity government’ in Kenya and Zimbabwe, <i>Journal of Modern African Studies</i> 2010, pp 203 – 229; relevant for the discussion: 203-207; 218-226</p> | <p>The first part of this sub-session introduces into the concept of Interim Constitutional Arrangements.</p> <p>The second part explores in how far post-conflict “unity-governments” might be considered a new kind of interim arrangements “made in Africa”</p> |

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| | <p>+ Reserve time / Time for individual consultations of participants with faculty members.</p> | <p>Experience from last year's summer course tells that some of the topics are very intensely debated and participants regretted not to have had more time for discussion. This slot serves as a buffer and provides the opportunity to have individual communication with faculty members.</p> |
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Friday, 4th of July 2014

| Session 4: Conference Session on selected issues of constitution building | | |
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| 09:00 – 09:30 | Welcome to the new faculty members / alumni; mutual introduction | |
| SESSION | ACTIVITY | COMMENTS |
| 09:30 – 12:30 See agenda | <p>Constitutional Implementation</p> <p>Background readings:</p> <p>Y Ghai, Chimera of constitutionalism: State, economy, and society in Africa (unpublished, part of the reader)</p> <p>P Burnell, The Relationship of Accountable Governance and Constitutional Implementation, with Reference to Africa. In: Journal of Politics and Law, Vol. I No. 3 (2008), 10-24.</p> <p>J Cotrell and Y Ghai, Maintaining the Role of a Constitution. International IDEA, Creating the New Constitution – A Guide for Nepali Citizens, Stockholm 2008, 249-264.</p> <p>B Sihanya, Constitutional implementation in Kenya, 2010-2015: Challenges and Prospects, FES Kenya Occasional Paper, No. 5, Nairobi 2012</p> <p>Implementation Modalities of the Comprehensive Peace Agreement, Sudan</p> <p>T Ginsburg and A Huq, What can Constitutions do? The Afghan Case, Journal of Democracy 2014, 116-130</p> | <p>It is one thing to make a constitution. It is quite another to breathe life into a constitution—to have it become a living, vibrant document that is used for effective governance, for controlling the exercise of state power, and for promoting the values and aspirations expressed in the constitution, to have it become a powerful tool that is used by the people to improve their lives. The fortunes of a constitution are shaped by many factors: personalities and elites, political parties and other organizations, social structures, economic changes, traditions of constitutionalism—and by the rules and institutions in the constitution itself. (Cotrell/Ghai)</p> <p>This session briefly discusses factors that influence the fortunes of a constitution and how its objectives can be achieved, including the role of independent institutions, or constitutional interpretation, of protective mechanisms, and of constitutional amendments.</p> <p>Agenda:</p> <ul style="list-style-type: none"> + Presentation on the implementation of constitutions by Yash Ghai followed by a discussion + Faculty members and participants share in 5 min. statements whether and how the issue of implementation was discussed in the drafting process of the constitutions they had been involved; tools / design options that were used are collected. + Tom Ginsburg will introduce his paper on constitutional implementation and discuss parallel dynamics in Africa. |

Session 4 (cont'd): Conference Session on selected issues of constitution building

| SESSION | ACTIVITY | COMMENTS |
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| <p>14:00 – 17:00</p> <p>See agenda</p> | <p>Merits and Challenges of Constitutional Datasets in actual Constitution Building Processes</p> <p>Background reading</p> <p>About Constitute, available at: https://www.constituteproject.org/content/about</p> | <p>Comparative datasets on constitutional issues provide an overview and insight in how constitutional documents are handling specific issues. Thus, they offer an immense reservoir of information and comparison for countries that are undergoing constitutional reform processes. At the same time, the information provided in the datasets only reflects one aspect of the constitutional reality in a given country. As a result, constitutional designers in another country may draw inaccurate assumptions from the information of the constitutional data.</p> <p>In this session, we want to explore the merits and challenges of constitutional datasets in actual Constitution Building Processes.</p> <p>Agenda:</p> <p>T Ginsburg will introduce the idea and rationale behind the constitutional dataset, which is now available as “constitute”</p> <p>Two groups are formed, both of them analyzing the project from a practitioners perspective. One group discusses the actual merits of the projects listing various instances in which they benefited from the information available. The other group examines the actual challenges of the information provided by the dataset, and how this information may mislead actual negotiations on the ground.</p> <p>Both groups are presenting their findings in the plenary, discussing what kind of “instruction leaflet” might be helpful to facilitate an adequate use of the information provided, specifically in Africa.</p> |

Session 4 (cont'd): Conference Session on selected issues of constitution building

| SESSION | ACTIVITY | COMMENTS |
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| <p>9:00 – 12:30</p> <p>See agenda</p> | <p>Updates on Constitution Building Processes in Africa</p> <p>Sharing and discussing first hand experiences</p> | <p>In the preparation of this course, participants / faculty members / alumni will gather information on an ongoing / recently concluded constitution building process, responding i.a. to the following questions (suggestions):</p> <p>For ongoing processes:</p> <ul style="list-style-type: none"> + Actual status of the process (compared to the envisaged agenda) + Most challenging task with regard to the process + Most challenging task with regard to substantive issues + Own analysis <p>For constitutions recently entered into force (also applicable for interim constitutions):</p> <ul style="list-style-type: none"> + What turned out to be the most debated constitutional issue after the adoption of the constitution? + To what degree the new setting / provisions are about to be implemented? Is there any kind of formalized processes keeping track with the implementation? + What turned out to be the most challenging task to be implemented? From a retro perspective, would you recommend to draft the pertinent provisions differently? |

Monday, 7th of July 2014

| Session 5: Institutional Structures – The Systems of Government | | |
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| SESSION | ACTIVITY | COMMENTS |
| <p>9:00 – 10:15</p> <p>5.1</p> <p>Format: Lecture + Plenary Discussion</p> <p>Lead Lecturer: CM</p> <p>Comments by KP, BK, and GH</p> | <p>Systems of Government I – An introduction</p> <p>D Baranger, C Murray, Governmental systems, M Tushnet et al. (eds.) The Routledge Handbook of Constitutional Law (2013), 73-84</p> <p>Van Cranenburg, O., Restraining executive power in Africa: horizontal accountability in Africa’s hybrid regimes. In: South African Journal of International Affairs, Vol. 16, No. 1, 49-68</p> <p>Background reading:</p> <p>J Martinez, Governmental Structuring, in: M Rosenfeld and A Sajo, The Oxford Handbook of Comparative Constitutional Law, OUP 2012, 548-575</p> | <p>There is a lively but unresolved academic debate about whether presidential or parliamentary systems promote more stable democracy. Many textbooks suggest that a specific system of government may direct governmental dynamics and powers in one way or the other. Analyzing different countries in Africa, this part tests in how far those perceptions hold true in reality. Key questions to be discussed in this context are:</p> <ul style="list-style-type: none"> + What are the principal differences between the various options for apportioning power between the executive and the legislature? What are the pros and cons of the several options? + Why is the classification of countries into systems of government ambivalent? + Why is it so difficult to predict the effect of a specific system of government? + Why, according to Cranenburg, should African regimes be considered as hybrid regimes? + What does the Cranenburg mean by “fusion of power”? + Why does the choice of electoral system matter? What are the constraints on choices? + What choice was made/is being made in each of countries (s. country studies) for the relationship between the legislature and the executive? Why? |

Session 5 (cont'd): Institutional Structures – The Systems of Government

| SESSION | ACTIVITY | COMMENTS |
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| <p>10:45 – 12:30</p> <p>5.2</p> <p>Format: Lecture + Plenary Discussion Lead Lecturer: KP Comments by MB and RU</p> | <p>Systems of Government II Taming the Executive - Design options for the de-concentrating Executive Powers</p> <p>K Prempeh, President Untamed, Journal of Democracy 2011, 96-106</p> <p>M Böckenförde, A Practical Guide to Constitution Building – The Design of the Executive Branch (2011), pp. 3-10.</p> <p>Background reading: K Prempeh, Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa, Hasting Constitutional Law Quarterly 2008, 761-834</p> <p>M Akech, Constraining Government Power in Africa, Journal of Democracy 2011, 96-106</p> | <p>One central challenge in the African context is the overly strong, often authoritarian executive powers in a country. This part analyses the cause of this dynamic and offers different options how to deconcentrate / check on executive powers.</p> <p>Question: What does the issue of presidential term limits in the African context tell you about “rule of law” and “constitutionalism” on the continent? In this context, do you consider the glass as being half full or half empty? Why?</p> <p>What is the adequate format of regulating fundamental rights issues in control of executive discretion?</p> |

Session 5 (cont'd): Institutional Structures – The Systems of Government

| SESSION | ACTIVITY | COMMENTS |
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| <p>14:00 – 15:15</p> <p>5.3</p> <p>Format: Lecture + Plenary Discussion</p> <p>Lead lecturers: CM & KP</p> <p>Comments by: BK</p> | <p>Systems of Government III – Power Sharing as a valid System of Governance?</p> <p>Nic Cheeseman, The internal dynamics of power-sharing in Africa, Democratization 2011, 336-365</p> <p>D Tull and A Mehler, The Hidden Costs of Power-Sharing: Reproducing Insurgent Violence in Africa, African Affairs 2005, 375-398.</p> <p>See also above under 2.1: D Horowitz, Conciliatory Institutions and Constitutional Processes in Post-Conflict States</p> | <p>Unitary Government and power-sharing designs are considered one option to overcome conflicts. Is this assumption justified by empirical evidence in Africa? Under what precondition might it work and at what costs might it come?</p> |
| <p>15:45 – 17:30</p> <p>5.4</p> <p>Format: Group work</p> | <p>Group Work on Taming the Executive</p> <p>Participants will receive a hypothetical case-scenario inspired by and synthesizing the experience of a number of countries such as but not limited to South Africa, Nigeria, Ethiopia, and Ghana where the dominance of the executive branch of government and particularly that of the head of the executive has been too excessive.</p> | <p>Participants will be asked to propose concert measures of reforming such constitutional systems and ensuring the proper balance of power by revitalizing the system of checks and balances. The objective of the exercise will be to enhance the participants' understanding of the mechanisms of horizontal accountability and the constitutional conditions required for their proper functioning.</p> |

Tuesday, 8th of July 2014

| Session 5 (cont'd): Institutional Structures – The Systems of Government | | |
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| SESSION | ACTIVITY | COMMENTS |
| 9:00 – 10:15 5.5 Format: Plenary Discussion Moderated by KP and BK | Debriefing of Group Work Participants will share their findings in the plenary, followed by discussion | |

| Session 6: The Judiciary / Constitutional Review | | |
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| SESSION | ACTIVITY | COMMENTS |
| 10:45 – 12:30 6.1 Format: Lecture & Plenary Discussion Lead Lecturers: BK and KP | Systems of Government IV - Design options for the Judiciary T Fleiner and C Saunders, Constitutions embedded in different legal systems , in: M Tushnet et. al.. Routledge Handbook of Constitutional Law (2013), pp. 21-32. A Chen and MP Maduro, The judiciary and constitutional review , in: M Tushnet et. al.. Routledge Handbook of Constitutional Law (2013), 97-109. | There is a world of difference between a paper constitution that is merely semantic and a normative constitution that constrains and regulates the exercise of political power and secures the enjoyment of human rights. Thus, how can we ensure that a written constitution's promise will be translated into reality? (A Chen and MP Maduro, 2013) The challenge is one of constitutional design. What kind of political and legal structures should be put in place? However, there is probably no other issue in constitutional design being so sensitive to the legal context. Although there are exceptions |

Comments: CM

B Kanté, **Models of Constitutional Jurisdiction in Francophone West Africa**, *Journal of Comparative Law* 2008, 158-173

A Chaskalson, **Constitutional Courts and Supreme Courts – a Comparative Analysis with Particular Reference to South Africa**, in: Pernice/ Kokott/ Saunders (eds.): *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden 2006, 97-110.

A Stroh and C Heyl, **The Creation of West African Constitutional Courts Revisited**, GIGA-working paper 2013

Background reading:

Y Ngenge, **International Influences and the Design of Judicial Review Institutions on Francophone Africa**, in: *American Journal of Comparative Law*, 2013, 433 – 460

Siri Gloppen, **Comparing Courts' Accountability Functions in Africa**, in: Gloppen, Siri, Bruce M. Wilson, Roberto Gargarella, Elin Skaar, and Morten Kinander (ed). *Courts and power in Latin America and Africa*. New York: Palgrave Macmillan, 2010., pp83-126.

(especially in Latin America), the legal system that had been practiced in a country predetermines some of the design options for judicial review.

Against this background, it is worth reflecting the characteristics of the two judicial systems that are also dominant in Africa. What are the specific characteristics according to the papers of *Fleiner/Saunders* and *Chen/Maduro*? In how far do they apply to African countries? How does a “decentralized / Supreme Court model” of judicial review operate? How does a “centralized / Constitutional Court model” of judicial review operate? Why, according to *Chen/Maduro* are they linked to the one or the other legal system?

Despite this imprints, why the Constitutional Court model may help to better overcome post-conflict scenarios? Why was it adopted in South Africa?

K Prempeh and B Kanté will share their experiences from Ghana (common law system) and Senegal (civil law system) respectively, with a specific focus on the structure of judicial review in those countries. C Murray will elaborate on the challenges of having opted for a Constitutional Court model in a common law country and how the model was adjusted to the system.

| Session 6 (cont'd) : The Judiciary / Constitutional Review | | |
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| SESSION | ACTIVITY | COMMENTS |
| 14:00 – 15:15 6.2 Lecture & Plenary Discussion -- Group Work Lead Lecturers: BK and RU | J Melton and T Ginsburg, Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence , The University of Chicago, Institute for Law and Economics Working Paper Series Index 2012, 1-45 | <p>It is trite but true that judicial independence is key for a strong third branch of government and a viable system of judicial review.</p> <p>And indeed, the large majority of constitutions around the world included the guarantee of judicial independence in their constitutions. In this session, participants discuss the findings of Melton / Ginsburg's paper in how far and under what condition <i>de jure</i> judicial independence turns into a <i>de facto</i> judicial independence.</p> <p>In a second step, participants will analyze in working groups, whether these findings are backed by their own experiences.</p> |
| 15:45 – 17:30 6.3 Lecture & Plenary Discussion Lead Lecturers: KP and BK | K Prempeh, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa , 80 Tulane Law Review (2006), 1239-1324 | <p>Judicial Review is generally considered to promote the emergence of constitutionalism. The author, however, argues that this kind of "juridicial constitutionalism" ignores persistent defects in the structure and distribution of power in the postcolonial African state. Against this statement, participants discuss the validity of this argument (taking into consideration some success stories of judicial review in the continent) and the suggestions made by the author to consider additional design options for the development of an African constitutionalism.</p> |

| Session 7: Decentralization and its Objectives | | |
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| TIME | ACTIVITY | COMMENTS |
| <p>9:00 – 10:15</p> <p>Format: Lecture + Plenary Discussion</p> <p>Lead Lecturers: MB, CM</p> <p>Comments by BK and KP</p> | <p>Effective Government through Decentralization?</p> <p>G Crawford and Ch Hartmann, Decentralization as a Pathway out of Poverty and Conflict / Decentralization – No Shortcut to Development and Peace, in: G Crawford and Ch Hartmann: Decentralization in Africa: A Pathway out of Poverty and Conflict, Amsterdam 2008, 1-32 / 232-252.</p> <p>S Ndegwa, Decentralization in Africa, A Stocktaking Survey, Worldbank, AfricanRegion Working Paper Series No. 40, 1-29</p> <p>Background reading:</p> <p>M Böckenförde, M Elbabour, T Megerisi, Decentralization in Libya, DRI-Report (2013)</p> | <p>Decentralization generally serves different objectives. In the context of constitution building, three of them are most relevant: a) designing a more effective government for the people (policy and services tailored to local needs should be administered at the local level); b) deepening democracy by bringing the elected government closer to the people; c) designing a government structure in which diverse groups can live together peacefully and to allowing stakeholders representing a minority to identify their space in the system. In short, decentralization is considered to alleviate poverty, increase public participation, and manage conflict.</p> <p>In this session –after a brief introduction into relevant terms of decentralization- decentralization’s presumed abilities to contribute to a more effective government are addressed.</p> <p>As argued by <i>Hartmann / Crawford</i>, most decentralization reforms in Africa have not been successful. Participants will identify the reasons, why the success rate has been so low and what had been the specificities of those reforms that were considered successful with regard to poverty alleviation.</p> <p>Against this background, participants will analyze what kind of constitutional design may support a more successful path to the aims of decentralization and whether the wording in the constitutions of Tunisia and Kenya may help to make their reforms a success story.</p> |

Session 8: Managing Diversity Through Constitutional Design?

| TIME | ACTIVITY | COMMENTS |
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| <p>10:45 – 12:30</p> <p>8.1</p> <p>Format:</p> <p>Lecture + Plenary Discussion</p> <p>Lead Lecturers:</p> <p>KP, RU</p> <p>Comments: BK</p> | <p>Introduction</p> <p>M Basedau, Managing Ethnic Conflict: The Menu of Institutional Engineering, GiGA Working Paper 171, 2011, 1-23</p> <p>K Prempeh, Constitutionalism, ethnicity and minority rights in Africa: A reply to Jeremie Gilbert, International Journal of Constitutional Law 2013, 438-443</p> | <p>Diversity is one of the strengths of many African countries. At times, living in diversity includes the challenge to create sufficient space for different groups.</p> <p>Representation of the people of a country should be inclusive, especially in fragmented societies which are found in many countries in Africa. This part addresses ways and means of accommodating diversity.</p> <p>+ Which of the ways of managing ethnic conflict discussed by the author do you think are most effective? Are both of them applied in the African context? If so, how do they work? (Basedeau)</p> <p>+ What options of protecting minority rights are available? How do they fit in the African context and what challenges need to be overcome? (Prempeh)</p> |

Session 8 (cont'd): Managing Diversity Through Constitutional Design?

| SESSION | ACTIVITY | COMMENTS |
|--|--|--|
| <p>14:00 – 15:15</p> <p>8.2</p> <p>Format:</p> <p>Lecture + Plenary Discussion</p> <p>Lead Lecturers: CM and GH</p> | <p>Diversity Management through Decentralization?</p> <p>G. Selassie, Ethnic Federalism: its promise and pitfalls for Africa. In: 28 Yale Journal of International Law (2003), 51-107</p> <p>Y Ghai, Introduction: The Nature and Origins of Autonomy, in: Y Ghai and S Woodman, Practising Self-Government – A Comparative Study of Autonomous regions, Cambridge 2013, 1-31</p> <p>R Suberu, Religion and Institutions: Federalism and the Management of Conflicts over Shari'a in Nigeria, J. Int. Dev. 2009, 547–560</p> | <p>Another objective of decentralization is to design a territorial structure in which diverse groups can live together peacefully and to allowing stakeholders representing a minority to identify their space in the system and preventing a country from falling apart. Two different approaches are available, one relying on the symmetric vertical division of power, the other one preferring an asymmetrical division.</p> <p>In this session, participants are discussing more generally the promises and pitfalls of ethnic and / or religious decentralization (also referring to challenges (Nigeria, Kenya, South Sudan, Tanzania) and the advantages / challenges of both options.</p> <p>If time permits, one very specific but overly contested issue is discussed in detail: How to delimitate internal boundaries? Relevant questions are, inter alia:</p> <p>What <i>criteria</i> shall be used in drawing regional boundaries?</p> <p>Should there be <i>minimum requirements</i>? Should regional boundaries be <i>defined in the constitution</i> or shall only criteria be included in the constitution? Should the population of prospective regions <i>be involved</i> in the delimitation process? Should minorities within prospective regions <i>have a say</i> in the delimitation process?</p> |

Session 8 (cont'd): Managing Diversity Through Constitutional Design?

| SESSION | ACTIVITY | COMMENTS |
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| <p>15:45 – 17:30</p> <p>8.3</p> <p>Format: Group Work</p> | <p>Group Work on Beyond the Genius of Unity</p> <p>Participants will receive a hypothetical-case scenario arising from a break-down of the democratic process after a seriously flawed and disputed election (inspired by Côte d'Ivoire, Kenya, Zimbabwe, Angola). The details of the scenario will indicate the interest groups backing the contestants and their core interests on which neither party is willing to compromise.</p> | <p>Participants will be asked to suggest constitutional designs/mechanisms which will secure the non-negotiable interests of the incumbent and at the same time will ensure that effective political power will be transferred to the winner of the election. The objective of the exercise will be to help participants explore constitutional ways of resolving post-election conflicts apart from forming unity governments.</p> |

Thursday, 10th of July 2014

| Session 8 (cont'd): Managing Diversity Through Constitutional Design? | | |
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| 9:00 – 10:15 | Debriefing of Group Work | |
| 8.4 | | |
| Format: Plenary Discussion | Participants will share their findings in the plenary, followed by discussion | |
| Moderated by CM and GH | | |

Session 9: Traditional authorities, cultural values and constitutionalism

| SESSION | ACTIVITY | COMMENTS |
|--|--|---|
| <p>10:45 – 12:30 9.1</p> <p>Format:</p> <p>Lecture + Plenary Discussion</p> <p>Lead Lecturers:</p> <p>K Prempeh, B Kanté, C Murray</p> | <p>The Challenge of Legal Pluralism</p> <p>SA Brobbey, Explaining Legal Pluralism in African Countries: Ghana as a Case Study</p> <p>J Frémont, Legal Pluralism, Customary Law and Human Rights in Francophone African Countries, Victoria University of Wellington Law Review 2009, 149-165</p> <p>S Rautenbach, Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law, Journal of Legal Pluralism 2012, 143 - 177</p> <p>A Oba, Religious and Customary Laws in Nigeria, Emroy International Law Review 2011, 882-895</p> <p>Background Reading F.M. Deng, Models of African Normative Concepts. In: F.M. Deng, Identity, Diversity, and Constitutionalism in Africa, 85-102</p> <p>F Pirie, Law before Government: Ideology and Aspiration, Oxford Journal of Legal Studies (2010), 207 - 228</p> | <p>In many African countries there isn't just one legal order that has an impact on the daily life of people. Especially in local and rural areas, the normative reality is dominated by traditional rules. In this session, participants will get an insight in the exciting phenomena of legal pluralism and the different constitutional approaches to bridge the different sets of norms</p> <p>Questions:</p> <p>How does <i>Brobbey</i> describe legal pluralism and the relation of different sets of norms to one another and with regard to the people in the country?</p> <p>How is legal pluralism organized in present Ghana?</p> <p>What are the areas of interface between traditional and modern approaches described by <i>Frémont</i>? What, according to the author, are the deficits of modern justice systems in the African context?</p> <p>According to <i>Rautenbach</i>, how handled South Africa the challenge of legal pluralism in the Constitution? Was the institutional integration successful?</p> |

Session 10 (cont'd) Traditional authorities, cultural values and constitutionalism

| SESSION | ACTIVITY | COMMENTS |
|---|---|---|
| <p>9.2</p> <p>Format: Presentation by Participants</p> | <p>Participants share the experiences of legal pluralities in their country (of expertise). Does the constitution attempts to accommodate legal diversity? In how far is the approach implemented? What are the actual challenges?</p> | |
| <p>9.3</p> <p>Format: Group work + plenary session</p> | <p>Group Work on Negotiating Diversity</p> <p>Participants will receive a hypothetical-case scenario of a country in which there are ethnic/religious divisions that are politically salient (inspired by and synthesizing the experience of Iraq, Nigeria, and Ethiopia ?? Kenya etc). The scenario will show how ethnic identify has been relevant to the national politics and how ethnic tensions have at times led to violent conflict. The scenario will underscore both the resource competition/economic dimensions of the conflicts as well as struggles for cultural/identity /linguistic/religious recognition.</p> | <p>Participants will be asked to devise constitutional mechanisms that will enable the various ethnic groups to be represented at different levels of governance and transform the conflict. A related challenge to the participants will be to devise ways through which the state could give recognition to the customs and laws (as well as the traditional and religious authorities enforcing them) of various ethnic and religious groups in a manner that will not undermine the fundamental rights of minorities and vulnerable groups</p> <p>Incidentally, there is a fascinating book by a German on ethnicity in elections in Africa which, through some serious attention to actual results, argues that ethnicity is NOT as salient as people claim.</p> |

Friday, 11th of July 2014

| Session 9 (cont'd) Traditional authorities, cultural values and constitutionalism | | |
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| 9:00 – 10:15 | Debriefing of Group Work | |
| 9.4 | | |
| Format: Plenary Discussion | Participants will share their findings in the plenary, followed by discussion | |
| Moderated by CM and GH | | |

| Session 10: Regional and Pan-African Constitutionalism | | |
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| SESSION | ACTIVITY | COMMENTS |
| 10:45 – 12:30 10.1 | S Vandeginste, The African Union, constitutionalism and power-sharing , Working Paper, Institute of Development Policy and Management, pp 1-11 | Legal plurality does not only exist within one country. In recent times, regional or even continental agreements gained importance and influenced the national legal order. In this part of the session a brief insight is provided how regional / continental agreements might impact constitutionalism at the national level and are worth considering. |
| Format: Lecture + Plenary Discussion | J Leininger, A Strong Norm for Democratic Governance in Africa , draft IDEA discussion paper | |
| Lead Lecturers: (tbd) | | |

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| <p>10.2</p> <p>Format:</p> <p>Lecture + Plenary Discussion</p> <p>Lead Lecturers: MB & GH</p> | <p>NEPAD, Ibrahim Index,</p> | <p>Beside regional organizations, other innovative initiatives in Africa were set up to strengthen the rule of law and constitutionalism. Two of them are introduced.</p> |
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| <p>Session 11: Wrap-up, Evaluation, Way forward</p> | | |
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| <p>SESSION</p> | <p>ACTIVITY</p> | <p>COMMENTS</p> |
| <p>14:00 – 15:15</p> <p>11.1</p> <p>Lecture + Plenary Discussion</p> <p>Lead Lecturers: KP</p> <p>Comments: CM, BK, GH</p> | <p>HK Prempeh, Africa’s “Constitutional Revival”: False Start or New Dawn? 5 International Journal of Constitutional Law 1 (2007)</p> | <p>At the end of the summer course, indications and possibilities for a new dawn of African constitutionalism are discussed</p> |
| <p>11.2</p> | <p>Summary of lessons learned</p> <p>& Course Evaluation</p> <p>& Distribution of Certificates</p> | <p>In addition to collecting comments on participants’ impression and experiences during the course, facilitators will seek reflections from participants on how they plan to build on the experiences gained during the course in their future work and research.</p> |
| <p>11.3</p> | <p>Brainstorming on the way forward</p> | <p>Faculty members and participants discuss options and opportunities for networking</p> |

