

A COMPARATIVE ANALYSIS OF CONSTITUTIONAL COUPS IN SUB-SAHARAN AFRICA

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**A PROJECT WORK WRITTEN IN, AND SUBMITTED TO THE FACULTY OF
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REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS
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FEBRUARY, 2021

CERTIFICATION

I, Patricia Ogadirimnma CHIGBUNDU (Miss) with Matriculation Number PG/LAW0902862 of the Faculty of Law, University of Benin, Benin City, hereby certify that apart from references made to the works of other people which have been duly acknowledged herein, this entire project is the product of my personal research, and it has neither in part nor in whole been presented for another degree elsewhere.

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APPROVAL

We certify that this project work was completed and written by Patricia Ogadirimma CHIGBUNDU (Miss) with Matriculation Number PG/LAW0902862 in partial fulfilment of the requirements for the award of the Master of Laws (LL.M) Degree of the University of Benin.

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DEDICATION

To the Almighty God, the stronghold of my life; my ever loving parents- Elder and Mrs S.I.D Chigbundu, who have stoutly refused to give up on me in spite of my shortcomings and to Mrs U.C Eromosele-Ibhiedu, the best prayer warrior I have ever met.

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TABLE OF ABBREVIATIONS AND ACRONYMS

ACDEG	African Charter on Democracy, Election and Governance
ACHPR	African Charter on Human and People's Rights
ACHPR	African Court on Human and People's Rights
AFORD	Alliance For Democracy
APRC	Alliance for Patriotic Reorientation and Construction
APRM	African Peer Review Mechanisms
AU	African Union
AUEOMs	African Union Observation Missions
BBC	British Broadcasting Corporation
DRC	Democratic Republic of Congo
EAC	East Africa Community
ECOWAS	Economic Community of West African States
EU	European Union
FARC	Revolutionary Armed Forces of Columbia
FDC	Forum for the Defence of the Constitution
MCP	Malawi Congress Party

MMD	Movement for Multi-Party Democracy
MP	Member of Parliament
NRM	National Resistance Movement
OAU	Organization of African Unity
PDP	Peoples Democratic Party
PSC	Peace and Security Council
RFI	Radio France International
SADC	South Africa Development Community
SWAPO	South West Africa People's Organization
UDF	United Democratic Front
UK	United Kingdom
USA	United States of America

ABSTRACT

Sub-saharan Africa is home to many of the world's longest-ruling political leaders. Not less than seventeen heads of government have tried with varying degrees of success to secure longer terms in office through "constitutional coups". This is done by proposing constitutional amendments for approval by the Legislature or Judiciary or in national referenda, so that by early 2021, at least, three sub-saharan African rulers had held on to power for more than thirty years each. The aims of this study, though limited to presidential systems, is to analyze comparatively, the concept of constitutional coups in sub-saharan Africa; to examine reasons for its prevalence; to show its impact on development and security in the region with a view to proffering solutions and recommendations for wholesome reforms which, it is sincerely hoped will curb the trend.

This study found that constitutional coups threaten the continuance and survival of true democracy. Democracy is dependent on the existence of strong and independent institutions able to counterbalance the enormous powers vested on the executive arm of government. These powers enable the executive to wield enormous influence over other arms of government, coercing them to do its bidding. It also finds that the most meaningful approach to curb the spate of constitutional coups is an intellectual revolution geared towards establishing an ideological order that replaces the old regime of holding on to power through constitutional coups.

This study though limited to presidential systems, contributes to knowledge by showing that constitutional coups have severe negative impact on the democratic disposition, security and development of States in which they occur. This is juxtaposed with other States in sub-

saharan Africa which have consolidated their democracy by upholding their constitutional provisions on presidential term limits.

CHAPTER ONE

BACKGROUND TO RESEARCH AND DEFINITION OF CONCEPTS

1.0 Introduction

Term limits in constitutions for Presidents became dominant in sub-saharan African countries in the early 1990s. This important constitutional safeguard was enshrined to prevent reversals to autocratic rule and also as a measure against prolonged stay in power by the executive arm of government. However, term limits which may be by age or the maximum number of times an individual can hold a particular public office, have increasingly come under threat and is currently trending in sub-saharan Africa. The abrogation, suspension or amendment of such constitutional provision through parliament, judicial approval or referenda, in order to hold on to power by all means, is what is referred to as 'constitutional coups'.

Over the last thirty one years, (1990-2021) more than fifteen sub-saharan African countries have at different times, had constitutional coups or attempts to do so. Fueled by their selfish interests, many sub-saharan African leaders see the restrictions on presidential tenures as foreign and un-African- a principle copied from the more matured western democracies, as a clog in the wheel of democratic choice, a hindrance to continuity in government, an obstacle to completion of government policies and an avenue to heat the polity. Based on analysis of primary and secondary data from existing literature on the subject, this study traces the origin of term limits to the early democratic practices of ancient classical Greece and Rome. This practice later on, laid the foundation on which the United States of America introduced

term limits for presidents in their constitution in 1789. It also discusses the instances where constitutional coups were successful and where they were resisted.

Worthy of note is the fact that while some presidents in sub-saharan Africa are propelling their countries to democratic backsliding, their counterparts in neighbouring countries like Botswana, Ghana, even Tanzania are consolidating their democracies by adhering to constitutional restrictions on presidential terms. This in turn facilitate peaceful, regular and predictable transfer of power, enhances political participation and nurtures opposition. This is the beauty of democracy.

This study reveals that, though there are diverging opinions surrounding presidential term limits in constitutions of sub-saharan States, leading to conflict in some countries, a high percentage of those controversies arise from the breach of constitutional provisions on term limits. In most cases, while these leaders and their supporters denounce term limits as un-african and hence foreign, the majority of citizens on the other hand, support the restrictions on terms as it enhances political participation, and consolidates democracy. Inasmuch as the views of these leaders and the citizens differ drastically, and the debate rages on, it is pertinent to note that though constitutional coups are challenged, they are still very much trending in sub-saharan Africa with evidence of great success.

1.1 Statement of Research Problem

Term limits for Presidents are embedded in the Constitutions of many sub-saharan African countries to act as safeguards against the arbitrary personalization of the executive powers of the State. Strict adherence to term limit provisions promotes popular participation and

encourages the growth of democratic institutions, thereby consolidating democracy. However, in many Sub-saharan countries, with the transfer of executive powers after independence to indigenous leaders who had gained recognition during national movements for independence, many of such leaders and their successors consolidated power, became intoxicated by it and in some cases, fought to become presidents for life, by hanging on to power beyond the stipulated limit provided for by the Constitutions of their countries. Despite international and regional legal framework like the Constitutive Act of 2000, the Lomé Declaration 2000 and the African Charter on Democracy, Elections and Governance 2007 and specific provisions for term limits in constitutions of various Sub-saharan States, to curb the trend, constitutional coups have persisted to the detriment of democratic consolidation. By the turn of the twenty-first century, the trend of entrenched leadership had spread across the region such that by early 2021, three African leaders had been in power for more than three decades, while more than a dozen others have retained their positions for at least ten years each by abrogating, suspending or amending constitutional provisions on term limits. This practice is what is now termed 'constitutional coups'. Constitutional coups play a great role in Sub-saharan Africa's developmental and security challenges, instability, corruption, societal fractures, stagnant or declining economies, and democratic backsliding. This study comparatively analyses the correlations existing between sub-saharan Africa's entrenched leadership through constitutional coups and their impact on the region as a whole. It is the finding of this study that, if urgent steps are not taken to tackle this trend, the hope of consolidating democracy in Sub-Saharan Africa will be extinguished. Though there are works by other scholars closely related to this study, most are centred on analysis based on one, two or three countries and the most recent of these studies go as far back as 2011. No

work to my knowledge as at the time of writing, has such a broad, comprehensive and recent data on the topic of this study. It is because of the paucity of a recent, comprehensive comparative literature demystifying the phenomenon of constitutional coups in sub-saharan Africa that this study was undertaken. This study by adopting a comparative approach brings us up to speed, even to 2021 on the prevalence of constitutional coups by analyzing over twenty countries on a case by case basis where there have been instances of constitutional coups in Sub-Saharan Africa.

The recent spike in constitutional coups in Sub-Saharan Africa have negative impacts on democracy and development in the States involved as well as on the Continent. The sooner leaders adhere to constitutional provisions on term limits, with the realization that such provisions are deliberately entrenched to curb personalization of State power and prevent democratic backsliding, the higher the chances of democratic consolidation in Sub-Saharan Africa.

1.2 Aim and Objectives

The general aim of this study is to show that strong correlations exist between sub-saharan Africa's entrenched leadership through constitutional coups and its developmental and security challenges.

The objectives of this study are as follows:

- (i) To show that the suspension, extension, manipulation or outright abolishment of constitutional provisions on presidential term limits by Sub-saharan African leaders is contrary to the spirit of the various constitutions involved and to that extent are undemocratic, unconstitutional changes of government;

- (ii) To show that entrenched leadership through constitutional coups weaken democratic institutions and thus hinder the democratic consolidation of Sub-saharan Africa;
- (iii) To advocate that international, regional and national political actors play more active roles by imposing severe sanctions on such leaders in order to curb this negative trend.

1.3 Methodology

This study was based on a comparative historical and descriptive analysis of relevant primary and secondary data. These primary and secondary data consulted included books, journal articles, online newspaper reports and local and foreign Newspapers. Therefore any unreferenced documentation relating to the facts of this study is based on my personal knowledge.

1.4 Expected Findings

This study finds that:

- (i) Constitutional coups undermine democratic consolidation in sub-saharan Africa and its prevalence has led to developmental, social, psychological and security challenges;
- (ii) States are more prone to constitutional coups when they lack strong institutions which are able to counterbalance the enormous power and influence of the executive arm of government;

- (iii) The inability and reluctance of international and regional bodies especially the African Union to take a stand against perpetrators of constitutional coups in sub-saharan Africa has encouraged the trend.

1.5 Expected Contribution to Knowledge

This study has contributed to knowledge in the following ways:

- (i) The study established that sub-saharan Africa's Leaders are increasingly securing longer terms through “constitutional coups,” proposing amendments for approval by the legislature or judiciary, or in national referenda, that allow for additional terms in office.
- (ii) The study established that constitutional coups by sub-saharan Africa’s leaders poses a number of challenges, like, instability, stagnant or declining economies, gross corruption, neglect of citizens welfare, human rights abuses and democratic backsliding. Furthermore, sub-Saharan African leaders engage in constitutional coups out of fear of loss of power, privileges associated with the office and fear of criminal prosecution which can be surmounted by the provision of attractive pension packages and immunity from politically motivated prosecution after they leave office.
- (iii) This study has also established that States in sub-saharan Africa, lacking strong effective political opposition, Legislature and Judiciary are more vulnerable to constitutional coups.

1.6 Definition of Concepts

(i) What is a Constitution?

The word 'Constitution' has been defined by various scholars, depending on the perspective of such scholar. According to Hogg¹, the term 'Constitution' may be used in a narrower or wider sense:

In the narrow sense, it refers to those rules embodied in a basic constitutional document, such as in the United States of America, India or Nigeria. In the wider sense, it includes all important rules which establish, empower and regulate the principles of government, some rules not contained in the basic document, and some non-justifiable rules, such as in the case of the United Kingdom.

Woosely² defines constitution as a collection of principles according to which the power of the government, rights of the governed and the relations between the two are adjusted.

Galligan and Versteeg³ defines a constitution by telling us its functions. A constitution establishes a system of government, defines the powers and functions of its institutions, provides substantive limits on its operation and regulates relations between institutions and the people.

Black's Law Dictionary⁴ defines the term "Constitution" as:

¹ Peter Hogg, 'Constitutional Law of Canada' [2012] (1)(6) *European Journal of Business and Social Sciences*, 69 – 85

² David Woosely quoted in Vjentda.D. Mahajan, *Political Theory* (Rajendraravindra (pvt) limited, 2008)18

³ David Galligan and Milla Versteeg, *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 6

⁴ Bryan A. Garner ed., *Black's Law Dictionary*, (10th edn, Thompson Reuters 2014) 347

The organic and fundamental law of a nation or State, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government and regulating, distributing and limiting the functions of its different departments, prescribing the extent and manner of the exercise of sovereign powers; A charter of government deriving its whole authority from the governed. The written instrument agreed upon by the people of Union or of a particular State, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or ordinance of such department or officer is null and void.

Despite the various definitions as outlined above, the underlying theme that runs through them is that the primary function of a Constitution is to clearly delineate power between arms and levels of government, their various functions and limitations and guarantee fundamental rights. Closely flowing from this, is the supremacy of the Constitution. Section 1 (1) of the 1999 Constitution of the Federal Republic of Nigeria for instance, boldly declares the Constitution to be supreme and that its provisions shall prevail over every other law. It states: *“This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.”*

Section 1 (2) *“The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.”*

It then follows that a Constitution serves as a restriction on arbitrary use of power and curbs illegality. All use or exercise of power is regulated and weighed against the provisions of the Constitution.

(ii) Defining Term Limits

Term limits, as a democratic principle has its origins in classical republican thought, whereby there was imposed a maximum number of times a person could be allowed to hold the same public office⁵

The phrase 'term limits' is not the same as a term of office. A term in office refers to the period that an elected public officer can serve before he is required to renew his mandate in a fresh election⁶. Term limits, on the other hand, set a ceiling on the number of terms that any one individual can serve in elected public office, even if the voters are ready to re-elect them⁷.

While term limits are often a common institution in presidential regimes, they are rarely employed in parliamentary regimes. This is largely due to the fact that, unlike in presidential regimes, chief executives in parliamentary systems often do not have set terms, serving instead for as long as they retain the support of the legislature. However, in a number of parliamentary republics that have ceremonial presidents in their Constitutional frameworks, term limits can be employed for the holders of presidential office, even in instances where these are not directly elected⁸. Examples of parliamentary republics that

⁵ Nicholas Comfort, *Brewer's Politics: A Phrase and Fable Dictionary* (University of London Press, 1993) 45

⁶ *ibid*

⁷ An example of this is like the two four year terms of the Nigerian President. Same thing applies to the United States of America President. The 22nd Amendment to the US constitution restricts holders of the office of president to two terms

⁸ Boniface Dulani, 'Personal Rule and Presidential term Limits in Africa' (unpublished paper presented to the *Department of Political Science*, University of Michigan, Michigan, 2011) 20

impose tenure limitations on ceremonial heads of state include Ethiopia, Germany, Greece, India, Ireland, Italy, Poland, Romania, and Ukraine.

(iii) The Meaning of Constitutional Coups

Term limits entrenched in Constitutions, are there to act as safeguards in order to prevent a slip into autocratic rule in sub-saharan Africa. The abrogation, suspension and amendment of constitutional provisions on term limits in order for Presidents to hold on to power beyond their tenure, is what is termed 'constitutional coups'. The alarming rate at which incumbent Presidents have attempted whether successfully or not in removing terms limits from 1990 to 2021 calls for an intellectual revolution on the part of both the governing and the governed. The Constitution, being the supreme law of any country, the abrogation, derogation and amendment of its provisions should not be arbitrary. Such changes must be done in a controlled manner that does not undermine the essence of constitutionalism and the rule of law⁹. This requires building strong democratic institutions as well as awareness and alertness on the part of citizens to ensure that there are no abuses.

1.7 Literature Review

The hunger and drive for democracy in post colonial sub-saharan Africa was largely fueled by neoliberal democratic principles with roots from the United States of America. The United States of America's ideals of constitutionalism, recognition of human rights and individual liberty, belief in strong democratic institutions as well as participatory and

⁹ Charles Manga Fombad, 'Constitutional Literacy in Africa: Challenges and Prospects' [2018] (44)(3) *Commonwealth Law Journal*; 19

representative government influenced the emergence of presidential term limits in sub-Saharan Africa.

Rachel Beatty Riedl¹⁰ asserted that though more than twenty four African States have embraced democracy as the system of government, they practice varying forms of party systems. While some States have party systems that are well organized, enjoy national spread, highly stable and institutionalized, other States have party systems that are weak, fragmented and divided along ethnic lines and poorly organized. This varying party structures are one of the ways authoritarian leaders manipulate, consolidate, and remain in power. The early stages of transition to democracy is often the most fragile and therefore very critical to authoritarian incumbents. Thus they utilize the unstable atmosphere to structure multiparty systems in their own selfish interest.

Karl Raaflaub and others¹¹ traced the development of democracy to ancient Greece. They also highlighted the necessary conditions that must exist for democracy to thrive. The relevance of this text is that it clearly brings to the fore the fact that democracy is a timeless concept which is still very much relevant today.

Samuel Huntington¹² provides a detailed analysis of the rise of democracy in about thirty States spread across Asia and Latin America, immediately after the fall of the Soviet Union and the revolutions of Eastern Europe. The author highlighted conditions which consolidate

¹⁰ Rachel Beatty Riedl, *Authoritarian Origins of Democratic Systems in Africa* (Cambridge University Press, 2014) 62

¹¹ Karl Raaflaub, and others, *Origins of Democracy in Ancient Greece* (University of California Press, 2007)

¹² Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991)

rather than reverses democracy. These conditions which include building strong democratic institutions is particularly relevant to sub-saharan Africa because democracy has ceased to be an ideology, and has now become a universal norm.

G. Doron and M. Harris¹³ explains that those who do not support constitutional coups are anti democratic. This argument is based on the premise that if democracy is about the will of the majority, then they should be allowed to decide who occupies the top seat and for what duration. Thus the constitution should not limit the majority choice, for that is undemocratic in itself.

Francis Fukuyama in his book¹⁴ written shortly after the fall of the Soviet Union, argued that liberal democracy has triumphed over other forms of government. He stated that the end of history is the triumph of liberal democracy over other systems of government like communism, fascism, socialism etc. and that the last man is the democratic man. However, despite this argument, it is clear that history has not ended because life is dynamic and democracy has not fully emerged victorious over other forms of government. This study, reveals that there are autocratic and authoritarian governments hiding under the façade of democracy through constitutional coups.

Fareed Zakaria¹⁵ argues that the principles of democracy are sometimes different from that which govern individual rights. One characteristic of democracy is rule by the majority and so it does not usually recognize minority rights. Thus majority rule in a democratic setting

¹³ Gordon Doron and Martin Harris, *Term Limits* (Lexington Books, 2001)

¹⁴ Francis Fukuyama, *The End of History and the Last Man* (Avon Books, 1992)

¹⁵ Fareed Zakaria, *The Future of Freedom* (New York: N. W. Norton and Co.,2003)

can be autocratic in nature by entrenching political repression, and discrimination. He states that giving much political power to the people can turn the people into a beast. Democracy thus becomes a beast instead of a beauty. One limitation of this book is that it severely criticized Islam as one of the challenges to the future of freedom. He failed to acknowledge the roles of other religions which have wide undemocratic and discriminatory practices as well.

Ben Kioko¹⁶ analyzes and examines the African Charter on Democracy, Elections and Governance in the light of the decision of the African Court on Human and Peoples Rights in the case of *Action pour la Protection des Droits de l'Homme (APDH) v Côte d' Ivoire*¹⁷. He argued that it is unclear whether the provisions of the Charter are justiciable. While this article is relevant to this study, its limitation is that it narrows its discuss to Côte d' Ivoire but the scope of this study, is sub-saharan Africa and it is therefore wider.

Ameen Auwali and Doreen Ajiambo¹⁸ assert and correctly so, that many African Leaders resist stepping down because they fear losing economic and political privileges. Furthermore, the fear of political retribution for the ill treatment of their opponents while in power, drive leaders to engage in constitutional coups.

¹⁶ Ben Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' [2019](63)(51)*Journal of African Law*; 39.

¹⁷ AFCHPR App No. 001/2014. Judgment of 18 November, 2016.

¹⁸ Ameen Auwalii and Doreen Ajiambo, 'How these African Leaders Subvert Democracy to Cling to Power for Life' *USA TODAY*, < <https://www.usatoday.com> > Accessed on 5 January, 2020

Denis Tull and Claudia Simons¹⁹ argued that compliance with the extant legal regime, including the Constitution, is a major test of institutionalization. Strong democratic institutions protect term limits. However they did not discuss the role regional bodies like the African Union have to play in order to ensure States mandatorily comply.

Kevin Eze²⁰ asserted that while term limits have been included in thirty-four constitutions in Sub-Saharan Africa since the 1990s, the provisions of such Constitutions are only completely adhered to in one-fifth of these States. Defence of presidential term limits and defiance of same have led to tensions between leaders and opposition party leaders, youth movements and citizens at large in some States.

Micha Wiebusch and Christina Murray²¹ investigates the African Union's responses to attempts to overturn or weaken term limits on executive power which is one of the most tenacious constitutional trend in sub -saharan Africa. They conclude that the AU's role has been largely limited. In line with the above argument, Adem Abebe²² took a swipe at the African Union, stating that the African Union needs to take a definite stand against leaders who change the Constitution in order to extend their rule. He argued that the African Union should draw a line and make it clear that manipulating constitutional provisions on term limits infringes on the principles of democracy and is therefore unacceptable.

¹⁹ Dennis Tull and Claudia Simons, 'The Institution of Power Revisited: Presidential Term Limits in Africa', [2017](2)(52) *Africa Spectrum* ; 79

²⁰ Kevin Eze, 'The Efficacy of Presidential Term Limits' (Unpublished paper presented at the Mandela Institute for Development Studies, Youth Dialogue, Dar es Salaam, Tanzania, 3rd- 4th August, 2016)

²¹ Micha Wiebusch and Christina Murray 'Term Limits and the African Union' [2018] (17) (2) *Journal of African Law*; 45-68

²² Adem Abebe, 'It is time to put a stop to “third-termism” *Aljazeera* (Addis Ababa, 8 July, 2019) <<https://www.aljazeera.com>> accessed 5 January 2020.

Alessandra Prentice²³ was of the view that African leaders who try to stay in power after the expiration of their tenures, copy from an established playbook in Africa; where incumbent Presidents have sought, often successfully to remain in power by massaging, bending or outrightly breaking extant laws often meant to ensure democratic transition of power. Charles Fombad²⁴ asserts that constitutional literacy is one of the factors inhibiting democracy in Africa. Strengthening the democratic foundations which have increasingly come under threat today, requires a comprehensive programme of constitutional education. Without knowledge and awareness of constitutional provisions, citizens will not be able to challenge any violation of them.

Jidefor Adibe²⁵ argued that until the 'third wave' of democracy in Africa which started with the National Conference in Bènin in 1990, the continent was a playground for autocratic life presidents and military adventurists who usurped power under the veneer of little messiahs. Whereas enlightened dictatorship arguably helped some countries such as Chile under Augusto Pinochet, South Korea under Park Chung-Hee and China under Deng Xiaoping to develop economically, Africa's dictators succeeded only in further under-developing their countries both politically and economically. Cheryl Hendricks and Gabriel Ngah Kiven²⁶opined that extending or abolishing term limits is not unique to the continent.

²³ Alessandra Prentice, 'What Limits? How African Leaders cling to power for decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

²⁴ Charles Manga Fombad, 'Constitutional Literacy in Africa: Challenges and Prospects' [2018] (44)(3) *Commonwealth Law Journal*; 19

²⁵ Jidefor Adibe, 'Africa--From Military coups to Constitutional coups' *Daily Trust* (Abuja, January 6, 2016) 14

²⁶ Cheryl Hendricks and Gabriel N. Kiven, 'Presidential Term Limits: Slippery slope back to Authoritarianism in Africa' *The Conversation* (Nairobi, 17 May, 2018) <<https://www.theconversation.com>> accessed 30 December 2019

Russia's President Vladimir Putin won a fourth term in March 2018 after changes to the Constitution and some nimble political footwork. Still in March 2018, the Chinese Parliament voted to abolish term limits, allowing for the possibility of President Xi Jinping becoming president for life. However, given that Russia and China play an influential role on the African continent these events do not bode well for the future of presidents sticking to term limits on the continent because it is a clear indication of democratic reversal.

Dikens Olewe²⁷ asserts that in the last three years African countries have registered an overall decline in the quality of political participation and rule of law, largely due to lack of credibility in government affairs. Joleen Steyn Kotze²⁸ opined that conventional wisdom tells us that good political societies are built on the principles of constitutionalism. This entails upholding the rule of law and separation of powers. This is to ensure an even distribution of power where a society is “built on principles of law, not men.” In the 1990s many African states reinvented their constitutions to build good political societies. They moved away from one-party authoritarian states to embrace a constitutional political order and representative democracy. They also enacted two-term presidential limits. But the limitations on presidential terms have not entirely quashed a culture of entitlement to rule. Glimpses of this culture persist. This is evident in what is now referred to as the “third term tragedy” or the “constitutional coup.” This is when African presidents extend their tenure in office, effectively becoming “president for life”, changing constitutions to achieve their selfish goals.

²⁷ . Dickens Olewe "Is Africa going backwards on democracy?" *BBC Africa News* (Lagos, 22 February 2019) <<https://www.bbc.com/news/world-africa-46971250>> accessed 30 December 2019

²⁸ Joleen. S. Kotze, 'Africa faces a new threat to Democracy: the Constitutional Coup' *The Conversation*, (Cairo, February 8, 2017. <<https://www.theconversation.com>> accessed 30 December, 2019

Suleman Maina²⁹ took a swipe at Africa's longest serving leaders, calling them self centred. He further stated that such governments are characterized by repression of differing opinions and aggressive clamp down on perceived opponents. Charles Fombad and Nathaniel Inegbedion³⁰ argued that poor leadership has been one of the major causes of the crisis of governance and the emerging apathy with the democratic transition in Africa. The learned authors while taking a swipe at unsuccessful attempts by former presidents of Malawi, Zambia and Nigeria to prolong their terms, stated that term limits provide a framework that not only ensures that political power is not retained for too long but also that no cult of personality develops around the leader. Term limits should be so entrenched in order to make their amendment extremely difficult. Two terms are long enough for leaders to manifest their leadership qualities and to complete their programmes. One major suggestion to encourage adherence to term limits, made by the learned authors is that, term limit provisions should guarantee former leaders, a certain minimum level of personal protection as well as benefits and privileges befitting their status and role as former presidents.

Catherine Wambua Soi³¹ gives an insight into the 2018 constitutional coup in Burundi. Seventy-three percent of Burudians voted 'yes' to change the constitution which would have allowed late President Pierre Nkurunziza to stay in office until 2034 as well as increase his executive powers. The few opposition leaders still in the country were arrested and

²⁹ Suleman Maina, 'Africa's longest serving leaders: Mugabe, Biya and others' *The Guardian* (Lagos, 7 September, 2019) <<https://guardian.ng/news/africas-longest-serving-leaders-mugabe-biya-and-others/>> accessed, 13 January 2020

³⁰ Charles Fombad and Nathaniel Inegbedion, 'Presidential Term Limits and their Impact on Constitutionalism in Africa' in Charles Fombad and Christina Murray (ed's.) (Pretoria University Law Press 2010) *Fostering Constitutionalism in Africa*; 1-29

³¹ Catherine W. Soi, 'Burundi Backs New Constitution Extending Presidential Term Limits' *Aljazeera* (Bujumbura, 8 July, 2019) <<https://www.aljazeera.com>>.accessed 5 January, 2020.

threatened to be assassinated if they voted against amending the constitution. The limitation of this article is that it narrows its discussion to Burundi. No mention is made of other sub-Saharan countries which have gone through similar experiences. Although these studies offer important insights into constitutional coups processes, the lack of comparative analysis does not offer a comprehensive understanding of the workings of constitutional coups. Most studies, predominantly focus on the English speaking countries in sub-Saharan Africa leaving out the French speaking countries, where constitutional coups are more prevalent.

However, there are two studies- by Boniface Dulani³² and by D. Posner and D. Young³³ which have been wider in scope by shifting focus from just one country. Posner and Young's study, ambitiously discusses the problem of removing term limits in sub-Saharan Africa. This comparative approach offers far reaching insights into constitutional coups. One of the main points made by Posner and Young is that changing the constitutional provisions on term limits just to hold on to power comes with negative costs. Dulani's study on the other hand taken as far back as 2011, also makes a shift from the single country approach by comparatively analyzing, removal of term limits in presidential systems in Africa. However the limitation to Dulani's study is that, it is not recent as there have been several instances of constitutional coups since 2011.

³² Boniface Dulani, 'Personal Rule and Presidential term Limits in Africa' (unpublished paper presented to the *Department of Political Science*, University of Michigan, Michigan, 2011)

³³ Daniel Posner and Daniel Young, 'The Institutionalization of Power in Africa' [2007] (18) (3)*Journal of Democracy*; 126-140

It is because of the foregoing, “a dearth of a recent, comprehensive comparative literature demystifying the phenomenon of constitutional coups in sub-saharan Africa” that this study was conceived.

1.8 Conclusion

The above textbooks and articles reviewed above, though very relevant, still do not offer a recent and comparative analysis of constitutional coups in sub-saharan Africa. By using information gathered from primary and secondary data as mentioned earlier, this study offers a comprehensive comparative analysis on a case by case basis of instances of constitutional coups, its prevalence and impact in sub-saharan Africa.

CHAPTER TWO

EVOLUTION OF PRESIDENTIAL TERM LIMITS IN SUB-SAHARAN AFRICA AND COMPARATIVE ANALYSIS OF CONSTITUTIONAL COUPS IN SUB- SAHARAN AFRICA

2.0 Introduction

This chapter traces term limits, just like so many other principles and ideals of democracy, to the early political practices in classical Greece and Rome, two civilizations that championed the concept of election into political positions. It also discusses the evolution of term limits in sub-saharan Africa as well as comparatively analyses cases of constitutional coups in sub-saharan Africa.

2.1 Term Limits in Classical Greece

The earliest historical evidence of term limits can be traced to the 7th century BC, when the citizens of the Greek state of Dreros passed a law that set strict limits on the number of times any individual could serve in the office of the State's chief magistrate, the *Kosmos*. The law, which was inscribed in stone, provided that an individual that had served as *Kosmos* for a period of ten years could not serve again in that position until at least a period of ten years had passed¹

The law provided thus:

¹ Boniface Dulani, "Personal Rule and Presidential term Limits in Africa" (unpublished paper presented to the *Department of Political Science*, University of Michigan, Michigan, 2011) 20

This has been decided by the polis: when a man has been *Kosmos* for ten years, that same man shall not be *Kosmos*. If he should become *Kosmos*, whatever judgments he gives, he himself shall owe double, and he shall be useless as long as he lives, and what he does as *Kosmos* shall be as nothing.²

By casting the law in stone, this not only demonstrated the commitment of the citizens of Dreros toward setting limits on holders of key political offices, but it also illustrated their desire to have this rule remain in their statute books in perpetuity. Meanwhile, decisions taken by any term-limited magistrate would be negated, the individual in question subjected to a useless status by being deprived of various civic capacities, including the capacity to hold public office for life.³

While the experience of Dreros demonstrates the importance of term limits in classical Greek constitutional regimes, this institution was popularised by its usage in classical Athens. As early as the 6th century BC, the majority of Athenian officials were not only elected but they were also only permitted to serve for fixed, and often non-renewable, terms.⁴ Among the notable examples of term-limited officials were the members of the Athenian Council of Five Hundred,⁵ who served as the effective governing body of the Greek State. The five hundred councillors, all of whom were elected by lot to ensure

² Ancient Greek law, quoted in Kurt Raaflaub and others, *Origins of Democracy in Ancient Greece* (University of California Press, 2007) 34

³ B. Dulani, "Personal Rule" and Presidential term Limits in Africa" (unpublished paper presented to the *Department of Political Science*, University of Michigan, Michigan, 2011) 23

⁴ *ibid*

⁵ This was referred to as the *Boule*

that every eligible Greek citizen had an equal chance of serving on the council, were by law only allowed to serve for a maximum of two years in their lifetime⁶

Apart from using term limits as an institution to negate the advantages of incumbency and thus encourage alternation in the occupants of public offices, the rule also precluded the possibility of the Council being hijacked and developing an independent and corporate sense.⁷ By promoting regular alternation in the membership of the Council on the other hand, the institution of term limits minimised the likelihood of the emergence of a group of people who might come to have distinct interests of their own and not necessarily the same as those of the ordinary people, *the demos*.⁸ Term limits, in other words, were perceived as an institutional mechanism for making key government bodies, such as the council, a fair sample of the Athenian people, whose views would naturally coincide with those of the people.⁹

While the five hundred councilors were each limited to serving for a maximum of two years, more stringent limits were imposed on offices that were held by a single individual. These restrictions reflected a strong fear for the likelihood of dictatorship if individuals in powerful positions were allowed to wield and exercise power for long periods.¹⁰ For example, the chairman of the Council of Five Hundred, the *Epistates*, who presided over

⁶ Kurt Raaflaub and others, *Origins of Democracy in Ancient Greece* (University of California Press, 2007) 40

⁷ Dulani, 'Personal Rule', 33

⁸ A. H. Jones, *Athenian Democracy* (John Hopkins University Press, 1986)15

⁹ Dulani, 'Personal Rule', 39

¹⁰ J. O'Neal, *The Origins and Development of Ancient Greek Democracy* (Rowman & Littlefield Ltd, 1995) 56

all Council meetings, and retained custody of the common seal of the city and the keys of the temples where the Athenian archives and money were stored, was rotated on a daily basis, and an individual holding that office could not serve again in that capacity in their lifetime.¹¹ The *Lycurgus* of Athens, who served as the director of administration responsible for Athens finances, was also allowed to serve for a single four-year term and could not serve in that capacity again in his lifetime.¹²

Strict term-limitation rules were also in force in the Greek state of Sparta. The five members of the Spartan *Ephorate*, who were elected to serve for a period of one year as magistrates, were forbidden from seeking re-election because the five *Ephors* were elected to act as a check on the power of the Spartan kings, their rotation was justified as part of a strategy of preventing them from assuming the same status and powers of the kings that they were expected to check.¹³

2.2 Term Limits in Rome

The ancient Roman Republic¹⁴ also featured a system of elected rulers who were subjected to specific term limits. During this period, the two holders of the office of *Consul*, who served as co-heads of the republican government, were limited to serving a maximum of one year. As in classical Greece, term limiting the Consuls was part of an institutional design aimed at preventing the possibility of their assuming too much power and thus acquiring

¹¹ ibid

¹² Kurt Raaflaub, and others, *Origins of Democracy*, 64

¹³ A. Altman, "A brief History of Term Limits" *Times*, (New York, 8, October 2008) <<http://www.time.com/nation/article/1846988008599.html>> accessed 13 January 2020

¹⁴ From 509 BC–27 BC

monarchical status that had been abolished at the start of the Republic.¹⁵ Other public offices in the Roman Republic that were subjected to term limits included *tribunes* of the plebs,¹⁶ *quaestors*,¹⁷ and *praetors*.¹⁸ Holders of these offices were only allowed to serve single terms of one year, with re-election forbidden for ten years.¹⁹ From 265 BC, holders of the office of Roman *Censor*, who were given the responsibility of maintaining the census, supervising public morality, and overseeing certain aspects of the government's finances, were also limited to serving a maximum of one term, initially of five years but later reduced to eighteen months.²⁰ When the office of *Censor* was first established during the reign of King Servius Tullius²¹ no formal term limits had been imposed on the office. Despite this absence of term limits, a tradition was soon established where no individual was ever elected to the office more than once.²² However, in 265 BC, Gaius Marcius Rutilus was re-elected as *Censor* for a second term. This prompted the enactment of a new law that prohibited re-election.²³ The decision to enact the term-limitation rule thus reflected a quest to codify the tradition of non-re-election.

¹⁵ P. J. Rhodes, 'Athenian Democracy after 403 BC' [1980] (4) (75) *Classical Journal*; 305

¹⁶ Meaning people's magistrates

¹⁷ Who supervised the treasury and financial affairs of the state, its armies, and its officers

¹⁸ Who exercised magistracy powers as well as acting as heads of government when the Consuls were absent from Rome.

¹⁹ *ibid*

²⁰ M. Schatzberg, *Political Legitimacy in Middle Africa* (Indiana State University Press, 2001) 44

²¹ He reigned from 578-535 BC

²² Dulani, *Personal Rule*, 42

²³ *ibid*

Although the unwritten tradition had lasted for several centuries, the re-election of Gaius Marcius Rutilus, highlighted the fact that irrespective of longevity, informal traditions do not acquire the force of law unless they are formalized.²⁴ The history of presidential term limits in the United States of America which invariably was embraced subsequently in sub-saharan Africa, also went through a similar process, starting with an informal tradition whereby no individual served as president for more than two terms for over one hundred and fifty years. However, this informal tradition did not prevent President Franklin Roosevelt from seeking re- election for an unprecedented four terms between 1933 until his death in 1945. It was not until after Roosevelt's presidency that the United States Constitution was amended to give the two-term-limit tradition a formal constitutional status.²⁵

2.3 Term limits in Sub-saharan Africa

Sub-Saharan Africa is, geographically, the area of the continent of Africa that lies south of the Sahara. Politically, it consists of all African countries that are fully or partially located south of the Sahara.²⁶

²⁴ Altman, 'A brief History', 45

²⁵ Dulani, 'Personal Rule', 92

²⁶ Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Republic of the Congo, Cote d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. It contrasts with North Africa, which is considered a part of the Arab world. The UN Development Program lists 46 of Africa's 54 countries as "Sub-saharan", excluding Algeria, Djibouti, Egypt, Libya, Morocco, Somalia, Sudan and Tunisia. See, F. Tapon, "Defining Sub-saharan Africa and the Countries in it" [2017] (5) (8) *Journal of African Politics* <<https://www.journalofafricanpolitics.com>> accessed 5 December, 2019

In the first decades after independence from colonial rule, African leaders were rightly depicted as “big men,” unconstrained by the rules that formally limited their power. Authority in this era stemmed from a combination of military might, intimidation, and the command of informal networks. Leaders entered and exited office not through elections or other regular means but primarily through the barrel of a gun.²⁷

The colonial legacy and the perception it created amongst Africans was that, the law was a blunt, alien instrument for controlling citizens and exploiting the colonies to the fullest without any regard to the possible developmental and transformative role of the law. This did not prepare Africans for constitutional governance. If we think of a Constitution as the soul of a nation, a mirror image of peoples desires and aspirations, then the post-independence constitutions were scarcely any of these.²⁸

Africa’s leadership in the post-independence era, extending from the 1960s onwards, was dominated by personalities that masterminded the transition from colonial rule. Liberation of the continent was on top of Africa’s agenda during the twentieth century, such that it constituted the founding objectives of the Organisation of African Unity²⁹ at its establishment on 25th May 1963.³⁰ The success of some African nationalists in negotiating self-rule accorded them a high degree of acclaim and allegiance in their respective jurisdictions. Many obtained accolades such as “Liberator”, and “Father of the nation,” but

²⁷ K. Eze, 'The Efficacy of Presidential Term Limits' (Unpublished paper presented at the Mandela Institute for Development Studies, Youth Dialogue, Dar es Salaam, Tanzania, August 3-4, 2016) 32.

²⁸ C.M. Fombad, "Constitutional Literacy in Africa: Challenges and Prospects" [2018] (44) (3) *Commonwealth Law Journal* ; 19

²⁹ The Organisation of African Unity- OAU was disbanded in 2002 and is now known as the African Union- AU

³⁰ Article 11(1)(d) of the AU Charter which came into force on May, 25, 1963

while some exemplary leaders maximised their repute to foster peaceful transfer of power,³¹ others entrenched personal rule.³² The significance of the position of president as a symbol of national unity degenerated in many instances into a reward of particular persons that contributed to independence, and their close compatriots.³³ This led to a “big man” syndrome in Africa’s politics. Efforts to monopolise political space were met with corresponding attempts to access the spectrum, causing strife among several African countries, with many plunging into armed conflicts fuelled by rebellion and state-sanctioned violence. In the period prior to 1990, many African leaders were ousted from power through military coups, assassinations and other forms of violent overthrow.³⁴ In West Africa alone, there were thirteen coups between 1963 and 1970; eleven coups between 1971 and 1980; and seven coups between 1981 and 1990.³⁵ Only a handful of presidential-system constitutions of African countries contained presidential term-limit clauses prior to 1990. These include The Republic of South Africa Constitution Act, 1961; The Constitution of the Federal and Islamic Republic of Comoros, 1978; The Constitution of the United Republic of Tanzania, 1984; The Constitution of the Republic of Liberia, 1986; and The Constitution of

³¹ Catherine Namakula, , 'The Efficacy of Presidential Term Limits' (Unpublished paper presented at the Mandela Institute for Development Studies, Youth Dialogue, Dar es Salaam, Tanzania, 3rd- 4th August, 2016)11

³² For example, Nelson Mandela of South Africa left office after one term in 1997; Julius Nyerere of Tanzania also left office in 1985 after his mandate expired as president.

³³ Gabriel Ogot, 'The Push for Executive Term Limits in Africa: Tracing the Peoples Efforts to Entrench Democratic Values', [2012] (5) (3)*The Citizens Coalition for Electoral Democracy in Uganda*; 2.

³⁴ Kisha S. Issaka, 'The AU and the Challenge of Unconstitutional Changes of Government in Africa,' *Institute of Security Studies*, Paper 197(Cape Town, 4 August 2009)4. <[https://www.issafrica.org/acpst/papers/the-au-and-\(the-challenge-of-unconstitutional-changes-of-government-in-africa\)](https://www.issafrica.org/acpst/papers/the-au-and-(the-challenge-of-unconstitutional-changes-of-government-in-africa)> accessed 21 December, 2019

³⁵ *ibid*, 6

the Republic of Tunisia, 1959 as amended in 1988.³⁶ In the mid-1990s, a global wave of democratisation inspired momentum for competitive party politics in Africa. This offered a viable alternative to the seemingly troubled autocratic regimes. The tilt towards political liberalisation was further intensified by donor pressure, amongst other factors.³⁷ It is against this background that what has been termed the “whirlwind of democratization” swept across the African continent.³⁸ Africa’s agenda transformed, to include promotion of democratic principles and institutions, popular participation and good governance.³⁹ The Constitutive Act of the African Union⁴⁰ limiting the tenures of the top leadership of a nation is arguably one of the most fundamental of democratic principles. Due to the challenge of streamlining the transition of power, the measure quickly gained prominence among African countries.⁴¹ Dulani notes that forty-nine out of the sixty-four constitutions which were adopted or amended between 1990 and 2010 incorporated term limits which represents three quarters of the enactments.⁴²

³⁶ Boniface Dulani, 'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure,' *Afrobarometer* Dispatch No. 30, 25 May 2015, <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30> accessed 30 December 2019

³⁷ Adrienne Lebas, 'Term Limits and Beyond: Africa's Democratic Hurdles, Current History' *Straight Talk* (Washington, 20 May 2016)170. <http://www.currenthistory.com/CurrentHistory_LeBas> accessed 30 December, 2019.

³⁸ Chengeta Thompson, 'A Critical Analysis of the Concept of 'Democracy' in Africa with Particular Reference to Majoritarianism and the Rights of Minorities' [2011] (10) (24) *Journal of African Politics*; <<http://dx.doi.org/10.2139/ssrn.2312331>> accessed 4 January 2020

³⁹ See Article 3 (g) of the Constitutive Act, 2000

⁴⁰ The Constitutive Act was adopted on 11 July, 2000 in Lome, Togo.

⁴¹ Dulani, 'Personal Rule', 55

⁴² Boniface Dulani, 'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure,' *Afrobarometer* Dispatch No. 30, 25 May 2015, <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30> accessed 30 December 2019

Thus, term limits evolved as a constitutional norm and elevated their profile to one of an entrenched democratic principle. The strategic location of term limits among constitutional frameworks raised the presumption that they represented the popular will of the people. The norm was accompanied by a broader set of constitutional developments, such as women's empowerment, multi-party politics, independence of the judiciary, and a commitment to conduct regular democratic elections, among other aspects. The resolve to encourage the participation of African women in politics and elections⁴³ enhanced competition in the political spectrum, where the need to change guards intensified as a new category of contestants emerged. A study conducted by Afrobarometer⁴⁴ between 2018-2019 among thirty-four African countries, revealed strong support for presidential term limits among three quarters of the citizens of the countries surveyed, including those where term limits had been scrapped earlier, such as Togo and Uganda.⁴⁵

2.4 Forms of Term Limit Provisions

The provisions limiting presidential tenures among all the forty-nine Constitutions of African countries adopted or amended between 1990 and 2020 set a two-term limit.⁴⁶The

⁴³ Nic Cheeseman, *Democracy in Africa: Successes, Failures and the struggle for Political Reform*, (Cambridge University Press, 2015) 67

⁴⁴ Afrobarometer is a non governmental organization which conducts surveys in African Countries where security conditions permit and citizens are largely able to speak freely.

⁴⁵ Afrobarometer dispatch No. 30, 25 November 2019. <<https://afrobarometer.org/sites/default/files/press-release/global/abr>> accessed on 20 December 2019. Togo re-introduced term limits in a 2019 constitutional amendment but Uganda remains unrestricted.

⁴⁶ Afrobarometer, Dispatch No. 37, 22 January 2020. <<https://afrobarometer.org/sites/default/files/press-release/global/abr>> accessed 30 January 2020

length of each term varied between four to seven years.⁴⁷ The only exception was the Constitution of the Republic of Seychelles, which provided for three-five year terms, but an amendment effected in 2016 has reduced them to two five-year terms.⁴⁸ The five-year two-term limit model is the most dominant, with over twenty three African countries subscribing to it at present.⁴⁹

2.5 Term Limits in Modern Day Politics

Today, term limits are majorly applicable to holders of executive positions. While it is common to place term limits on the executive position at the national level, it is not unusual to extended it to top executives at State and Local government levels. Though in a number of cases, term limits are also extended to holders of legislative office at the various tiers of government, by far the most common application of term limits today is on the office of president. This is true for nearly three quarters (73 percent) of all presidential regimes globally.⁵⁰

Table 1 shows presidential terms and limits in constitutions of various sub-saharan countries.

⁴⁷ Ghana and Nigeria have two four-year term limit; Ethiopia and Liberia have two six-year term limit, while Senegal and Republic of Congo have two seven-year term limits.

⁴⁸ Mathieson Winsor, 'Seychelles Cuts Presidential Term Limits, Going Against Recent Trend in Africa' *African Affairs*, (Pretoria, 17 May 2016) <<http://www.ibtimes.com/seychelles-cuts-presidential-term-limits-going-against-recent-trend-africa-2348695>> accessed on 19 December, 2019

⁴⁹ Examples include: Tanzania, Kenya, Angola, Benin, Botswana, Burundi, Cape Verde, Central African Republic, Democratic Republic of Congo, Madagascar, Eritrea, Malawi, Mauritania, Mauritius, Mozambique, Namibia, Niger, Sao Tome and Principe, Sierra Leone, South Africa, Tanzania, Egypt, Mali and Zambia.

⁵⁰ B. Dulani, 'Personal Rule', 78

Table 1: Presidential Term Limits in sub-saharan Africa, 1990-2020

Country	Executive position	Term in office	Constitutional term limit
Angola	President	5 years	2
Benin Republic	President	5 years	2
Burkina Faso	President	5 years	2
Burundi	President	7 years	2
Chad	President	6 years	2
Cameroon	President	7 years	Unrestricted
Central African Republic	President	5 years	2
Comoros	President	5 years	Unrestricted non consecutive terms
Côte d' Ivoire	President	5 years	2
Democratic Republic of Congo	President	5 years	2
Djibouti	President	5 years	Unrestricted
Equatorial Guinea	President	7 years	2
Eritrea	President	5 years	2
Gabon	President	7 years	Unrestricted
Ghana	President	4 years	2
Gambia	President	5 years	Unrestricted
Guinea	President	6 years	2
Kenya	President	5 years	2

Liberia	President	6 years	2
Madagascar	President	5 years	2
Malawi	President	5 years	2
Mali	President	5 years	2
Mauritania	President	5 years	2
Mozambique	President	5 years	2
Namibia	President	5 years	2
Niger	President	5 years	2
Nigeria	President	4 years	2
Rwanda	President	5 years	2
Republic of the Congo	President	5 years	3
Senegal	President	5 years	2
Seychelles	President	5 years	2
Sierra Leone	President	5 years	2
Somalia	President	5 years	2
South Sudan	President	5 years	2
Sudan	President	5 years	Unrestricted
Tanzania	President	5 years	2
Togo	President	5 years	2
Uganda	President	5 years	Unrestricted
Zambia	President	5 years	2
Zimbabwe	President	5 years	2

Source: own compilation from Internet search.

A cursory look at modern sub-saharan African countries constitutions, show that there are entrenched provisions for presidential term limits. However, despite the remarkable progress made in incorporating provisions that promote the fundamental principles of democracy, participatory politics, respect for human rights, the rule of law, and good governance, sub-saharan African leaders still see the imposition of term limits as alien and unafrican. It is hence no surprise that there has been a progressive degradation of the standards, values and principles embedded in these constitutions, as African leaders and ruling elites have stealthily exploited the enormous power wielded by virtue of their executive positions to renege on their constitutional obligations.⁵¹

2.6 Comparative Analysis of Constitutional Coups in Sub-Saharan Africa.

According to Locke, the purpose of the government and law is to uphold and protect the natural rights of men. So long as the government fulfils this purpose, the laws given by it are valid and binding, but when it ceases to fulfil it, then the laws would not have validity and the government can be thrown out of power.⁵²

This interpretation of the purpose of government also informs the principles of good governance. These are transparency, responsibility, accountability, participation, responsiveness, and respecting the rule of law. The social contract between those who govern and those who are governed is founded on this rights-based approach to governance. This means that leaders govern at the pleasure of the people, and do not rule with sovereign license at the cost of constitutional rules. The well-being and rights of the people must be the

⁵¹ C.M. Fombad, 'Constitutional Literacy in Africa: Challenges and Prospects' [2018] (44) (3) *Commonwealth Law Journal*; 19

⁵² John Locke, *The Second Treatise on Civil Government* (Prometheus Books, 1986) 88

central concern of those who govern.⁵³ Good governance entails playing by the rules. This includes the constitution which should be the supreme law of the land.

There have been some classic examples of “constitutional coups” in recent years. These include:

(i) Burundi

Burundi is a country in east-central Africa, south of the Equator. The landlocked country, a historic kingdom, is one of the few countries in Africa whose borders were not determined by colonial rulers.⁵⁴ Late Pierre Nkurunziza was its president from 2005 - June, 2020. Nkurunziza rose to power following the signing of the Arusha accords ending a thirteen year civil war that killed many people. He was re-elected unopposed in 2010 after the opposition boycotted the vote.

Having already served two terms, and with a two-term limit in place that barred him from running for re-election in 2015, late Pierre Nkurunziza decided to seek a third term. His first move was to try to amend the Constitution, but he fell one vote short of the eighty percent parliamentary majority he needed.⁵⁵

His next move was to seek a ruling from the Constitutional Court that would permit the third term on the grounds that his first election in 2005 should not count toward the two-

⁵³ J.O. Kotze, 'Africa faces a new threat to Democracy: the Constitutional Coup' *The Conversation*, (Cairo, 8 February 2017) <<https://www.theconversation.com>> accessed 30 December, 2019

⁵⁴ T. Ginsburg and J. Melton and Z. Elkins 'On the Evasion of Executive Term Limits' [2011] (52) (37) *William & Mary Law Review*; 180

⁵⁵ Catherine W. Soi, 'Burundi Backs New Constitution Extending Presidential Term Limits' *Aljazeera* (Bujumbura, 8 July, 2019) <<https://www.aljazeera.com>>.accessed 5 January, 2020.

term limit because the election had been by the national assembly rather than directly by the people. Although the Court ruled in his favor, the decision was by all accounts coerced. In any case, Nkurunziza took the Court's ruling as justification for proceeding with the third term bid. When protestors took to the streets in large numbers to oppose the president, Police responded harshly and several demonstrators were killed. As protests continued, officers associated with General Godefroid Niyombareh attempted a coup, but it failed. At least one hundred people were killed and more than twenty thousand people fled the country during the ensuing crackdown.⁵⁶The end result was that the election went forward and Nkurunziza emerged victorious in a contest marred by an opposition boycott and low turnout.

Allegations of rights abuses led to Burundi leaving the International Criminal Court and kicking out the U.N. human rights office. Burundi's government strongly denies allegations that it targets its own people. Despite the fact that he was ready to step down after his third term,⁵⁷ late Nkurunziza's influence could have lingered on since he received the title of "supreme guide to patriotism" under legislation approved by the government in January 2020. In 2018, the ruling party declared him "the eternal supreme guide," a description mocked by some critics.⁵⁸

⁵⁶ Kumar Peterson 'We have achieved a lot. God is our witness', *African News* (Bujumbura, 26 January 2020) <<https://www.africanews.com/2020/01/26/burundi-gen-evariste-ndayishimiye-chosen-to-replace-nkurunziza/>> accessed on 28 January, 2020

⁵⁷ Ferdinand Omondi, 'Burundi Election: Nkuruziza Set to Become Supreme Guide' *BBC News* (Bujumbura, 19 May, 2020) <<https://www.bbcnews.com/burundi-election-nkuruziza-set-to-become-supreme-guide/>> accessed 31 May, 2020. However President Pierre Nkurunziza died on Monday, 8 June 2020 after a heart attack at the age of 55 years.

⁵⁸ *ibid*

(ii) Cameroon

President Paul Biya, who has already turned 87 years old as at the time of writing, and sub-Saharan Africa's oldest leader, took over the presidency in 1982. The national assembly adopted a constitutional bill in April 2008, removing a two-term presidential limit to allow him extend his rule past 2011. He has won two elections, the last being in 2018 that opposition candidates have said were fraudulent.⁵⁹

(iii) Chad

President Idriss Dèby has ruled Chad since coming to power after a 1990 coup. A 2005 referendum removed a two-term limit from the constitution. Parliament approved a new constitution in 2018 reimposing the two-term limit, but it will not be applied retroactively, meaning Deby could serve two terms after the next election in 2021, potentially ruling until 2033.⁶⁰

(iv) Comoros

President Azali Assoumani, a former military officer who first seized power in a coup in 1999, won a referendum in 2018 to extend term limits and end a system of rotating power

⁵⁹ Alessandra Prentice, 'What Limits? How African Leaders Cling to Power for Decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

⁶⁰ George Allen, 'Which Way for African Democracy as More Countries Remove Presidential Term Limits from their Constitution?' *The African Courier*, (Cape Town, 21 November, 2019.<www.theafricancourier.de/africa/which-way-for-african-democracy-as-more-countries-remove-presidential-term-limit-from-their-constitution/html>. accessed 5 January 2020

among the archipelago's three main islands off Africa's east coast. The vote allowed him to run for two more five year-terms. The opposition dismissed the referendum as illegal.⁶¹

(v) Djibouti

President Ismail Omar Guelleh has been in power since 1999. Djibouti's ruling Union for a Presidential Majority (UMP) coalition party has effectively usurped the state. A constitutional amendment passed by the National Assembly in 2010 removed the two-term limit for presidents, reduced presidential terms from six years to five, and specified that candidates must be between the ages of 40 and 75. The changes allowed Guelleh to stand for a third term in 2011. The decision sparked a series of antigovernment protests in which at least two were killed and hundreds arrested, including the leaders of three opposition parties. The 2011 presidential campaign was marred by the harassment of opposition leaders and a clampdown on public gatherings. Guelleh ultimately faced only one challenger and won with 81 percent of the vote. He has won two subsequent elections.⁶²

(vi) Togo

Former President, Eyadéma Gnassingbé, ruled Togo with an iron fist for thirty-eight years. In 2002, in what critics called a 'constitutional coup', the national assembly voted unanimously to change the Constitution and allow Eyadéma to 'sacrifice himself again' and run for a third term during the 2003 presidential elections.⁶³ The constitutional change

⁶¹ ibid

⁶² ibid

⁶³ Solomon Tube, 'Togo Family Dynasty eyes Rule until 2033' *African Insiders* (Lomè, 14 May, 2019) <<https://africanarguments.org/2019/05/14/insiders-togo-constitution-family-dynasty-rule-2033/>> accessed on 2 February 2020

eliminated presidential term limits. Faure Gnassingbe has been the President of Togo since 2005 after taking over from his late father. The Gnassingbé family has ruled for a combined fifty-two years, making it the oldest political dynasty in African history. Togo's parliament approved a constitutional change in 2019 permitting long-standing President Faure Gnassingbe to potentially stay in office until 2030, despite widespread protests calling for the end of his family's political dynasty. However it does not take into account the three terms Gnassingbe has already served since coming to power in 2005, the latest of which ended in May, 2020.⁶⁴

By these amendments, the president is elected in a two-round race, by universal suffrage and for a term of five years, renewable once.⁶⁵ The amendment was signed off on by all ninety legislators present surpassing the required four-fifths approval by parliament to make such changes.⁶⁶ Another change passed by the National Assembly guaranteed immunity for life to all former presidents, who the new constitutional terms said cannot be "prosecuted, arrested, detained, or tried for acts committed during their presidential term."⁶⁷

Gnassingbe's Union for the Republic party holds two-thirds of the seats in parliament. The main opposition boycotted legislative elections in December, 2018 in part because of the

⁶⁴ Kamissa Camara, 'Here is how African Leaders stage constitutional coups: They tweak the constitution to stay in power' *The Washington Post*, (New York, 29 December 2019) <<https://www.washingtonpost.com/africa/here-is-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power/html>> accessed on 23 January 2020

⁶⁵ See article 59 of the 1992 Constitution of Togo (as amended)

⁶⁶ Kamissa Camara, 'Here is how African Leaders stage constitutional coups: They tweak the constitution to stay in power' *The Washington Post*, (New York, 29 December 2019) <<https://www.washingtonpost.com/africa/here-is-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power/html>> accessed on 23 January 2020

⁶⁷ *ibid*

dispute over term limits, leaving them without seats in parliament and powerless to vote against the amendments.⁶⁸

On February 24th, 2020 President Gnassingbe was declared winner for a fourth term. Provisional results from the National Electoral Commission showed that the incumbent had received 72 percent of votes cast in the 22nd February, 2020 elections.⁶⁹

(vii) **Uganda**

Uganda's Yoweri Museveni, came into power in January 1986. Museveni was one of the most vocal advocates of presidential term limits. Speaking at his first inauguration as president on January 25, 1986, for example, Museveni promised to usher in a new era of leadership, characterized by regular alternation, as a response to Africa's history of long-serving personal rulers:

Ours is not a mere change of guards but a fundamental change. The problem of Africa in general and Uganda in particular is not people, but leaders who want to overstay in power which breeds impunity, corruption and promotes patronage For us in NRM/A, we shall be here for only four years, after which we shall hand over power to a free and fairly elected civilian government.⁷⁰

Although by 1995, when the new Ugandan Constitution was being promulgated, Museveni had already exceeded his promised tenure by five years, he was nevertheless seen as a major

⁶⁸ Akin Sotunde, 'Togo Changes Law to let President Stand for Two More Terms' *Aljazeera* (Lomè, 30 May, 2019) <<https://www.aljazeera.com/news/2019/05/togo-law-president-stand-terms-190509180859448.html>> accessed 28 January 2020

⁶⁹ Barry Faye, 'Togo's President Faure Gnassingbe Wins Fourth Term' *France 24* (Lomè, 24 February, 2020) <<https://www.france24.com/togo/president/wins/elections/1254887446.html>> accessed 31 May 2020

⁷⁰ Yoweri Museveni, Inaugural Speech, 29 January 1986, quoted in John Okuku, 'Beyond Third Term Politics: Constitutional Reform and Democratic Governance in Uganda,' [2005] (11) (2) *East African Journal of Peace and Human Rights*;, 182-219

supporter of term limits, a view that was widely shared by the Ugandan populace.⁷¹ For example, the Constitutional Commission that drafted the 1995 Constitution, echoed Museveni's fears for personal rule and longevity of office, arguing that –the disadvantage of infinite re- election is the danger of personal ambition and using the office to secure re-election to the neglect of more important duties of state...the overwhelming majority view...is to limit the term of office of the president...the general consensus is two terms.⁷² Thus term limits was entrenched in Uganda in 1995. In 2001, Museveni and his party, the National Resistance Movement,⁷³ reaffirmed their commitment to adhere to the concept of term limits by promising in the party's 2001 election manifesto that Museveni was going to step down after completing his–second and final term as directly elected president.⁷⁴

However, while on the surface Museveni and the NRM appeared committed to the institution of term limits, they were at the same time working in the background strategizing on finding ways to remove them. In January 2001, two months before Museveni was elected for a second term, his government established a Constitutional Review Commission whose terms of reference included a proviso for the re-examination of –the consistency and compatibility of the constitutional provisions relating to the sovereignty of the people...and make recommendations as to how best to ensure that the country is governed in accordance with the will of the people at all times.⁷⁵ Although this did not specifically address the

⁷¹ John Okuku, 'Beyond Third Term Politics: Constitutional Reform and Democratic Governance in Uganda,' [2005] (11) (2) *East African Journal of Peace and Human Rights*;, 182-219

⁷² Dulani, 'Personal Rule', 109

⁷³ Hereinafter, NRM

⁷⁴ NRM 2001 Election Manifesto, page 11

⁷⁵ See section 1.8(8) of Legal Notice No. 1 of 2001

question of term limits, it was used by President Museveni and the NRM as a window to push through the proposal to remove term limits on the pretext that the people should decide whether to retain or remove presidential limits.⁷⁶

In a move that put opponents of removing term limits in a very untenable position, the Uganda government decided to package the bill with a proposal to allow the reintroduction of multi-party politics, which had been banned under the no-party democracy system that had been adopted under the 1995 Constitution. As a result, opposition to the removal of term limits would have also resulted in the rejection of the reintroduction of multi-party politics.⁷⁷ The bill to remove term limits was subsequently brought to the Ugandan National Assembly on 15th February, 2005. After months of debate, Parliament voted on the proposal and it was passed with eighty-five percent of the total number of the membership of the Ugandan National Assembly⁷⁸

On September 26, 2005, President Museveni assented to the amendment, thus clearing the path for him to seek indefinite re-election in future presidential contests⁷⁹ In 2006, Museveni ran for a third term and won with 59 percent of the vote. He repeated this feat in early 2011 when he won a fourth term with 68 percent of the vote⁸⁰ He was re-elected to a

⁷⁶ Dulani, 'Personal Rule', 165

⁷⁷ Boniface Dulani, 'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure,' *Afrobarometer* Dispatch No. 30, 25 May 2015, <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30> accessed 30 December 2019

⁷⁸ John Okuku, 'Beyond Third Term Politics in Uganda: The Implications of Proposed Constitutional Reforms for Democratic Governance' [2006] (36) (1) *Africa Insight*; 13 -23.

⁷⁹ Suleman Makara, 'Uganda's 2006 Multiparty Elections: Consolidating Democracy and Building Peace' [2007] (13) (1) *East African Journal of Peace and Human Rights*; 54-80.

⁸⁰ See Africa Elections Database. <www.africanelectionsdatabase.com> accessed 13 January 2020

fifth term in February 2016. He had two years earlier had the country's Constitution changed to enable him run again. "We don't believe in term limit," he said in an interview after his election victory, which opposition leader, Kizza Besigye, described as a sham.⁸¹ Also in 2019, the Ugandan Supreme Court upheld a constitutional amendment removing age limits on the presidency allowing the ageing President Yoweri Museveni to extend his more than three decade reign. The age limit was the last remaining hurdle after Museveni orchestrated the removal of presidential term limits in 2005.⁸² President Museveni was reelected for a sixth term by winning 58.6 percent of the votes cast in the 14 January, 2021 presidential election held in Uganda.⁸³

(viii) Republic of Congo

Republic of Congo, also called Congo Republic or Congo-Brazzaville, is a Central African nation with rain forest reserves. Congo Brazzaville is bordered by five countries Gabon and Atlantic Ocean to the west; Cameroon to the northwest; the Central African Republic to the northeast; the Democratic Republic of Congo to the east and south; and the Angolan enclave of Cabinda to the southeast. Its capital city, Brazzaville, lies across the Congo River from Kinshasa, the Democratic Republic of Congo's capital.⁸⁴

⁸¹ Henry Anozie 'Which Way for African Democracy as more Countries Remove Presidential Term Limit from their Constitutions?' *The African Courier*(Lagos, 16 May, 2016) <<https://www.theafricancourier.de/africa/which-way-for-african-democracy/html>> accessed 22 January 2020

⁸² *ibid*

⁸³ Sara Goufou 'Ugandan President Yoweri Museveni Wins Sixth Term as Rival, Bobi Wine Alleges Fraud' *ABC News* (Kampala: 17 January, 2021)<<https://www.abc.net.au/news/2021-01-17/ugandas-museveni-wins-sixth-term-as-rival-alleges-fraud/13064610>> Accessed 19 January 2021

⁸⁴ Kerri Shillington, *History of Africa* (MacMillan Education, 2005) 44

76 year old Dennis Sassou Nguesso, one of Africa's longest serving presidents has been in power in Republic of Congo for thirty-eight years. On 27th March, 2015 he announced that his government would hold a referendum changing the country's constitution of 2002 to allow him to run for a third consecutive term in office. On 25th October, 2015, the government held a referendum to allow Sassou Nguesso to run in the next election. The government claimed that the proposal was approved by ninety-two percent of voters with seventy-two percent of eligible voters participating. The opposition, who boycotted the referendum, said that the government's statistics were false and the vote a constitutional coup. The new constitution lifted term and age limits that would have made Nguesso ineligible. He won a new five-year term in a 2016 election, although the opposition rejected the outcome, alleging fraud. He has ruled for all but five years since 1979.⁸⁵ This was met with mass protest, with people proclaiming that the "Congo does not belong to Nguesso". To cap it all, he sacked two ministers who came out publicly to oppose his third term plans⁸⁶

(ix) Rwanda

President Paul Kagame of Rwanda took over power in 2000 after the genocide that claimed thousands of lives. In July 2015, Rwanda had a referendum by which the constitution was amended to allow him a third term. Under the extant provisions, Kagame could seek another

⁸⁵ Roos Allison, 'Congo Republic President Says Expect Referendum Over a Third Term' *Reuters*. (Kinshasa, 30 July, 2014) <<http://mobile.reuters.com/article/idUSKBN0MN25N20150327>> accessed 30 December 2020

⁸⁶ Rebecca Bouka, 'Congo opposition holds ceremony for killed protesters,' *Reuters*. 22nd June 2014 <<http://mobile.reuters.com/article/idUSKCN0SO24720151030#6gUx7xJL8tLmw1OB.97>> accessed 15 January, 2020

seven-year term and two five-year terms after that thus, potentially remaining in power until 2034.⁸⁷

Kagame, who won a third term in 2017, has faced mounting criticism for what human rights groups say are widespread abuses, clamping down of independent media, and suppression of political opposition.⁸⁸

(x) Democratic Republic of Congo

Joseph Kabila Kabange was the former president of Democratic Republic of Congo.⁸⁹ Kabila took over power from his father, former president Laurent-Désiré Kabila who was killed in 2001 by his bodyguard. He was elected as President in 2006 and re-elected in 2011 for a second term. The DRC was due to hold elections in December 2016 to end President Kabila's rule. Kabila was constitutionally barred from seeking re-election after two terms but had no intention of relinquishing power. Kabila's term was due to expire on December 20, 2016, according to the terms of the constitution adopted in 2006. Officials suggested that elections would be held in November 2016, but on 29 September 2016, the nation's electoral authority announced that the election would not be held until early 2018. Thus illegally extending his stay in office for two years. This sparked an outrage from his opponents, most of whom said he should have stepped down when his second term finished in late 2016.

⁸⁷ Alessandra Prentice, 'What Limits? How African Leaders cling to power for decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

⁸⁸ *ibid*

⁸⁹ Hereinafter DRC

Kabila remained in office, sparking sporadic protests in which security forces killed dozens of people.⁹⁰

However, amidst fears and severe pressure from political stakeholders and the international community that Kabila would manouver the Constitution and prolong his stay even after his illegal extension of office, in August 2018, Kabila announced that he would step down and not seek reelection in the December 2018 general election. Kabila left office on 24th day of January 2019 and was succeeded by President Félix Tshisekedi.⁹¹

(xi) Guinea

Former Guinean President, Lasana Conte used referendum to abolished term and age limits on the presidency in 2001 but died in office in 2008. He was succeeded by the current Guinean President Alpha Conde, the West African country's first democratically elected leader, who is currently serving his second five-year term. By the provisions of the 2010 Constitution of Guinea, he is due to relinquish power in 2020. However, the 81-year-old thought out ways to orchestrate a constitutional change that would allow him to run for a third and even a fourth time.⁹²

⁹⁰ Alessandra Prentice, 'What Limits? How African Leaders cling to power for decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

⁹¹ Johnny Bidwaya, 'Kabila's Third Term Bid Come Alive; Court Judges To Confirm Move' *Congo Indèpendant* (Kinshasa, 23 May 2018) <<https://www.congoindèpendant.com/kabilas-third-term-bid-come-alive-court-judges-to-confirm-move/>> accessed 2 February, 2020

⁹² Kamissa Camara, 'Here is how African Leaders stage constitutional coups: They tweak the constitution to stay in power' *The Washington Post*, (New York, 29 December 2019) <<https://www.washingtonpost.africa/here-is-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power/html>> accessed on 23 January 2020

Conde cleverly evaded talking directly about the issue, but refused to rule out a third term, saying his decision would be based on the "will of the people". Prime Minister Ibrahima Kassory Fofana, appointed in May 2019, also signaled that a referendum on a new constitution was a possibility. Furthermore, a billboard containing the message "Yes to a referendum. Yes to a new Constitution. We support you for life." was hoisted outside Guinea's National Assembly.⁹³

On 22nd March 2020, Guineans voted in a constitutional referendum which was fully boycotted by the main opposition parties. The new Constitution which received 89.76% of the votes cast resets presidential limits to two six year terms, thus allowing President Condé to be eligible for a third term in October 2020 and which he won with 59.49 percent of the votes cast.⁹⁴ President Condé is following in the footsteps of his predecessor, Lansana Conte - a man he fought hard and long to depose. Conde's third-term bid caused significant deterioration of stability in Guinea. Opposition parties, civil society groups and trade unions opposed to constitutional reforms established the National Front for the Defense of the Constitution (FNDC) and called for protests.⁹⁵ Security forces wounded and arrested protesters and more than fifty persons before and post election have reportedly been killed.

⁹³ ibid

⁹⁴ Kabinet Fofana, '2020 Guinean Constitutional Referendum' *African Arguments*, (Conakry, 16 April, 2020) <<https://www.africanarguments.org/2020-guinean-constitutional-referendum/1114525>> accessed 31 May, 2020. See also: J. Riley, 'Guinea's Condé Takes Presidential Oath for Third Term After Disputed Election' *France 24* (Conakry, 15 December, 2020) <<https://www.france24.com/en/africa/20201215-guinea-s-president-cond%C3%A9-sworn-in-after-disputed-re-election-urges-unity>> Accessed 8 January 2021

⁹⁵ ibid

Condé and his supporters cleverly relied on an academic interpretation that makes a conceptual distinction between a "new" Constitution and "revision" of the existing one.⁹⁶

(xii) Namibia

Namibia was one of the last African countries to gain its independence. Namibia's transition from apartheid rule to an independent state coincided with the first of the democratic waves that hit the African continent in the early 1990s. Breaking the entrenched authoritarianism that characterized the majority of African states at the time, Namibia adopted a Constitution that was founded along the principles of democracy, the rule of law and justice for all.⁹⁷ Among the new institutional innovations that were included in this Constitution was the provision that stipulated that any individual could only serve as president for a maximum of two five-year terms.⁹⁸ This meant that President Nujoma, who became Namibia's first president in 1990 and was re-elected to a second term in 1995, was limited to serving as president only until 2000, after which he would have been constitutionally barred from seeking additional terms. Namibia's incorporation of presidential tenure limitations marked only the sixth time in independent Africa's Constitutional history that these rules had been included as an institutional mechanism for addressing the practice of personal rule reflected in long-serving leaders, which had become a common feature of post-independent African

⁹⁶ A. Prentice, 'What Limits? How African Leaders cling to power for decades', *Reuters*, (Kigali, 18 October, 2019) <<https://www.reuters.com/what-limits-566681233/>> Accessed on December 30, 2019.

⁹⁷ See Article 1(1) of the Constitution of the Republic of Namibia, 1990.

⁹⁸ C. Clapham, "Clientelism and the State" in C. Clapham ed., *Private Patronage and Public Power*. (Frances Pinter, 1982.) 55

politics.⁹⁹ Namibia's adoption of term limits thus represented an important break with the history of personalizing power in Africa, generating an expectation that the previous tradition, where some leaders went to the extent of having themselves declared presidents-for-life, was going to be institutionally constrained.¹⁰⁰

However, upon being sworn into his second term in 1995, Nujoma and his closest supporters within the ruling South West People's Organization,¹⁰¹ began to contemplate removing term limits to enable the president to seek re-election for a third term. Although discussions of a third term began as soon as Nujoma was sworn in for his second term in 1995, the first public expression of this debate was made in March 1997, when the SWAPO Elders Council resolved to amend the term-limit provision to enable –President Nujoma to stand for many more years to come.¹⁰² Nujoma responded by telling the Namibian National Assembly in April 1997 that he was–still young and if people of Namibia want him to continue making a contribution, I will continue to do so.¹⁰³ Meanwhile, leading figures within SWAPO weighed in joining in the calls to amend the Constitution to enable Nujoma to seek a third term. In order to appease domestic and international critics that were wary about the creation of another president-for-life, Nujoma's supporters framed their proposal around a narrow and

⁹⁹ Roberts Jackson, and Carl Rosberg, 'Personal Rule: Theory and Practice in Africa' [1984] (16) (4)*Comparative Politics*; 421-442.

¹⁰⁰ Boniface Dulani, 'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure,' *Afrobarometer* Dispatch No. 30, 25 May 2015, <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30> accessed 30 December 2019

¹⁰¹ Hereinafter SWAPO

¹⁰² Fanny Nicholas, 'Nujoma Urged to Stand Again,' *The Namibian* (Windhoek, 18 March, 1997)1 quoted in B. Dulani, "Personal Rule" and Presidential term Limits in Africa" (unpublished paper presented to the *Department of Political Science*, University of Michigan, Michigan, 2011) 23

¹⁰³ Veronica Alexander, 'Nujoma Goes for It'*The Namibian* (Windhoek, 3 April, 1997)1 quoted in Dulani, 'Personal Rule', 143

technical reading of the Constitution arguing that, since the president had been first elected by a Constituent Assembly in 1989, his first term of office fell outside the ambit of the constitutional definition of elections as being through-direct universal and equal suffrage.¹⁰⁴ This narrow reading of the Constitution reflected not only the manipulation of constitutional rules to advance a personalistic agenda, but it also placed Namibia among a long list of countries that departed from adhering to the spirit of the Constitution by focusing on the letter of the law itself.¹⁰⁵

The third-term debate in Namibia ultimately culminated in the tabling of a Parliamentary motion on October 8, 1998, that sought to amend the term-limit provision to allow President Nujoma to seek a third term of office. Although the small Namibian Parliamentary opposition, joined by a handful of the country's fledgling civil society, fought a spirited campaign against the proposal, SWAPO used its commanding majority in the National Assembly and the National Council to push the amendment through with ease.¹⁰⁶ President Nujoma quickly signed the bill into law, clearing the way for him to run for a third term in the 1999 elections, which he subsequently won with seventy seven percent of the vote.¹⁰⁷

(xiii) Senegal

¹⁰⁴ Article 28(2)(a) of the Namibia Constitution, 1990.

¹⁰⁵ Dulani, 'Personal Rule', 184

¹⁰⁶ SWAPO, at the time of the amendment, held fifty three of the seventy two seats in the National Assembly and nineteen of the twenty six seats in the National Council, giving it a majority of over seventy-three percent in both Chambers.

¹⁰⁷ Africa Elections Database. <www.africaelections.com> accessed 18 January 2020

Abdoulaye Wade was first elected to a seven-year term in 2000, but the following year voters approved a new Constitution reducing presidential terms to five years. In 2007, Wade was elected to a second term. However, immediately after his reelection, he had the National Assembly pass a constitutional amendment going back to the seven-year term. Even more provocatively, he argued that since the constitution of 2001 went into effect during his first term, his initial mandate did not count towards the new two-term limit and that he was entitled to run for another term of seven years in 2012.¹⁰⁸ He took the matter to the Constitutional Court which ruled in his favour. Ironically, the citizens were not convinced by that argument and Macky Sall coasted home to victory with more than sixty-five percent of the vote over the incumbent who, amicably conceded defeat.

2.7 Cases where Constitutional Coups failed

(i) Zambia

While Nujoma was being sworn in for a third term in early 2000, his colleague in neighboring Zambia, Fredrick Chiluba, embarked on his own campaign to remove the term-limit provision from the country's Constitution. The introduction of presidential term limits in Zambia was part of major Constitutional changes in 1991, which marked a major break from one-party authoritarian rule and the introduction of competitive multi-party politics.¹⁰⁹ The inclusion of a term-limit provision in the new Constitution was motivated in large part by Zambia's long history with authoritarian rule: from

¹⁰⁸ Peter Pham, 'Senegal Consolidates its Constitutional Democracy' *Africa Source* (Dakar, 29 March, 2016) <<https://www.atlanticcouncil.org/blogs/africasource/senegal-consolidates-its-constitutional-democracy/>> accessed on 23 January, 2020.

¹⁰⁹ Dulani, 'Personal Rule', 88

independence in 1964, Zambia had had only one president, Kenneth Kaunda. It was only after the adoption of the new Constitution in 1991, which lifted a long-time ban on opposition parties, that Kaunda was forced to leave office after losing to Chiluba in the first competitive elections since Zambia's independence in 1964. Although Chiluba and his party, the Movement for Multi-Party Democracy¹¹⁰ were among the leading advocates of presidential term limits, he and his supporters in the MMD had completely reversed positions when the president's time to step down loomed close.¹¹¹

As in the Namibian case, the bid to remove presidential term limits in Zambia generated an intense political debate. While Chiluba remained non-committal about his true position on the debate, his supporters mounted a very aggressive, and sometimes violent, campaign for the removal of term limits.¹¹² However, although the MMD had a very strong legislative majority,¹¹³ the proposal to remove term limits caused a major split within the MMD ranks. Several cabinet ministers, led by Vice President Christon Tembo, and several MMD Members of Parliament (MPs), joined hands with opposition parties, civil society, trade unions, student groups, and church leaders to mount a well-coordinated campaign against

¹¹⁰ Hereinafter MMD

¹¹¹ Shannon Mpuha 'No One Capable of Succeeding Chiluba', *The Post of Zambia* (Lusaka, 26 March, 2001)3 quoted in Dulani, 'Personal Rule', 196

¹¹² Momba James., 'Chiluba: The Third Term Temptation', [1999] (15) (2) *Africa Files*, 28-30.

¹¹³ 131 seats out of 150 National Assembly seats

the proposal. They pointed at Kenneth Kaunda's twenty-seven-year rule as an example of what could happen in the absence of limits on presidential office.¹¹⁴

Although Chiluba and his supporters persisted by bulldozing the MMD's convention in early 2001 to adopt the proposal to remove term limits as a ruling-party position, the strong opposition within the MMD and wider society increased the likelihood that the bill would not pass through parliament. Faced with the prospect of defeat in a Parliament dominated by his own party, Chiluba was forced to concede defeat and declare that he would be stepping down on the eve of the bill's tabling in Parliament on 7th May, 2001.¹¹⁵ The bill was subsequently withdrawn and the MMD hastily chose Levi Mwanawasa to lead the party in the December 2001 elections. With ten opposition candidates splitting the opposition vote, Mwanawasa managed to squeak through to victory with twenty-nine percent of the presidential vote ¹¹⁶

(ii) Nigeria

Former military Head of State, Olusegun Obasanjo came into power in 1999 as an elected civilian president after years of military rule and was reelected in 2003. Towards the end of his second term, he made moves to change the Constitution to enable him to run for a third time. Despite the sweeping powers entrusted on the Nigerian president by the country's Constitution, Obasanjo was prevented from prolonging his tenure in 2007 after his attempt

¹¹⁴ Adam Garrick 'Fourteen MMD Members Reject Perpetual Presidency Syndrome' *The Post of Zambia* (Lusaka, 28 March, 2001) 4 quoted in Dulani, 'Personal Rule', 100

¹¹⁵ Dulani, 'Personal Rule', 112

¹¹⁶ Africa Elections Database. <www.africaelections.com> accessed 28 January, 2020

to remove term limits was defeated. Although Obasanjo's People's Democratic Party¹¹⁷ had a commanding parliamentary majority and his quest for a third term was accompanied by a major campaign of patronage to entice supporters, it was defeated due to the PDP's policy which provided for rotation and zoning of party and public elective offices and stipulating that its presidential candidates should be rotated between geographical zones after every two terms.¹¹⁸ This zonal rotation policy meanwhile, was influenced by an informal recognition of the need to rotate leadership of the party between the largely muslim northern part of the country and the predominantly Christian south and the dichotomy between the three major tribes in Nigeria.¹¹⁹ Thus, after having served as Nigeria's president for two terms, Obasanjo's attempt to seek a third term was seen as an abrogation of the PDP's informal arrangement to promote leadership rotation.¹²⁰ As a result, several PDP legislators in the Nigerian Senate joined their counterparts in the opposition and voted against the bill that sought to remove term limits when it was brought before the Senate in May 2006.¹²¹

(iii) Gambia

Former Gambian President Yahya Jammeh seized power after a bloodless coup in 1994. The military leaders promised a return to civilian rule once corruption had been eliminated but meanwhile ruled by proclamation. Dissent was brutally repressed, and political activity was banned until August 1996. Presidential elections were held late that year, with elections for

¹¹⁷ Hereinafter PDP

¹¹⁸ See Article 7(2)(c) of the People's Democratic Party Constitution 2009

¹¹⁹ That is Hausa, Yoruba and Igbo

¹²⁰ Dulani, 'Personal Rule', 180

¹²¹ Elizabeth Leto 'No Third Term for Nigerian Leader', *BBC Africa News*, May 14 2006.<<http://news.bbc.co.uk/2/hi/africa/4986904.stm>> accessed 23 January 2020.

the National Assembly following in early 1997. Jammeh, now retired from the military, was elected president, and his political party, the Alliance for Patriotic Reorientation and Construction,¹²² dominated the National Assembly. A new Constitution, approved by voters in 1996, came into effect. However, signs of domestic discord appeared. Jammeh's rule became increasingly authoritative, and by 1998 the corruption he had pledged to eliminate was evident in his own administration. Media freedom was restricted, and an increasing number of human rights abuses were cited by international observers. Jammeh's administration was the subject of coup attempts in 2000, 2006, and 2014, which, although unsuccessful, underlined the growing discontent in the country.¹²³ Still, Jammeh was reelected in 2001 and 2006 in elections deemed generally free and fair, though with some flaws. His reelection in 2011 was denounced by the opposition, while the opinions of international organizations were mixed. Jammeh retreated from some international bodies, initiating a withdrawal from the Commonwealth in 2013 and the International Criminal Court in 2016.

As the end of his fourth term in office drew close, President Jammeh stated that presidents should be judged on what they do in power not by the length of time they have been in office. "I will deliver to the Gambian people and if I have to rule this country for one billion years, I will, if Allah says so,"¹²⁴ According to him, imposing a two-term limit on the presidency is "very un-African." The months leading up to the December 2016 election were filled with anxiety. International rights groups and other bodies cautioned that the

¹²² Hereinafter APRC

¹²³ Carl Martin, 'West African Leaders shelve Third Term Ban proposal' *BBC Africa* (Nairobi, 20 May 2015) <<https://www.bbc.com/news/world-africa-32808685>> accessed 23 January 2020

¹²⁴ *ibid*

upcoming election would not be free or fair, and the Economic Community of West African States¹²⁵ refused to send a monitoring group. For the first time, however, several opposition groups rallied to support just one candidate, Adama Barrow. The newly united opposition posed the greatest threat to Jammeh in his twenty-two years of rule. Prior to the poll, Jammeh announced that postelection demonstrations would be banned, and on the day of the election, internet service was cut off and international calls were blocked, adding to the already tense political climate.¹²⁶

In a surprising turn of events, Barrow was declared the winner of the December 1st election, taking about 46 percent of the vote; Jammeh came in second, with about 37 percent. Even more surprising was Jammeh's gracious concession to Barrow. He vowed not to contest the results and pledged to assist Barrow with the transition. Jammeh's acceptance of the election results did not last long, however.¹²⁷ Less than a week after the results were released, the electoral commission revised the results because of a tabulation error that had been found and corrected. Barrow still had the most votes, but his margin of victory was reduced to winning 43.29 percent to Jammeh's 39.64 percent. Jammeh then rejected the results and called for a new election. His actions were immediately condemned by the international community, which recognized Barrow as the winner of the election.¹²⁸ On December 13 the ruling party, Jammeh's APRC, filed a petition with the Supreme Court, asking for the

¹²⁵ Hereinafter ECOWAS

¹²⁶ Carl Martin, 'West African Leaders shelve Third Term Ban proposal' *BBC Africa* (Nairobi, 20 May, 2015) <<https://www.bbc.com/news/world-africa-32808685>> accessed 23 January 2020

¹²⁷ *ibid*

¹²⁸ Anthony Clark, 'The Gambia - Political Change' *Britannica*. (London, 15 June, 2019) <<https://www.britannica.com/place/The-Gambia/Political-change/>> accessed 22 February, 2020

election results to be declared void, and Jammeh continued to maintain that he would not stand down. Efforts by ECOWAS to peacefully mediate the political standoff continued into January 2017 but to no avail. Also that month, the Supreme Court said that it would not be able to hear the APRC's case until May or November, when the court, which was composed of foreign judges, would be available to meet.¹²⁹

As the January 19 inauguration date grew nearer, both sides took action. Barrow prepared to take office, and ECOWAS assembled troops along the Gambian border, ready to act if Jammeh did not stand down at the end of his mandated term. Meanwhile, on January 17 Jammeh declared a three-month state of emergency, and the next day the National Assembly extended his presidential term by three months. On January 19 Jammeh still refused to step down, and Barrow was sworn in as president in neighbouring Senegal. Later that day, with Jammeh still refusing to hand over power to Barrow, ECOWAS troops moved across the border into The Gambia. Their advance was halted before reaching Jammeh in order to allow one last attempt by mediators to convince him to change his mind. They were successful: Jammeh agreed to step down and left the country late on 21st January 2017. ECOWAS troops then secured the capital and other areas in preparation for Barrow's return. A few days later the National Assembly ended the state of emergency and revoked the extension of Jammeh's term. Barrow returned to The Gambia on January 26, 2017, and was greeted with a crowd of cheering supporters.¹³⁰

(iv) Burkina Faso

¹²⁹ ibid

¹³⁰ ibid

Captain Blaise Compaoré became president in October 1987 after a military coup toppled and killed another young captain, Thomas Sankara. Compaoré managed to stay in power, adapting to democratisation in the 1990s by accepting a multiparty system while remaining firmly in control of political space. He manipulated the Constitution two times to lift obstacles to his continued rule. In 2014, having held on to power for twenty seven years, he was about to use the National Assembly to amend the country's Constitution to allow him to run for a third term in late 2015.¹³¹

The popular insurrection of October 30-31, 2014 where hundreds of thousands of Burkinabè protested against this undemocratic practice changed the course of their country's history by pushing their president, to resign and flee. For the protesting Burkinabè, the 2014 attempt at constitutional change was one too many.¹³²

(v) Malawi

The calls for the removal of term limits in Malawi, adopted as part of a new Constitution in 1994, which followed three decades of authoritarian rule by - President-for-Life Hastings Kamuzu Banda, began to emerge long before Malawi's president between 1994-2004, Bakili Muluzi, had even finished serving his first term. In January 1999 for example, a senior official of the ruling party- United Democratic Front, declared that Muluzi would stand as the UDF's presidential candidate beyond the two terms because there is nobody capable of assuming the reins of leadership from him. That he had another twenty-six years to rule the

¹³¹ Godfrey Yabi, 'Tackling third term bids: Lessons from Burkina Faso' *Great Insights* (Accra, 4 November, 2015) 2

¹³² *ibid*

country.¹³³ As Muluzi approached the end of his second term in 2004, the calls for him to seek a third term gained further traction. These calls culminated in a decision by the UDF National Executive Committee in July 2000 to endorse Muluzi's candidature in the 2004 elections¹³⁴

In order to make up for the shortfall in legislative numbers, Muluzi resorted to an extensive campaign that involved the disbursement of various forms of patronage to his party followers, members of the opposition, civil society, and traditional leaders, in return for support for the removal of term limits. In addition to boosting Muluzi's chances of extending his tenure, the campaign to reach out to the opposition, civic, and traditional leaders helped to project the third-term campaign in Malawi as a national cause instead of being perceived as a narrow partisan one. The success of these efforts was reflected in the fact that the actual bill proposing to remove term limits was sponsored and tabled in the Malawi National Assembly by a legislator from the opposition Alliance for Democracy,¹³⁵ and seconded by the vice president of the main opposition Malawi Congress Party,¹³⁶ Mr. John Tembo.¹³⁷

¹³³ Patrick Kasich, 'Chiluba Announces He Will Step Down', *Post of Zambia* (Harare, 7 May, 2001)3, Lily Marais, 'Third Term for Muluzi' *Daily Times* (Lilongwe, 13 January, 1999)1 quoted in Dulani, 'Personal Rule', 207

¹³⁴ B. Dulani and J. K. Van Donge. 'A Decade of Legislature-Executive Squabble in Malawi' (1994–2004)' in Muhammed Salih (ed.), *African Parliaments: Between Governments and Governance*. (Palgrave Macmillan, 2005) 74.

¹³⁵ Hereinafter AFORD.

¹³⁶ Hereinafter MCP

¹³⁷ E. Kanyongolo, 'Constitutionalism and the Removal of Presidential Term Limits from the Constitution of Malawi', [2003] (7) (1) *Unima Law Journal*; 59-72.

When Parliament voted on the bill on July 4, 2002, however, only one hundred and twenty five Members of Parliament¹³⁸ voted in favour of removing term limits. This was three votes shy of the required two-thirds majority of one hundred and twenty-eight votes, and the proposal was therefore defeated.¹³⁹ Although the UDF conceded defeat after the July 4 vote, a meeting of the party's regional and district Executive Committees was held two weeks later, on July 20, 2004, reiterating the endorsement of Bakili Muluzi as the party's presidential candidate in the 2004 elections. This meeting further agreed that the party should table a modified version of the bill, this time calling for an increase in the maximum number of presidential terms from two to three¹⁴⁰

This represented a climb down from the earlier proposal, which had called for the complete removal of the term-limit provision. This change was offered by the UDF as a compromise and was expected to generate less resistance than the earlier bill.

In a further change of tactic, the new bill was tabled in the Malawi Parliament on September 8, 2002, by the Minister of legal affairs, thus dispensing with the pretence that the government had no direct interest in the Constitutional maneuvering. However, as with the original bill, this proposal met with widespread resistance within and outside parliament. For example, the civil society organizations in the country came together and formed a new

¹³⁸ Hereinafter MP

¹³⁹ Dulani and Van Donge, 'A Decade of Legislature-Executive', 92

¹⁴⁰ Rita Federik, 'Muluzi Goes into Second Term', *The Nation* (Lilongwe, 22 June 1999) 3, see also Andrew Shaga, 'Third Term Refuses to Die' *Daily Times* (Lilongwe, 22 July 22, 2002)² quoted in Dulani, 'Personal Rule', 214

group called the Forum for the Defence of the Constitution (FDC), whose primary aim was to campaign and lobby MPs to vote against the new bill.¹⁴¹

Meanwhile, Muluzi's former allies in the opposition MCP, whose support was crucial in nearly securing the passage of the July 4 vote, indicated that they would not support the new bill, thus further undermining the prospects of its passage.¹⁴² Faced with increasing uncertainty at the bill's passage, Muluzi called upon his party's legislators not to prioritize the bill over other pressing issues, a call that led to the suspension of the Parliamentary debate.

However, the shelving of the bill proved to have only been temporary, as Parliament was again summoned on January 27, 2003, for an emergency session with the sole purpose of debating the proposal to increase the maximum number of presidential terms from two to three. In the ensuing debate, however, it became very clear that the government would yet again fall short of the two-thirds support needed to effect the amendment. As a face-saver, the UDF was forced to retreat under the pretext of referring the bill to the Legal Affairs Committee of Parliament for further scrutiny. Two weeks later, Muluzi declared that he would not be standing for a third term, thus putting the campaign to a final rest¹⁴³

(vi) Sudan

¹⁴¹ See FDC Declaration and Resolutions on the Proposed Third Term Amendment to the Constitution—October 8, 2002

¹⁴² Dulani and Van Donge, 'A Decade of Legislature-Executive', 100

¹⁴³ *ibid*, 220

The consequences of constitutional coups, in most cases, are disastrous, leading to state dysfunctionality, civil unrest, economic crises and social disorientation. This was the case in Sudan. Omar Hassan Ahmad Al-Bashir came into power in 1989 as the seventh president of Sudan. His government was characterised by repression of dissent, social and political crisis, and lack of respect for human rights. Al-Bashir in December 2018 came close to another term in office after a majority of lawmakers backed a constitutional amendment to extend term limit that would have required him to step down in 2020. On April 11 2019, Al-Bashir was removed from his exalted office by the Sudanese Armed Forces after several months of protests and civil uprisings.¹⁴⁴

2.8 Resilient Autocrats

From the cases discussed above, presidential term limits are a common feature in sub-saharan African constitutions but constitutional amendments by self centred presidents using referenda, parliament or the judiciary are increasingly posing a tangible threat to this democratic principle. Beginning from the 1990s, many presidents in sub-saharan Africa have attempted with varying degrees of success to hold on to power beyond their legal mandate. It is obvious that this is a well trodden path in Africa, where executive incumbents go to great lengths and often successfully, to retain power by manipulating, amending, or outright abrogation of presidential term limits entrenched in their Constitutions, meant to ensure democratic transition of power and encourage political participation.

¹⁴⁴ Faith Azaba, 'Term Limits Safeguard Democracy' *Zimbabwe Independent*, (Harare, 6 December 2019) <<https://www.theindependent.co.zw/2019/12/06/term-limits-safeguard-democracy/>> accessed 3 February, 2020.

This trend- the constitutional coup consolidates presidential power, encourages autocracy while clothing such government with the facade of democracy. While regional bodies such as ECOWAS and the African Union are increasingly coming under pressure to take a stand on constitutional coups, State parties remain strongly opposed to formal bans. If presidential term limit is thriving as a democratic principle, well, so is its antithesis--the constitutional coup.

Table 2 shows the countries in sub-saharan Africa where constitutional coups were successful and countries where they were resisted from 1990-2021

Country	Name of President	Year	Successful
Burkina Faso	Blaise Campaorè	2003	Yes
Burundi	Pierre Nkuruziza	2015	Yes
Cameroon	Paul Biya	2008	Yes
Chad	Idris Deby	2005	Yes
Democratic Republic of Congo	Joseph kabila	2016	Yes
Djibouti	Ismail Omar Guelleh	2010	Yes
Comoros	Azali Assoumani	2018	Yes
Gabon	Omar Bongo	2003	Yes
Gambia	Yahya Jammeh	1997	Yes
Guinea	Lasana Contè	2001	Yes
	Alpha Condé	2020	Yes
Malawi	Bakili Muluzi	2002	No
Namibia	Sam Nujoma	1998	Yes
Niger	Mamadou Tandja	2009	Yes
Nigeria	Olusegun Obasanjo	2006	No

Republic of Congo	Sassou Nguesso	2015	Yes
Rwanda	Paul Kagame	2015	Yes
Senegal	Abdoulaye Wade	2008	No
Sudan	Omar Al Bashir	2018	No
Togo	Eyadema Gnassingbe	2002	Yes
	Faure Gnassingbe	2019	Yes
Uganda	Yoweri Museveni	2005	Yes
Zambia	Federick Chiluba	2001	No

Source: own compilation from research on the internet.

Flowing from the above case studies of countries whose presidents have engaged in constitutional coups, whether successful or not, it is obvious that these presidents either amended the constitution through a national referendum or through the parliament, except in the case of Burundi where the President intimidated the judiciary to rule in his favour. Constitutions often provide a strict procedure for amendment. While a referendum gives the citizens the opportunity to have a say in the proposed amendment by voting, an amendment of the Constitution by parliament is done by the elected representatives of the people. Furthermore, a constitutional amendment by a referendum is often passed by simple majority while a constitutional amendment through the parliament often has varying majority thresholds depending on the provisions of the particular Constitution.

Table 3 highlights the procedure used to amend the Constitutions of some sub-saharan African countries which have been involved in constitutional coups.

Country	Procedure used to amend the Constitution	Majority threshold
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Burkina Faso	Parliament	Two-thirds majority
Burundi	Judiciary	Simple majority
Cameroon	Parliament	Simple majority
Chad	Referendum	Simple majority
Comoros	Referendum	Simple majority
Democratic Republic of Congo	Parliament	Three-fifths majority
Djibouti	Parliament	Two-Third majority
Gabon	Referendum	Simple majority
Gambia	Parliament	Two-thirds majority
Guinea	Referendum	Simple majority
Malawi	Parliament	Two-thirds majority
Namibia	Parliament	Two-thirds majority
Niger	Parliament	Four-fifths majority
Nigeria	Parliament	Two-thirds majority
Republic of Congo	Referendum	Simple majority
Rwanda	Referendum	Simple majority
Senegal	Judiciary	Simple majority
Togo	Parliament	Four-fifths majority
Uganda	Parliament	Two-thirds majority
Zambia	Parliament	Two-thirds majority

Source: Own compilation from research on the internet.

2.9 Conclusion

There are arguments that placing restrictions on presidential term limits are inimical to policies and developmental programmes of government since such restrictions disrupt

continuity. This was one issue touted by Obasanjo's supporters during the third term bid debate in Nigeria. Further still, as canvassed by Neguesso of the Republic of Congo, the people should be allowed to choose who to lead them and for how long. However there are counter arguments that constitutional amendments at the behest of the president in order to hold on selfishly to power, is undemocratic, a constitutional coup and is contrary to the spirit of the Constitution. Such practice encourages autocracy, creates political and social instability, undermines security, while inhibiting economic and developmental growth as depicted above.

CHAPTER THREE

LEGAL FRAMEWORKS AND THE ROLE OF REGIONAL AND INTERNATIONAL BODIES IN THE PREVENTION OF CONSTITUTIONAL COUPS IN SUB-SAHARAN AFRICA.

3.0 Introduction

Democracy in sub-saharan Africa is increasingly under threat due to constitutional coups. With the developments in The Gambia, Sudan, Burundi and Democratic Republic of Congo, among other countries, it is clear that alterations to presidential term limits do not have the support of the people. Tampering with constitutional provisions on term limits, is a recipe for domestic conflict.¹ The consensus in favour of democratization and consolidation of democratic institutions that emerged in the 1990s² led the OAU, later the AU, to adopt a number of initiatives intended to improve the quality of democratic governance of its member states. These initiatives include setting standards and formalising common principles and values related to constitutional democracy³ monitoring and evaluating

¹ Dumiso Gatsha, 'Legal Frameworks and Practices of Presidential Term Limits in Africa' *Africa Network Youth Policy Experts* (Botswana, 3 February, 2017) <<https://www.afrinype.org/legal-frameworks-and-practices-of-presidential-term-limits-in-africa/>> accessed 4 February, 2020

² See Declaration of the OAU Assembly of Heads of State and Government on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, (AHG/Decl.1 (XXVI)) (1990). See also Micha Wiebusch and Christina Murray 'Term Limits and the African Union' [2018] (17) (2) *Journal of African Law*; 1

³ The normative framework of the AU on democratic governance is built around various treaties, protocols, resolutions, declarations and decisions. For an overview, see African Governance Architecture "Shared Values" instruments available at <<http://agaplatfom.org/index.php/about>> accessed 21 January 2020. For an overview of the AU's normative and enforcement framework on protecting constitutionalism, see M Wiebusch 'The Role of Regional Organizations in the Protection of Constitutionalism' [2016] (7) (2) *International Institute for Democracy and Electoral Assistance*; 12

member States' human rights, and electoral and governance systems.⁴ The AU's Constitutive Act of 2000 lays the foundation for other regional legal instruments in this regard and it will be discussed alongside relevant national, sub-regional and regional legal instruments in sub-Saharan Africa.

3.1 Regional Legal Framework on Prevention of Constitutional Coups in Sub-Saharan Africa

The main instruments that establish constitutionalism as a basic principle of the AU are the Constitutive Act of 2000, the Lomé Declaration 2000 and the African Charter on Democracy, Elections and Governance 2007.

(a) The Constitutive Act of the African Union 2000

The Constitutive Act of the AU⁵ which came into force in 2000 provides the basis for developing a more effective monitoring mechanism for scrutinising and assessing the way in which presidential term limits are imposed, altered or removed and this is reflected in the preamble to the Act which states that the AU is "*DETERMINED to provide and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law*".⁶

⁴ Dennis Tull and Claudia Simons , ' The Institution of Power Revisited: Presidential Term Limits in Africa', [2017] (52) (2)*Africa Spectrum*; 79

⁵ Hereinafter, the Act.

⁶ See preamble to the Act

One of the core objectives of the AU is to promote democratic principles, popular participation and good governance.⁷ The Act further commits its State parties to uphold democratic principles, human rights, the rule of law and good governance.⁸ Article 30, specifically prohibits unconstitutional means of coming to power. It provides: *“Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”* By virtue of article 23, non compliance with decisions and policies of the Union may attract various sanctions.⁹

From the foregoing, it is clear that the Act provides the legal framework for upholding constitutionalism and the rule of law in sub-saharan Africa. Compliance with the provisions of the Constitution should not be confined to the letter. The spirit of the constitution, that is, the mischief which such provision seeks to prevent should be taken into consideration as well. Constitutional coups occur when leaders selfishly jettison the democratic intentment of the draftsman in order to hold on to power at all costs.

(b) African Charter on Democracy, Elections, and Governance, 2007

⁷ To this end article 3 (g) of the Act requires states: to promote democratic principles and institutions, popular participation and good governance.

⁸ Article 4

⁹ See article 23(2) which states that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly”.

The African Charter on Democracy, Elections, and Governance of 2007¹⁰ was inspired by the AU's well-established discourse on 'unconstitutional changes of government' under the Act.¹¹ Its adoption was premised on the realization that conflicts on the continent were caused or exacerbated by many factors, notably, lack of democratic practices in the management of public affairs, non-observance of human rights, as well as unfair electoral processes. The ACDEG is seen as a bulwark to ensuring free, fair and credible elections, the building of democratic institutions and the rule of law, as well as deepening democratic ideals and values on the continent.¹² There has been a growing number of states which modified constitutionally determined presidential term limits or adopted a flexible interpretation of relevant constitutional provisions to allow incumbent leaders additional terms in the highest office.¹³

To this end, article 23 provides:

State Parties agree that the use of, *inter alia*, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union:

1. Any putsch or coup d'Etat against a democratically elected government.

¹⁰ Hereinafter, ACDEG. It was adopted on January 30, 2007 and entered into force on February 15, 2012. At the time of writing, February 2020, the ACDEG has been signed by **forty** six member states and ratified and acceded to by thirty one, being twelve of the fifteen member states in western Africa, six of the ten in southern Africa, eight of the thirteen in eastern Africa, two of the nine in central Africa and three of the seven in northern Africa. It has been a slow process, which is not unusual for AU treaties. See, B. Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' [2019] (63) (51)*Journal of African Law*; 39.

¹¹ Micha Wiebusch and Christina Murray 'Term Limits and the African Union' [2018] (17) (2)*Journal of African Law*; 1

¹² Ben Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' [2019] (63) (51)*Journal of African Law*; 39.

¹³ Dumiso Gatsha, 'Legal Frameworks and Practices of Presidential Term Limits in Africa' *Africa Network Youth Policy Experts* (Botswana, 3 February, 2017) <<https://www.afrinype.org/legal-frameworks-and-practices-of-presidential-term-limits-in-africa/>> accessed 4 February, 2020

2. Any intervention by mercenaries to replace a democratically elected government.
3. Any replacement of a democratically elected government by armed dissidents or rebels.
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

While the AU has been more active and outspoken in cases of military coups,¹⁴ its role, despite the elaborate provisions of ACDEG particularly in article 23(5) has remained largely constrained.¹⁵

Furthermore Article 25 subsections (1)-(8) state that:

1. When the Peace and Security Council observes that there has been an unconstitutional change of government in a State Party, and that diplomatic initiatives have failed, it shall suspend the said State Party from the exercise of its right to participate in the activities of the Union in accordance with the provisions of articles 30 of the Constitutive Act and 7(g) of the Protocol. The suspension shall take effect immediately.
2. However, the suspended State Party shall continue to fulfill its obligations to the Union, in particular with regard to those relating to respect of human rights.
3. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.

¹⁴ An example of such intervention is Mali in 2012

¹⁵ An interesting example of this is Rwanda. After having served as an interim president between 2000 and 2003, Kagame was elected for a full seven-year term in 2003 and re-elected in 2010 for a second term which expired in 2017. In November 2015, a constitutional revision was approved by both houses of parliament and later endorsed by a popular referendum. The revised constitution maintains a two-term limit, but reduces the length of a term to five years. However, before coming into force, the new provisions will be preceded by a “transitional presidential term” of seven years (2017–2024) for which any presidential candidate, including President Kagame, will be eligible (Article 172) to stand. Thus the amended presidential two-term limit will only take effect after the end of the next (“transitional”) seven-year term. In other words, President Kagame, who won the transitional term in 2017, could theoretically rule Rwanda until 2034. “No law stops him,” the speaker of the Lower House told a news conference after the chamber’s approval of the revised Constitution. Thus although Rwanda’s former and current Constitution both foresee a two-term limit, Kagame would be able to rule the country for a total of 31 years in full compliance with the law. See: Unwiringiyimana Clement, 'Rwandan Parliament Agrees to Extend Kagame’s Rule' *Reuters*, (Kigali, 29 October, 2015) <www.reuters.com> accessed 5 February 2020. See also D. Tull and C. Simons, 'The Institution of Power Revisited' 89

4. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.
5. The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act.
6. The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.
7. State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government.
8. State Parties shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition.

Also Article 44(2)(d) states that :

The Commission shall ensure that effect is given to the decisions of the Union in regard to unconstitutional change of government on the Continent.

The ACDEG reflects the shared values, standards and norms of the AU and its member states towards democratisation and, together with the Act, envisages that states will hold each other accountable to ensure compliance through the application of the sanctions provided for in article 23 of the Act against States that fail to comply with the AU's principles and policies. Going by the provisions of the ACDEG, the AU commits its State parties to uphold the principles of democracy even during constitutional revisions. Article 23 (5) refers to situations, which can be conveniently termed constitutional coups, where constitutions are amended to alter the provisions concerning change in government by procedures that do not meet AU standards of democracy and the rule of law as well as fall short of the domestic standards of democracy reflected in the constitution itself.¹⁶ Sadly, the AU has done practically nothing to enforce this provision. The contrast between the AU's response to military coups and "constitutional coups" is most visible in political crises that

¹⁶ D. Tull and C. Simons, 'The Institution of Power Revisited: Presidential Term Limits in Africa', [2017] (52) (2) *Africa Spectrum*; 79

involved both.¹⁷For example, in Niger in 2009, although the Peace and Security Council¹⁸ had endorsed the decision of ECOWAS to impose sanctions including suspension because it considered the constitutional referendum to remove presidential term limits in violation of the ECOWAS Supplementary Protocol on Democracy and Good Governance, the PSC did not actually impose sanctions.¹⁹ It was only when a military coup took place in 2010 that the PSC suspended Niger from all AU activities.²⁰ The reason for this delayed response may be in part because Niger had signed but not yet ratified the ACDEG, leaving the AU without the legal basis to impose sanctions under article 23(5).²¹ However, in the case of Burkina Faso, even though it had ratified the ACDEG, the 2014 attempt by President Blaise Compaoré to remove presidential term limits did not lead the AU to consider action under article 23.²² Instead, it was only when the introduction of a bill in parliament to change the constitution was followed first, by a popular uprising which led to Compaoré's resignation and then, a military coup triggered by leadership disputes within the transitional government that the PSC responded, threatening suspension and targeted sanctions.²³

(c) Lomé Declaration 2000

¹⁷ ibid

¹⁸ Hereinafter PSC

¹⁹ PSC Communiqué of the 207th Meeting on 29 October 2009 (PSC/AHG/Comm3(CCVII))

²⁰ PSC Communiqué of the 216th Meeting on 19 February 2010 (PSC/PR/Comm 1(CCXVI))

²¹ P. Manirakiza 'Insecurity Implications of Unconstitutional Changes of Government in Africa: From Military to Constitutional Coups' [2016] (17) (2) *Journal of Military and Strategic Studies*; 86.

²² Dickens Olewe 'Is Africa Going Backwards on Democracy?' *BBC Africa News* (Lagos, 22 February 2019) <<https://www.bbc.com/news/world-africa-46971250>> accessed 30 December 2019

²³ PSC Communiqué of the 207th Meeting on 29 October 2009 (PSC/AHG/Comm3(CCVII))

The Lomé declaration stipulates that the “preparation, content and method of revision” of constitutions “should be in conformity with generally acceptable principles of democracy”.²⁴

The ACDEG expands on this by providing the safeguard that the process of amendment or revision of a constitution requires national consensus, “obtained if need be, through referendum.”²⁵

Other regional initiatives include setting standards and formalising common principles and values related to constitutional democracy, monitoring and evaluating member States’ human rights, and electoral and governance systems through the African Charter on Human and Peoples’ Rights²⁶ state reporting mechanism,²⁷ African Union Election Observation Missions²⁸ as well as the reporting systems under the African Peer Review Mechanism²⁹ and the ACDEG³⁰. The AU also developed an increasingly effective security structure, coordinated mainly by the PSC, which is the principal decision-making body for the

²⁴ Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI))

²⁵ Article 10(2)

²⁶ Hereinafter, the African Charter

²⁷ M. Evans and R. Murray, 'The State Reporting Mechanism of the African Charter' in M. Evans R. Murray (eds) *The African Charter on Human and Peoples' rights: The System in Practice 1986-2006* (Cambridge University Press 2008) 49.

²⁸ Hereinafter, AUEOMs. See, also, C.C Aniekwe and S.M Atuobi, 'Two Decades of Election Observation by the African Union: A Review', [2016] (15) (1) *Journal of African Elections*; 25.

²⁹ Hereinafter, APRM. Although the APRM was created outside the (O)AU system, the AU Assembly of Heads of State and Government of the AU decided to incorporate it into the structures of the AU. See 23rd Ordinary Session of the Assembly of Heads of State and Government of the African Union in Malabo, Equatorial Guinea June 2014 (Assembly/AU/Dec.527(XXIII))

³⁰ Art. 49 ACDEG. See also the Guidelines for State Parties’ Reports under the ACDEG (2019), available at <<http://aga-platform.org/resources>> At the time of writing only one state (Togo) had submitted a report..

prevention, management and resolution of conflicts.³¹ In 2009, the PSC adopted the principle that “Constitutions shall not be manipulated in order to hold on to power against the will of the people” and that “constitution-making or constitutional review processes shall not be driven by personal interests and efforts aimed at undermining popular aspirations”³² To this enforcement regime has been added the African Court on Human and Peoples’ Rights³³ which complements the African Commission on Human and Peoples’ Rights³⁴ to protect human rights and which has a broad mandate extending to all human rights instruments ratified by a state party to a case.³⁵ In 2010, the AU Assembly of Heads of State and Government reminded member states of the need to “uphold the rule of law and to abide by their own constitutions, especially with regards to constitutional reforms, bearing in mind that failure to respect these provisions could lead to situations of tension which, in turn could trigger political crisis”.³⁶

The legal framework outlined above and the AU’s “zero tolerance” of coups³⁷ show the willingness of the AU to uphold the principle that formal constitutional procedures must be

³¹ See Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002

³² J. Ezulwini, 'Framework for the enhancement of the implementation of measures of the African Union in situations of unconstitutional changes of government in Africa' [2009] (5) (9) *Journal of African Law*; 67

³³ Hereinafter, ACtHPR

³⁴ Hereinafter, ACHPR

³⁵ Art 3(1) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court 1998

³⁶ Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union (Assembly/AHG/Dec.269 (XIV)) (2010) at para 6(ii)(a)

³⁷ See, for example, the AU response to sanction the military coups in Central African Republic (2003, 2013), Mauritania (2008), Guinea (2008), Madagascar (2009), Niger (2010), Mali (2012), Guinea Bissau (2012), Egypt (2013) and Burkina Faso (2015).

adhered to, even when constitutions themselves are amended. This commitment of AU member states to adherence to constitutionalism is revealed by the various formal procedures which are used to alter presidential term limits.³⁸

3.2 Sub-regional Legal Frameworks on the Prevention of Constitutional Coups

There are also sub-regional legal frameworks on the prevention of constitutional coups. However, it must be noted that the effectiveness of these sub-regional economic communities vary greatly according to leadership dynamics, political and cultural cleavages, and the depth of integration.

(i) West Africa

In West Africa, from the early 1990s, ECOWAS (under Nigeria's leadership) pioneered the practical implementation of normative legal frameworks for security and political cooperation.³⁹ The 1991 ECOWAS Declaration of Political Principles envisioned a sub-region governed by common values, democratic accountability and respect for human rights.⁴⁰ Spurred on by military interventions in Guinea-Bissau, Liberia, and Sierra Leone, ECOWAS also adopted the Mechanism for Conflict Prevention, Management, Resolution,

³⁸ Dumiso Gatsha, 'Legal Frameworks and Practices of Presidential Term Limits in Africa' *Africa Network Youth Policy Experts* (Botswana, 3 February, 2017) <<https://www.afrinype.org/legal-frameworks-and-practices-of-presidential-term-limits-in-africa/>> accessed 4 February, 2020

³⁹ Gilbert Ghadiagala 'Regional Cooperation on Democratization and Conflict Management in Africa' *Carnegie Endowment for International Peace* (Pretoria, 19 March 2018) <<https://carnegieendowment.org/2018/03/19/regional-cooperation-on-democratization-and-conflict-management-in-africa-pub-75769>> accessed 4 February, 2020

⁴⁰ Amanda Lucey and Moyosore Arewa, 'Sustainable Peace: Driving the African Peace and Security Architecture Through ECOWAS' (Collaboration for Better Peacebuilding, Cape Town, 22 November 2016) See also, Jean Bossuyt, 'The Political Economy of Regional Integration in Africa: The Economic Community of West African States' (Peace and Security, Maastricht, January 2016)

Peacekeeping and Security, which enabled the body to proactively intervene in the conflicts of member states.⁴¹

To strengthen the 1991 collective security protocol, ECOWAS signed a supplementary Protocol on Democracy and Good Governance in December 2001 that elaborates a set of shared “constitutional convergence principles.”⁴² These include the separation of powers; independence of the judiciary; free, fair, and transparent elections; zero tolerance for power obtained by unconstitutional means;⁴³ popular participation in decisionmaking; adherence to democratic principles and decentralization of power at all levels of governance; freedom from ethnic, religious, regional, or racial discrimination; and freedom of association and of the press.⁴⁴ Should a member state be found in violation of a principle, the protocol authorizes the use of sanctions, including the state’s suspension from ECOWAS decision making bodies.⁴⁵ As Jean Bossuyt notes, the ECOWAS protocol on security and democracy “conferred a clear and quite unique mandate to the regional organization to be a guarantor of peace and a guardian of the effective application of democracy and human rights norms in a region with a relatively large number of fragile states.”⁴⁶

⁴¹ D. Tull and C. Simons, 'The Institution of Power Revisited: Presidential Term Limits in Africa', [2017](52) (2) *Africa Spectrum*; 79

⁴² *ibid*

⁴³ Article 1 (c)

⁴⁴ Article 5 and 6 of the ECOWAS, Protocol A/SPI/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Dakar: ECOWAS Executive Secretariat, 2001), 5–6.)

⁴⁵ Article 22 of the ECOWAS, Protocol A/SPI/12/01 on Democracy and Governance

⁴⁶ Jean Bossuyt, 'The Political Economy of Regional Integration in Africa: The Economic Community of West African States' (Peace and Security, Maastricht, January 2016) 67

(ii) Southern Africa

Southern Africa has benefited from a long history of interstate collaboration and the presence of South Africa, the sub-regional anchor State. Article 5 of the Southern African Development Community⁴⁷ Treaty 1992, mandates member states to promote “common political values, political systems, and other shared values which are transmitted through institutions, that are democratic, legitimate and effective.”⁴⁸

In addition, the Protocol on Politics, Defence, and Security Cooperation 2001, directs member states to promote the development of democratic institutions and practices and encourage universal human rights. SADC has also established the Principles and Guidelines Governing Democratic Elections 2015, which along with the mandates of the SADC Electoral Advisory Council, were put in place to foster participatory and accountable elections.⁴⁹

(iii) East Africa

In East Africa, the East African Community⁵⁰ has set up mechanisms for peace, security, and democratization. The EAC Treaty 2000, obliges member states to abide by operational principles related to democracy, the rule of law, social justice, and universally accepted standards of human rights. These principles are also reiterated in

⁴⁷ Hereinafter SADC

⁴⁸ SADC Consolidated Text of the Treaty of the Southern African Development Community (Gaborone: SADC, 2011), 6; and SADC, SADC Principles and Guidelines Governing Democratic Elections (Gaborone: SADC, 2000, revised 2015)

⁴⁹ Dimpho Motsamai, 'SADC's 2013 Review of Its Principles and Guidelines Governing Democratic Elections: Need for Civil Society Inputs?' *Global Insights* (Pretoria, October 2013)

⁵⁰ Hereinafter, EAC

the EAC's Draft Protocol on Foreign Policy 2010.⁵¹ In addition, the EAC Forum of National Electoral Commissions has established common standards and principles to determine the credibility and legitimacy of electoral processes.⁵²

3.3 Domestic Legal Frameworks on the Prevention of Constitutional Coups in Sub-Saharan Africa

As pointed out earlier many sub-saharan African countries have adopted term limits in their constitutions as a reflection of their willingness to democratise. A pre-1990 review of the constitutions of African countries revealed that only six countries had presidential term limits restrictions.⁵³ Between 1990 and 2010, sixty four constitutional amendments or adoptions were effected increasing the number to forty nine countries with a general two term limit.⁵⁴ This reflects the progressive support term restriction has gathered over time. Despite the fact that constitutional coups are still very much trending, there are still countries in sub-saharan Africa which are yet to have their presidential term limits challenged.⁵⁵ This means that all hope is not lost for democracy in sub-saharan Africa.

⁵¹ Gilbert Ghadiagala 'Regional Cooperation on Democratization and Conflict Management in Africa' *Carnegie Endowment for International Peace* (Pretoria, 19 March 2018) <<https://carnegieendowment.org/2018/03/19/regional-cooperation-on-democratization-and-conflict-management-in-africa-pub-75769>> accessed 4 February, 2020

⁵² East African Community (EAC), Draft Protocol on Foreign Policy Coordination (Arusha, Tanzania: EAC, 2010), 2; and EAC, East African Legislative Assembly, Report on the Assessment of Good Governance in Partner States From 1st to 5th October 2012 (Arusha, Tanzania: EAC, 2012)

⁵³ Boniface Dulani, 'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure,' *Afrobarometer* Dispatch No. 30, 25 May 2015, <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30> accessed 30 December 2019

⁵⁴ *ibid*

⁵⁵ An example of such country as of the time of writing is Tanzania

Article 96 of Burundi's Constitution of 2005 and article 101 of Rwanda's Constitution of 2003 as amended impose term limits.⁵⁶ These, however, have been compromised through constitutional coups spearheaded by incumbent leaders and their supporters, distorting the will of the citizens to ensure they stay in power.⁵⁷

A common and popular argument in favour of constitutional coups is attributed to citizens preferring the stability leadership continuity provides. This is viewed as a way of legitimizing leaders to stay in power.⁵⁸ However, it could also be argued that a lack of alternative political options drives the citizenship to prefer longstanding leaders as the case with Presidents Biya and Museveni in Cameroon and Uganda respectively.⁵⁹ The opposition in these countries have been largely weak and ineffective as they have been targets of arbitrary arrest, imprisonment and death.

Article 220 of the DRC's Constitution of 2006, Burkina Faso's Constitution of 1991, Tanzania's Constitution of 1977, Ghana's Constitution of 1992, Republic of B enin's Constitution of 1990, limits the tenure of a president to two terms.⁶⁰ In Togo, public protests were held against President Gnassingb e's re-election even though as at that time there was

⁵⁶ Boniface Dulani, 'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure,' *Afrobarometer* Dispatch No. 30, 25 May 2015, <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30> accessed 30 December 2019

⁵⁷ Institute for Security Studies (ISS) 'Peace and Security Council Report' 70 (2015) 9

⁵⁸ Mark Davis 'Africa's 'third-term' movement gains momentum' *Legal Brief* (Accra, 3 November, 2016. <<https://africa-third-term-movement-gains-momentum/html>> accessed 5 February, 2020

⁵⁹ Boniface Dulani, 'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to extend their Tenure,' *Afrobarometer* Dispatch No. 30, 25 May 2015, <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno30> accessed 30 December 2019

⁶⁰ D. Tull and C. Simons, 'The Institution of Power Revisited: Presidential Term Limits in Africa', [2017](52) (2) *Africa Spectrum*; 79

no term limit in Togo's Constitution.⁶¹ In a constitutional amendment in 2019, term limits were reintroduced in Togo providing that the president is elected in a two-round race, by universal suffrage and for a term of five years, renewable once. Term limits were also removed in Zimbabwe but reintroduced in 2013. Similarly, section 135(2) and section 137(1)(b) of the 1999 Constitution of the Federal Republic of Nigeria as amended, stipulates that the president shall vacate his office at the expiration of a period of four years and that a person is disqualified from holding such office if he has been elected to that position at any two previous elections. However, term limits have been completely abolished in Cameroon, and Uganda paving the way for unimpeded and wholly corrupt power to be wielded by one individual, at the expense of the nation.⁶²

To highlight the prevalence of constitutional coups, only four of the sixteen countries that had elections between September 2015 and the end of 2016 did not have sitting presidents running for office⁶³including the most recent crisis in The Gambia, and Sudan in 2018/2019. This poor reflection of adherence to term limits is evidence of the dominant type of political orientation among leaders in sub-saharan Africa.

3.4 Role of Regional and International Bodies in Prevention of Constitutional Coups in Sub-saharan Africa

(i) The African Union

⁶¹ Micha Wiebusch and Christina Murray 'Term Limits and the African Union' [2018] (17) (2)*Journal of African Law*; 1

⁶² Tindu Lissu 'Democracy and Security in Africa' [2019] (19) (2)*Journal of African Law*; 67

⁶³ Klaas Brian, 'Two Elections and you're out? Good Governance Africa' *Shaky Foundations*, (New York, 17 May, 2019) <<http://gga.org/stories/editions/aif-32-shaky-foundations/two-elections-and-you2019re-out>> accessed 22 January, 2020

The AU's role in curbing constitutional coups remains largely passive despite the fact that forty six States have ratified the ACDEG as at the time of writing. Articles 23(5), 25 and 44 (2) of the ACDEG represent the AU's policy purview on term limits.⁶⁴The broad scope of the articles and the ACDEG in its entirety leave democracy to domestic and sovereign interpretation. This directly reflects on the populist narrative of referendums or parliamentary action in tampering with term limits being in the interest of citizens.⁶⁵ So as long as the incumbent president follows the legal procedure for constitutional amendment, this is deemed constitutional under the AU in spite of international community concerns, western definition of democracy and constitutionalism.⁶⁶

Presently there is no consensus on term limits among AU member States for presidential term limits to be imposed.⁶⁷ The lack of consensus is one of the many challenges the AU should address since this is directly linked to the AU's inability to implement its policies effectively. A key reason for this is the lack of collective political willpower and constraints on manpower and funding.⁶⁸ There is therefore a clear challenge to take a stand on constitutional coups as member States of the AU are a mix of democrats and autocrats

⁶⁴ Micha Wiebusch and Christina Murray 'Term Limits and the African Union' [2018] (17) (2)*Journal of African Law*; 1

⁶⁵ Tindu Lissu 'Democracy and Security in Africa' [2019] (19) (2)*Journal of African Law*; 67

⁶⁶ D. Tull and C. Simons, 'The Institution of Power Revisited: Presidential Term Limits in Africa', [2017](52) (2) *Africa Spectrum*; 79

⁶⁷ Amanda Lucey and Moyosore Arewa, 'Sustainable Peace: Driving the African Peace and Security Architecture Through ECOWAS' (Collaboration for Better Peacebuilding, Cape Town, 22 November 2016)

⁶⁸ C Landsberg 'South Africa's African Agenda: Challenges of Policy and Implementation' (unpublished paper prepared for the Presidency Fifteen Year Review Project 5, 2009)

disguised as democrats. However, the AU has managed to address funding through establishing the AU foundation for creating alternative sources of funding.⁶⁹

Another reason for the AU's inability to implement policies and established standards effectively, is the duplicate mandate with sub-regional organs such as the Southern African Development Community, the Economic Community of West African States among others.⁷⁰

The AU's practice of its skeletal normative and policy purview on term limits is inconsistent with its objectives for upholding democracy. Given the philosophy of leaving term limits to sovereign and domestic democratic policy; the inevitable result is leadership entrenchment and authoritarianism as the leader and ruling party stay in power as long as they want.⁷¹ This defeats the very principles of democracy which the AU aim to strengthen and respect for the rule of law, the AU advocates for to ensure democratic consolidation. Going by the different ways sub-saharan African leaders interpret democracy in glaring contrast to the western model definition, the AU requires a strict approach to alterations of presidential term limits which will serve as a basis to hold leaders who want to hold on to power accountable.⁷²

(ii) SADC

⁶⁹ Armanda Lucey and Moyosore Arewa, 'Sustainable Peace' 97

⁷⁰ *ibid*

⁷¹ R. B. Riedl, *Authoritarian Origins of Democratic Systems in africa* (Cambridge University Press, 2014) 92

⁷² Micha Wiebusch and Christina Murray 'Term Limits and the African Union' [2018] (17) (2)*Journal of African Law*; 1

South Africa is an exception to the African narrative of term limits. Its foreign policy termed 'Africa Agenda' is based on the following understanding; 'that socio-economic development cannot take place without political peace and stability and these are prerequisites for socio-economic development'.⁷³ This includes strengthening regional and sub-regional structures in peace and security, governance and a shared agenda. Term limits were however neglected despite the high prevalence of extensions.⁷⁴ Africa Agenda is viewed as an intentional opposition in philosophy to the aggressive and destabilizing strategy adopted during the apartheid era.⁷⁵ This history is shared with many other African nations that had to struggle for liberation.⁷⁶

The only problem with Africa Agenda is like that of the AU; its implementation. This is evidenced by the silent diplomacy adopted by former President Mbeki in the Zimbabwe's political crisis over the last decade, the compromised mediation in newly formed South Sudan and persistent conflict in Lesotho.⁷⁷ All three country situations dealt with presidential contentions that led to some power sharing or prolonged presidential terms.⁷⁸

South Africa's peace-driven foreign policy is evidenced by conflict resolution in Angola in 1994, dialogue facilitation in the DRC in 1999, and establishing a 2004 cease-fire that led to

⁷³ C. Landsberg 'South Africa's African Agenda: Challenges of Policy and Implementation' (unpublished paper prepared for the Presidency Fifteen Year Review Project 5, 2009)

⁷⁴ *ibid*

⁷⁵ *ibid*

⁷⁶ Gavin Cawthra, 'The Role of SADC in Managing Political Crisis and Conflict: The cases of Madagascar and Zimbabwe' *Peace and Security Series* (Maputo, November 2010) 10

⁷⁷ Tindu Lissu, 'Democracy and Security in Africa' [2019] (19) (2)*Journal of African Law*; 67

⁷⁸ *ibid*

a new government in Burundi in 2005.⁷⁹ It is evident that South Africa took a lead in conflict resolution and somewhat proved more successful in its interventions compared to the AU or sub-regional mechanisms. This can be attributed to sub-regional mechanisms being initially formed for economic purposes. This is also reflected in South Africa's notable challenge in ensuring that Africa Agenda is aligned to its economic interests. Country level interventions seem to be more effective given the relative success of South Africa's Africa Agenda.⁸⁰

(iii) ECOWAS

The need for setting restriction on presidential term limits has been evident in West Africa given the many instances of extension attempts. Opposition to establishing norms on term limits is attributed to two nations with long-standing leaders.⁸¹ Togo and The Gambia opposed the proposed sanctioning of third presidential term bids by ECOWAS in May 2015.⁸² Despite backlash in some instances, the sub-regional community has been somewhat successful in intervening. ECOWAS sanctioned Niger after President Tandja's attempt to unconstitutionally extend his term limit.⁸³ ECOWAS also showed its willingness not to tolerate leaders who will not step down after the expiration of their tenure with President

⁷⁹ ibid

⁸⁰ C. Landsberg 'South Africa's African Agenda: Challenges of Policy and Implementation' (unpublished paper prepared for the Presidency Fifteen Year Review Project 5, 2009)

⁸¹ Dumiso Gatsha, 'Legal Frameworks and Practices of Presidential Term Limits in Africa' *Africa Network Youth Policy Experts* (Botswana, 3 February, 2017) <<https://www.afrinype.org/legal-frameworks-and-practices-of-presidential-term-limits-in-africa/>> accessed 4 February, 2020

⁸² Amanda Lucey and Moyosore Arewa, 'Sustainable Peace: Driving the African Peace and Security Architecture Through ECOWAS' (Collaboration for Better Peacebuilding, Cape Town, 22 November 2016) 88

⁸³ ibid

Jammeh of The Gambia's challenge to the December 2016 elections.⁸⁴ Among the sub-regional bodies, ECOWAS has been the most effective, with Nigeria serving as a strong anchor and advocate for democratization and peacekeeping. ECOWAS has intervened against, sanctioned, or condemned actions taken by most of its member States over the past two decades. It has organized peaceful resolutions and restored constitutional governments in Burkina Faso, Côte d'Ivoire, and The Gambia, among others.⁸⁵

(iv) **The European Union**

Democracy in Africa has often been criticized as being a facade put up to receive funding from foreign governments. The international reaction to autocratic governments is normally to impose sanctions, one example being Zimbabwe⁸⁶. However, such sanctions are not enough to ensure that governments become more accountable to their citizens. A lot of development cooperation institutions fund government bodies that they know are not accountable to their citizens.⁸⁷The European Union⁸⁸ is losing the knack of dealing with autocratic regimes. This is because they prioritise competing with other non-european trading partners such China, India or Brazil for space in the African market over

⁸⁴ Anthony Clark, 'The Gambia - Political Change' *Britannica*. (London, 15 June, 2019) <<https://www.britannica.com/place/The-Gambia/Political-change/>> accessed 22 February, 2020

⁸⁵ Amanda Lucey and Moyosore Arewa, 'Sustainable Peace: Driving the African Peace and Security Architecture Through ECOWAS' (Collaboration for Better Peacebuilding, Cape Town, 22 November 2016)) 103

⁸⁶ Tjiurimo Hengari, 'Presidential Term Limits: A New African Foreign Policy Challenge' [June 2015] Paper on policy Briefing, *South African Institute of International Affairs*; 138 <<http://www.saiia.org.za/policy-briefings/849-presidential-term-limits-a-new-african-foreign-policy-challenge/file>> accessed 18 February 2020

⁸⁷ Dickens Olewe "Is Africa Going Backwards on Democracy?" *BBC Africa News* (Lagos, 22 February 2019) <<https://www.bbc.com/news/world-africa-46971250>> accessed 30 December 2019

⁸⁸ Hereinafter EU

democracy.⁸⁹ However, the EU have imposed sanctions on several African countries, including Burundi, the DRC, and Zimbabwe, in response to impeded political transitions or fair elections. The United Nations and the EU endorsed ECOWAS military action in The Gambia and threatened sanctions if Jammeh refused to leave. Millions in EU development aid to The Gambia were frozen in December 2014 due to human rights concerns under Jammeh; following Jammeh's departure, the bloc released the funds.⁹⁰

(v) The United States of America

Promoting democracy has been a long time priority of the United States of America⁹¹ on the African continent. President Barack Obama said in a 2012 briefing on the USA strategy in sub-Saharan Africa, that the United States would “not stand idly by when actors threaten legitimately elected governments or manipulate the fairness and integrity of democratic processes.” In an address to AU leaders three years later, Obama urged the body to ensure that Heads of States comply with term limits.⁹² It remains to be seen how closely the newly elected President, Joseph Biden will adhere to that precedent.

⁸⁹ Wanjiku Mwaura, 'Dealing with autocratic regimes in Africa' *Direct Impact* (Nairobi, 3 October, 2016) <<https://www.dw.com/en/dealing-with-autocratic-regimes-in-africa/a-35925562>> accessed on 5 February, 2020

⁹⁰ Tjiurimo Hengari, 'Presidential Term Limits: A New African Foreign Policy Challenge' [June 2015] Paper on policy Briefing, *South African Institute of International Affairs*; 138 <<http://www.saiia.org.za/policy-briefings/849-presidential-term-limits-a-new-african-foreign-policy-challenge/file>> accessed 18 February 2020

⁹¹ Hereinafter, USA

⁹² Richard Joseph 'Democracy and Reconfigured Power in Africa' *Brookings*. (New York, 9 November 2019) <<https://www.brookings.edu/research/democracy-and-reconfigured-power-in-africa/>> accessed 4 February, 2020

When the Trump administration came to power in 2016, it said it would not “subsidize corrupt leaders and abusers of human rights” on the continent, but a new Africa strategy outlined in late 2018 marked a shift in priority from democracy advancement to countering China and Russia in the region.⁹³

However, the USA has imposed economic sanctions, including bans on travel to the United States and business transactions with its nationals, on individuals who “undermine democratic processes.”⁹⁴ The USA issued sanctions against Mugabe and other Zimbabwean officials in 2003. The Obama and Trump administrations sanctioned top officials from the DRC when former President Kabila refused to schedule an election in late 2016. Ahead of Nigeria’s 2019 election, the USA and United Kingdom jointly announced they would deny visas to Nigerians involved in vote rigging or electoral violence.⁹⁵ At the same time, analysts contend that the United States has often prioritized security interests over concerns about prolonged rule. The USA has chosen not to penalize long-serving leaders, such as are found in Cameroon, Chad, and Uganda.⁹⁶ In DRC, the USA, accepted disputed 2018 election results to avoid further instability.

3.5 Conclusion

⁹³ ibid

⁹⁴ Dickens Olewe "Is Africa Going Backwards on Democracy?" *BBC Africa News* (Lagos, 22 February 2019) <<https://www.bbc.com/news/world-africa-46971250>> accessed 30 December 2019

⁹⁵ Richard Joseph 'Democracy and Reconfigured Power in Africa' *Brookings*. (New York, 9 November 2019)<<https://www.brookings.edu/research/democracy-and-reconfigured-power-in-africa/>> accessed 4 February, 2020

⁹⁶ ibid

From the analysis above, it is generally clear that the AU recognises the negative trend of unconstitutional change of government. However can amending constitutions in order to abrogate, suspend or even abolish presidential term limits be read or seen as unconstitutional change of government? What constitutes democratic change of government in sub-saharan Africa and on what basis can a constitutional amendment be termed unconstitutional in itself and therefore undemocratic even though it follows the legal process?' These questions can be answered by a critical appraisal of the principles of democracy. Democracy as an ideal has a minimum content. The philosophy behind democracy is about inclusion and popular participation. What were the intentions of the draftsman in entrenching term limits in these Constitutions? It was to prevent one man or party from staying in power for as long as he wants to the detriment of other stakeholders. Most of these leaders who engage in constitutional coups do so selfishly because they are intoxicated by power and are scared that their access to the nation's wealth will be cut off as well as face charges of corruption, human rights abuse etc, when they step down. Furthermore, most of these governments are characterized by severe repression of opposition parties, weak or absence of democratic institutions, clamp down on formation of strong civil societies, lack of press freedom, stagnant economy due to high levels of corruption, security breaches and a prevalence of poverty. A Constitution, should not be narrowly interpreted to comprise of only the formal document; the intention behind its provisions are also fundamental. The earlier the AU start seeing constitutional coups as unconstitutional changes of government, the better the prospect of democracy will be on the continent.

CHAPTER FOUR

CONSTITUTIONAL COUPS AND STRONG, EFFECTIVE, PERFORMING DEMOCRATIC INSTITUTIONS

4.0 Introduction

Sub-saharan Africa's entrenched leadership through constitutional coups, is directly linked to its developmental and security challenges, conflict, political instability, stagnant or declining economies, corruption index, democratic backsliding and frequent human rights violations. However there are incentives and measures which can be put in place to encourage adherence to term limits. Furthermore, where there exists strong, effective and performing democratic institutions acting as checks on the power of the executive arm of government, they can prevent incumbent presidents from engaging in constitutional coups.

4.1 The Impact of Constitutional Coups

The Impact of constitutional coups in sub-saharan Africa cannot be overemphasized. They include:

(i) Corruption

Most Constitutions in sub-saharan Africa still have some provisions entrenched in them which can be traced to our colonial history. We inherited Constitutions designed to extract wealth rather than create wealth. Many Presidents realise this and seek multiple reelections through constitutional coups because holding on to power gives them access to the state's coffers, as well as immunity from prosecution. When Presidents prolong their stay in power, it invariably leads to corruption and plunder of public resources. In sub-Saharan Africa, the

lack of campaign finance laws, president's monopoly over the allocation, timing and location of development projects is a breeding ground for corruption.¹

Thus where an incumbent stages a constitutional coup, he rewards members of his political party and supporters for their loyalty with state resources and juicy contracts which are never monitored. For example, Angola's former president Eduardo José dos Santos was frequently accused of funneling government funds to a small group of elites, as well as to his own family. His daughter Isabel, was named head of the state oil company by her father in late 2016 while her brother, Jose Filomeno dos Santos, was placed as Chairman of the country's sovereign wealth fund. In the DRC, former President, Joseph Kabila have been accused of amassing a fortune by stealing state funds and effectively disregarding the provision of public service.² According to Transparency International, DRC is ranked 165 out of 180 countries in the world in the 2019 corruption index.³ Also the Human Rights Watch stated that, hundreds of millions of dollars from vast mining revenues have been siphoned by former President Kabila, his family and cronies, amassing great wealth at the expense of impoverished citizens.⁴ Equally, revenues from investment projects did not trickle down to the citizens in terms of provision of basic public services, as this money

¹ G. O. Arishe, *Developing Effective Legislature: The Country Specific Approach To Assessing Legislative Power*(Paclerd Press Ltd, 2017) 145

² David Pilling 'Africa: A Shrinking Place for Autocrats?' *Financial Times* (New York, January 23, 2017) <<https://www.ft.com/content/716ee35e-dd6d-11e6-9d7c-be108f1c1dce>> Accessed 28 March 2020

³ Transparency International Corruption Index 2019 Report. Available at <https://www.transparencyinternational.com/corruption2019-report/>> accessed on 23 February, 2020

⁴ Human Rights Watch Dispatch No 582, Report on DRC. Available at <<https://www.humanrightswatch.org/drc/report-2018/>> accessed 24 February 2020

ended up in the pockets of Kabila and his cronies.⁵ In Uganda, to ensure the parliament played ball, President Museveni paid two thousand dollars to each member to influence their voting.⁶ In the latest term limit extension in 2017, Museveni also paid parliamentarians eight thousand dollars each to pass the bill repealing presidential age limit.⁷

In Nigeria during the third term bid of former President Olusegun Obasanjo, the Nigerian National Assembly members were subjected to intense bribery pressure, and blackmail.⁸

The consequences of widespread corruption is evident in the poor delivery of social services, high levels of poverty, unemployment and insecurity. The prevalence of corruption trumps the political process. When the stakes for remaining in office are so high, Presidents are more likely to engage in constitutional coups again and again just to stay in power by all means.⁹

(ii) Lack of Opposition

Constitutional coups lead to a dearth of opposition politics and dissenting opinions. Incumbents who hold on to power know the power that opposition brings in a democratic society, therefore there is a clamp down on dissension, and zero tolerance for opposition.

⁵ David Pilling 'Africa: A Shrinking Place for Autocrats?' *Financial Times* (New York, January 23, 2017) <<https://www.ft.com/content/716ee35e-dd6d-11e6-9d7c-be108f1c1dce>> Accessed 8 March 2020

⁶ D. Moehler, 'Participation and Support for the Constitution in Uganda'. *The Journal of Modern African Studies*, (2006)33(2), 24-32.

⁷ Mulubi Asiligwa, 'Liberal Democracy Conundrum: Examination the Impact of Term Limit Extension on Liberal Democracy in Africa' (Unpublished paper presented to the *School of Humanities and Social Sciences*, United States University, Africa) 67

⁸ Mulubi Asiligwa, 'Liberal Democracy', 70

⁹ Dickens Olewe 'Is Africa going Backwards on Democracy?' *BBC Africa News* (Lagos, 22 February 2019) <<https://www.bbc.com/news/world-africa-46971250>> accessed 30 December 2019

Permission to hold meetings or rallies for the opposition parties are denied, their members are assassinated or targets of assassination, they are called names, threatened, arrested and arbitrarily imprisoned. For example, in Rwanda and Cameroon, harassment and intimidation is certain for those who dare oppose Presidents Kagame and Paul Biya. Opposition leaders have been jailed, assassinated and exiled. Citizens cannot therefore stand up to or criticize the government.¹⁰ Political repression against the opposition and civil rights activists were the hallmarks of Al-Bashir's regime in Sudan. This is used as a mechanism of silencing the dissenting voices to the incumbency. According to Amnesty International, activities of Civil Society Organizations¹¹ and opposition parties are heavily restricted in Sudan.¹² Also in Djibouti, to ensure President Guelleh remains in control of what goes on in the country, any protests against the government is not allowed. The government uses the law enforcement agencies to intimidate and deal brutally with any opposition protests. For instance, during the February 18 and 25 2016 protests, the government brutalized the demonstrators, rounded up more than one hundred people and charged them for disturbance of peace and demonstrating without a permit.¹³ Thus, presidents are able to act with impunity because there is no strong, organized opposition to challenge entrenched incumbents and push them

¹⁰ David Pilling 'Africa: A Shrinking Place for Autocrats?' *Financial Times* (New York, January 23, 2017) <<https://www.ft.com/content/716ee35e-dd6d-11e6-9d7c-be108f1c1dce>> Accessed 8 March 2020

¹¹ Hereinafter CSOs

¹² Amnesty International Report, 'Rwanda and Sudan: Prisoners of Conscience' (Kigali, 4 April, 2018) Available at <<https://www.amnestyinternational.org-rwanda-sudan-prisoners-conscience/2018>> accessed 3 March 2020

¹³ Mulubi Asiligwa, 'Liberal Democracy', 85

toward a genuine political opening in these countries.¹⁴ In Uganda, opposition members were thrown out of parliament when the constitutional amendment was passed to pave the way for President Museveni to run again. Also security forces are used to criminalise otherwise legitimate political activities, which has resulted in tension and uncertainty in the State. Arbitrary arrests of opposition leaders are also the order of the day, accentuated by the fight against terrorism. As a result, the legitimate opposition has become a target of trumped up terror charges.¹⁵ Since 2005 a review of media reports shows that Kizza Besigye “Museveni’s main challenger in the opposition” has been arrested more than a thousand times.¹⁶ It has also become routine that whenever Besigye’s allies plan rallies or other political events, their homes are cordoned off by security forces to stop them from leaving.¹⁷

(iii) Autocracy

Regimes which thrive on constitutional coups in order to stay in power, are more autocratic in nature than democratic. Therefore they rely on coercion and force to compel legitimacy. As such, simple protests against the regime end up in massive repression and brutalization of citizens by the state law enforcement agencies.¹⁸ This was very evident in DRC when

¹⁴ Joleen. S. Kotze, 'Africa Faces a New Threat to Democracy: the Constitutional Coup' *The Conversation*, (Cairo, February 8, 2017) <<https://www.theconversation.com/Africa-faces-a-new-threat-to-democracy-121558/>> accessed 30 December, 2019

¹⁵ Moses Khisa 'How Museveni has Twisted Uganda’s Constitution to Cling to Power' *The Conversation* (North Carolina, 20 June, 2019) <<https://theconversation.com/how-museveni-has-twisted-ugandas-constitution-to-cling-to-power-118933>> accessed 23 January 2020

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ D. Roddick, 'Is Liberal Democracy Feasible in Developing Countries?' *Springer Science Business Media* (New York, 25 October, 2016)<<https://springersciencebusinessmedia/is-liberal-democracy-feasible-developing-countries>> accessed 3 March 2020

civilian demonstrations organized by the Catholic Church in Kinshasa turned violent with scores of people being killed, while others were arrested and injured by security forces.¹⁹ In autocracy, the State is personalized, and resources are spent on cronies and neopatrimonial structures, which enable the incumbency to fasten its grip on political power. Autocratic regimes thrive in a culture of high corruption, repression, and patronage.²⁰ The January 2021 presidential election in Uganda which saw President Yoweri Museveni winning a sixth term was marked by deadly crackdown by security forces on members of the opposition, families and supporters. The main challenger Bobi Wine²¹ and his family were placed under house arrest, for his 'safety', the government said.²² In the run-up to the vote, local civil society groups and foreign governments questioned its credibility and transparency, after scores of requests for accreditation to monitor the election were denied.²³ Little or no restraint in the exercise of state power are characteristic of autocratic regimes bent on ensuring that the wishes of the autocrat in terms of resource distribution, corruption, patronage, and absolute power control, exceeding constitutional term limits are realized with no room for political competition or independent institutional development.²⁴

¹⁹ Alessandra Prentice, 'What Limits? How African Leaders cling to power for decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

²⁰ Mulubi Asiligwa, 'Liberal Democracy', 96

²¹ His real name is Robert Kyagulanyi

²² Sara Goufou 'Ugandan President Yoweri Museveni Wins Sixth Term as Rival, Bobi Wine Alleges Fraud' *ABC News* (Kampala: 17 January, 2021) <<https://www.abc.net.au/news/2021-01-17/ugandas-museveni-wins-sixth-term-as-rival-alleges-fraud/13064610>> Accessed 19 January 2021

²³ *ibid*

²⁴ D. Tull and C. Simons, 'The Institution of Power Revisited: Presidential Term Limits in Africa', [2017] (52) (2) *Africa Spectrum*; 79

(iv) Weak Institutions

Constitutional coups have a great impact on the Legislature and Judiciary. The enormous power and influence of the executive arm of government which is contained in the Constitutions of sub-saharan States, tend to exalt the executive arm of government to a far more grandiose and populist level over and above the other two arms of government.²⁵ In the States where constitutional coups succeed, there is a clear indication that the other two arms of government are completely fused to the executive arm. Therefore the executive arm becomes dominant, out of control and act with absolute impunity. For instance in Djibouti, following the protest on 18-25 February, 2016, about 80 of the demonstrators were taken to court, on the 27 February 2016. However, after the judge dismissed the cases, the judge was sacked by the Justice Minister, Mohammed Barkat, who serves at the pleasure of President Guelleh. A new judge was appointed who convicted the demonstrators. It is therefore evident that in Djibouti, the judiciary serves under the pleasure of the president. Those who work in support of the president are rewarded, while those who deviate are punished.²⁶

Similarly in Chad, the referendum seeking the extension of President Idris Deby's term, sailed through with a 65.75% 'yes' vote amendment to the Constitution, which included the removal of the two-term presidential limit. The extension included replacing the Senate with

²⁵ G. O. Arishe, *Developing Effective Legislature: The Country Specific Approach To Assessing Legislative Power*(Paclerd Press Ltd, 2017) 139

²⁶ Mulubi Asiligwa, 'Liberal Democracy', 97

the Cultural, Economic and Social Council in addition to giving the president the powers to amend the Constitution.²⁷

In Uganda, the judiciary, parliament, and other government agencies serve at the whims of the President. Reacting to the latest constitutional amendment in 2017, Job Kijja, the Coordinator of Uganda National NGO Forum registered his disappointment as follows: “*I felt defrauded as a Ugandan, these (MPs who passed the bill) were an unserious lot...this shows connivance between parliament and executive to disregard citizens’ concerns.*”²⁸

When Museveni decides what is to be done, it gets done. No one dares stand in his path or oppose him. Museveni believes that since he is the one who liberated Uganda from tyrants, he has earned a license to do whatever he wants with Uganda.²⁹

In Kenya, since 2013, President Uhuru Kenyatta has systematically worked to roll back significant institutional changes achieved by the power-sharing government. The most recent evidence of this was Kenyatta's assault on the judiciary, after the Supreme Court annulled his first-round election victory in September 2017. Kenyatta called the judges ‘crooks’ and promised to ‘fix’ them.³⁰

²⁷ Khalifa Said, 'Mkapa on Presidential Term Limits' *The Citizen* (Dar es Salaam, 14 November 2019) <<https://www.thecitizen.co.tz/news/Mkapa-on-presidential-term-limits/1840340-5348272-154deopz/index.html>> accessed 23 February 2020

²⁸ Quoted by Moses Khisa in 'How Museveni has Twisted Uganda’s Constitution to Cling to Power' *The Conversation* (North Carolina, 20 June, 2019) <<https://theconversation.com/how-museveni-has-twisted-ugandas-constitution-to-cling-to-power-118933>> accessed 23 January 2020

²⁹ Joel Barkan, 'Uganda: An African Success Past Its Prime?' (Challenges and Change in Uganda, Washington, 2 June 2005)

³⁰ Alexander Noyes, 'In Africa, Presidential Limits are Working' *Washington Post*, (New York, 24 April, 2018) <<https://www.rand.org/blog/2018/04/in-africa-presidential-term-limits-are-working.html>> accessed 23 February, 2020

Despite the gains of the past twenty years and work towards democratic consolidation, many sub-saharan Africa's incumbent presidents and ruling political parties do their best to thwart these democratic aspirations. Unwilling to relinquish autocratic control, they block reforms that would curb permissive constitutional arrangements and strengthen institutional checks and balances, separation of power and instead launch efforts through constitutional coups to jettison or weaken other arms of government which would restrain the enormous power of the executive arm of government.

(v) Democratic Reversal

Constitutional coups lead to democratic reversals. This is because democratic State institutions of popular control over the executive arm of government such as the Legislature, the Judiciary and the electoral process have been so overshadowed by the executive, that they have lost their institutional relevance.³¹ Democratic reversals occur in States where elections are no longer the means of choosing the political leadership.³²

Since leaders do not get to power through popular support, they feel they do not need popular support to stay in power. In Uganda the president is the only decision maker in government, nothing gets done without Museveni's nod.³³ Officials in government must

³¹ G. O. Arishe, *Developing Effective Legislature: The Country Specific Approach To Assessing Legislative Power*(Paclerd Press Ltd, 2017) 150

³² Robert Mattes and Michael Bratton, 'Learning about Democracy in Africa: Awareness, Performance and Experience' [2007](51)(1) *American Journal of Political Science* ;192-217

³³ John Okuku, 'Beyond Third Term Politics: Constitutional Reform and Democratic Governance in Uganda,' [2005] (11) (2) *East African Journal of Peace and Human Rights*;, 182-219

travel for hundreds of kilometers from Kampala to his farm to seek his blessings for their plans.³⁴

Frequent constitutional amendments at the whims of the executive, lead to a concentration of powers, authoritarian rule and violations of human rights, which was a common pattern of colonial administration. This continues unabated in spite of the bill of rights or provisions purporting to recognise and protect human rights. Thus, ordinary citizens are rarely involved in the reform processes that see African leaders and the ruling elites consolidate and centralise power whilst incrementally closing all avenues for open debate. In many of these countries, the incumbents manipulate the process and the input of the 'attentive' public in constitutional reforms are fairly limited.³⁵

(v) Electoral Authoritarianism

Constitutional coups lead to the manipulation of the electoral process as well as the elections in the State which are almost always won by the incumbent.³⁶ Electoral authoritarianism occurs when the incumbent manipulate the election to ensure he stays in power. So we have countries conducting elections that are legal but are illegitimate. While several countries across sub-Saharan Africa tout themselves as multiparty states, some, including Cameroon and Rwanda, remain de facto one-party states. Rwanda's Paul Kagame, who has effectively been the country's leader since 1994, secured another seven-year term in August 2017, with

³⁴ ibid

³⁵ Charles Manga Fombad, 'Constitutional Literacy in Africa: Challenges and Prospects' [2018] (44) (3) *Commonwealth Law Journal* ; 19

³⁶ Peter Pham, 'Senegal Consolidates its Constitutional Democracy' *Africa Source* (Dakar, 29 March, 2016) <<https://www.atlanticcouncil.org/blogs/africasource/senegal-consolidates-its-constitutional-democracy/>> accessed on 23 January, 2020.

the Electoral Commission reporting he had the support of almost 99 percent of voters.³⁷ Even where there is a working multiparty system in place, ruling parties and presidents have learned how to survive the advent of multiparty elections. Denying freedoms of association, speech, press, manipulating registration lists, denying voters' rights, and engaging in fraudulent vote counts are part of their winning strategy.³⁸

In Burundi, the opposition leader, Leonce Ngendakumana, while reacting to the referendum which the then incumbent used in amending the Constitution, stated that "this referendum is organized in extreme intimidation and total opacity. A referendum organized in such a manner will definitely result in a biased outcome, yet, citizens can not dare oppose due to related consequences,"³⁹ Similarly, citizens faced checkpoint intimidation, where they had to show their voter cards to prove they will participate in the referendum and will vote for the incumbency. Therefore, the fear of the consequences of not participating in the referendum, and voting for the then incumbent, late Pierre Nkurunziza, drove dissenting voices to vote in support of term extension despite their personal wishes and conviction not to do so.⁴⁰ In Gabon, President Ali Bongo, whose father ruled for forty two years, won an election that

³⁷ Dickens OIewe "Is Africa going backwards on democracy?" *BBC Africa News* (Lagos, 22 February 2019) <<https://www.bbc.com/news/world-africa-46971250>> accessed 30 December 2019

³⁸ Moses Khisa 'How Museveni has Twisted Uganda's Constitution to Cling to Power' *The Conversation* (North Carolina, 20 June, 2019) <<https://theconversation.com/how-museveni-has-twisted-ugandas-constitution-to-cling-to-power-118933>> accessed 23 January 2020

³⁹ Quoted in Kumar Peterson 'We have achieved a lot. God is our witness', *African News* (Bujumbura, 26 January 2020) <<https://www.africanews.com/2020/01/26/burundi-gen-evariste-ndayishimiye-chosen-to-replace-nkurunziza/>> accessed on 28 January, 2020

⁴⁰ Mulubi Asiligwa, 'Liberal Democracy', 103

was swung by what seemed to many an improbable 95.5 per cent of the vote on a 99 per cent turnout in Mr Bongo's home district.⁴¹

Thus electoral outcomes are usually predetermined, and elections are just mere rubber stamps reflecting the wishes of the regimes. During constitutional coups, it is possible to find citizens supporting the extension of the regime due to strategic dilemmas; supporting the regimes means more oppression, but failure to support the regime could lead to more severe consequences like arbitrary imprisonment, torture and assassination.⁴² Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status. These principles include universal, equal, free, secret or direct suffrage and stability of electoral laws.

(vi) Stagnant or Declining Economies

Inept undemocratic leadership through constitutional coups has led to mismanagement of revenues from the State's natural resources. This has continued to fuel corruption, conflicts and poverty, which ultimately, hurt economic growth and social development. Successive governments in sub-saharan countries across Africa have also not been able to stimulate the necessary courage and political will to build institutions capable of curbing the pillaging of the continent's commonwealth. Rather than effectively harness their nature-endowed resources to develop their economies and become dominant players in the global economic

⁴¹ David Pilling 'Africa: A Shrinking Place for Autocrats?' *Financial Times* (New York, January 23, 2017) <<https://www.ft.com/content/716ee35e-dd6d-11e6-9d7c-be108f1c1dce>> Accessed 8 March 2020

⁴² *ibid*

scene, most African leaders amass personal wealth in foreign countries plunging their countries into debts, and then depend on foreign aid and loans to survive.⁴³

In the DRC under former president Joseph Kabila, the DRC suffered from gross corruption, embezzlement, and neglect of public infrastructure. An economy based almost exclusively on mineral extraction deteriorated as Kabila embezzled government funds.⁴⁴

Zimbabwe, one of the continent's richest nations, tumbled under Mugabe to a place of chronic underdevelopment with a long-struggling economy. Mugabe's alleged misuse of federal funds has been linked to dysfunctional government branches in the wake of a slew of constitutional amendments granting Mugabe broad power. The country experienced drops in life expectancy and per capita income between 1990 and 2005. Economic instability has continued under Mugabe's successor, Emmerson Mnangagwa, with a severe currency crisis prompting widespread protests in early 2018.⁴⁵

The World Bank report on sub-saharan Africa, outlines issues which continue to hold back growth across the region. One of them is debt. It is not just the growing amount of debt, but also the type of debt that countries are taking on that is leading to widespread vulnerabilities. External debt is shifting from traditional, concessional, publicly-guaranteed sources to more private, market-based, and expensive sources of finance, putting countries at risk. By the end of 2018, nearly half of the countries in sub-saharan Africa covered under the Low-Income

⁴³ K. Eze, 'The Efficacy of Presidential Term Limits' (Unpublished paper presented at the Mandela Institute for Development Studies, Youth Dialogue, Dar es Salaam, Tanzania, August 3-4, 2016) 32.

⁴⁴ Dickens Olowe "Is Africa going backwards on democracy?" *BBC Africa News* (Lagos, 22 February 2019) <<https://www.bbc.com/news/world-africa-46971250>> accessed 30 December 2019

⁴⁵ *ibid*

Country Debt Sustainability Framework were at high risk of debt distress or in debt distress, more than double the number in 2013.⁴⁶

(vii) Human Rights Abuses

Rights abuses in the countries with leaders who stage constitutional coups have included secret or arbitrary arrests and detentions, tight restrictions on freedom of expression, torture, assassination and police brutality. Human Rights Watch reported that the humanitarian situation in Burundi remained dire nearly four years after late President Pierre Nkurunziza's decision to run for a third term sparked mass protests. It accused the security services and the ruling party's Youth League of widespread abuses ahead of a May 2018 referendum to lengthen presidential terms.⁴⁷

In Sudan, Omar al-Bashir remained in office despite allegations by international and domestic bodies of human rights violations during and after widespread electoral irregularities and fraud. He presided over a decade-long civil war that ended with the south seceding to become the new state of South Sudan in 2011. Bashir was indicted by the International Criminal Court in 2009 on charges of war crimes and crimes against humanity for attacks on civilians in Darfur.⁴⁸

⁴⁶ The World Bank, 'Taking the Pulse of Africa's Economy' (Washington, April 2019) <<https://www.worldbank.org/en/region/afr/publication/taking-the-pulse-of-africas-economy/>>accessed 23 February 2020

⁴⁷ Mulubi Asiligwa, 'Liberal Democracy', 112

⁴⁸ ibid

(viii) Poverty

Constitutional coups have an impact on poverty as regimes who engage in it, do so for their own selfish purpose of unrestricted access to state coffers. The gross mismanagement of resources lead to high poverty levels and scarcity of basic amenities. Sudan's capital, Khartoum is notorious for poverty and destitution yet the population has continued to increase over the last twenty years. Weak democratic institutions, lack of transparency and accountability in the management of natural resources, corruption, political instability and incessant conflicts, among others, are said to have kept majority of the people extremely poor. Till date, the government cannot show what it has done with the vast oil resources to combat the poverty.⁴⁹

The 'our turn to eat' mentality of undemocratic sub-saharan Africa's leaders contribute to the stunted development and impoverishment of many sub-saharan African states. After years of "eating" the spoils of public office, President Gnassingbe of Togo is still unwilling to relinquish power. He won another term in February 2020 after the Constitution was amended in 2019 to enable him to do so. Statistics show that political patronage in Togo's public spending has exacerbated economic hardships and raised poverty levels.⁵⁰

Due to the fact that these leaders hold on to power for selfish reasons, the welfare of the ordinary man on the street is not priority. Thus while Presidents and their allies in sub-

⁴⁹ Tindu Lissu 'Security and Democracy in Africa' [2019] (19) (2)*Journal of African Law*; 67

⁵⁰ Stephanie Hanson, 'Corruption in Sub-saharan Africa' *Brookings* (Washington, 13 April, 2019) <<https://www.cfr.org/background/corruption-sub-saharan-Africa/>> accessed 16 February 2020

saharan Africa are growing richer and travelling to foreign countries for vacations, their countries are populated by very poor people.⁵¹

(ix) Intimidation of the Press

Presidents who stage constitutional coups react negatively to the Press. Members of the press who do not sing their praises are seen as the opposition too. Therefore there is severe restrictions on freedom of the Press. To ensure the opposition gained zero mileage in their quest to resist term extension, President Dèby of Chad, used the National Broadcast Regulator to cut off local radio stations from airing any opposition messages for the entire campaign period, while at the same time used the State radio to freely air messages and debates in support of his term extension bid.⁵² Press freedom is virtually non-existent in Djibouti⁵³ and in Burundi,⁵⁴the initial six-month ban imposed on two foreign radio broadcasters, the British Broadcasting Corporation and Voice of America, ahead of a referendum on a change to the Constitution, was extended in early 2019.⁵⁵

⁵¹ Omobola Tolu-Okunsibor, *The Nation*, (Lagos, 9 December, 2019) <<https://thenationonlineng.net/how-bad-leadership-corruption-fuel-poverty-in-africa/>> accessed 3 March 2020

⁵² Tindu Lissu 'Security and Democracy in Africa' [2019] (19) (2)*Journal of African Law*; 67

⁵³ Ranked 176th in the world. See, 2020 World Press Freedom Index 'The 2020 RSF Index: Big Changes for Press Freedom in Sub-Saharan Africa' <<https://rsf.org/en/rankings/2020>> accessed, 20 January 2021

⁵⁴ Ranked 160th in the world in the 2020 World Press Freedom Index. See note 50

⁵⁵ 2020 World Press Freedom Index 'The 2020 RSF Index: Big Changes for Press Freedom in Sub-Saharan Africa' <<https://rsf.org/en/rankings/2020>> accessed, 20 January 2021

In DRC,⁵⁶ Journalist in Danger, an international organization, documented one hundred and twenty one cases of abuses against the media in 2017.⁵⁷ Attacks, arbitrary arrests, and media closures constitute an organized system for preventing journalists from covering the DRC's dangerous authoritarianism. During the DRC's presidential election of 2018, the authorities withdrew the accreditation of correspondents of the French public broadcaster- Radio France International,⁵⁸ which has a large audience in the DRC, banned local broadcasting by RFI, and disconnected the Internet.⁵⁹

Covering opposition protests is a delicate exercise in many sub-saharan African countries. In Togo,⁶⁰ the authorities withdrew the accreditation of an international TV broadcaster's correspondent after she covered opposition protests. In Guinea,⁶¹ the president's direct threats to close media outlets that interviewed a union leader helped create a climate of hostility towards the media. Radio stations were closed while journalists were sometimes targeted by supporters of the President Alpha Condé. In response to threats and attacks on

⁵⁶ Ranked 150th in the world in the 2020 World Press Freedom Index. See note 50

⁵⁷ 2020 World Press Freedom Index 'The 2020 RSF Index: Big Changes for Press Freedom in Sub-Saharan Africa' <<https://rsf.org/en/rankings/2020>> accessed, 20 January 2021

⁵⁸ Hereinafter RFI

⁵⁹ *ibid*

⁶⁰ Ranked 71st in the world in the 2020 World Press Index. See note 50. See also, Solomon Tube, 'Togo Family Dynasty eyes Rule until 2033' *African Insiders* (Lomè, 14 May, 2019) <<https://africanarguments.org/2019/05/14/insiders-togo-constitution-family-dynasty-rule-2033/>> accessed on 2 February 2020

⁶¹ 110th in the world in the 2020 World Press Freedom Index. See note 50

reporters during demonstrations in Chad⁶² the country's journalists staged "A Day without Press" protest in February 2018.⁶³

Sudan,⁶⁴ continues to be one of the continent's riskiest places for opposition reporting. In January 2018, eighteen journalists were arrested and several media outlets were shut down amid protests against a bread price increase. Still in Sudan, Reporters Without Borders⁶⁵ registered one hundred arrests of journalists and scores of confiscation of newspaper issues in late December 2018, which saw the start of the biggest protests in more than thirty years calling for former President Omar al-Bashir's removal and new elections. Sudan's National Intelligence and Security Service (NISS) kept on seizing entire newspaper issues as they came off the press, in part to throttle the publishers economically.⁶⁶

Internet cuts or restrictions on access to online social networks are now trending in sub-Saharan Africa as a medium of gauging dissent and preventing coverage of elections and unrest within

⁶² 123rd in the world in the 2020 World Press Freedom Index. See note 50

⁶³ George Allen, 'Which way for African Democracy as more Countries remove Presidential Term Limit from their Constitution?' *The African Courier*, (Cape Town, 21 November, 2019). <www.theafricancourier.de/africa/which-way-for-african-democracy-as-more-countries-remove-presidential-term-limit-from-their-constitution/html>. accessed on 5 January 2020

⁶⁴ Near the bottom at 159 of the 2020 World Press Freedom Index. See note 50

⁶⁵ Known officially in French as Reporters Sans Frontières, is a Non-profit Organization caring for the welfare of journalists in the world.

⁶⁶ Faith Azaba, 'Term Limits Safeguard Democracy' *Zimbabwe Independent*, (Harare, 6 December 2019) <<https://www.theindependent.co.zw/2019/12/06/term-limits-safeguard-democracy/>> accessed 3 February, 2020.

a sector of the population. This was the case in the January 2021 presidential election in Uganda where the internet was cut off a day before the election.⁶⁷

The latest African elections have seen many attempts to restrict reporting, including arrests of journalists, disruption of social networks and Internet cuts. Suspending media outlets, especially international ones, continues to be a widely-used weapon to suppress critical coverage and a public debate. They are systematically imposed on the eve of every street protest in Democratic Republic of Congo.⁶⁸

In Cameroon,⁶⁹ an unprecedented complaint was filed against the government before its own constitutional court after it disconnected the Internet for several months in two English-speaking regions that were protesting against discrimination. Still in Cameroon, the former head of the state-owned radio and television broadcaster, Amadou Vamoulké, was arbitrarily detained for more than two and a half years. President Paul Biya's reelection for a seventh term in October 2018, was accompanied by many cases of intimidation, attacks and arrests of journalists often labelled as opponents.⁷⁰

Uganda ranks 125th in the world on the list of countries suppressing the Press, according to the World Press Freedom rating of 2020, in part because it created a special security unit to closely monitor websites and social networks. More generally, any reporting critical of the

⁶⁷ Sara Goufou 'Ugandan President Yoweri Museveni Wins Sixth Term as Rival, Bobi Wine Alleges Fraud' *ABC News* (Kampala: 17 January, 2021) <<https://www.abc.net.au/news/2021-01-17/ugandas-museveni-wins-sixth-term-as-rival-alleges-fraud/13064610>> Accessed 19 January 2021

⁶⁸ 2020 World Press Freedom Index 'The 2020 RSF Index: Big Changes for Press Freedom in Sub-Saharan Africa' <<https://rsf.org/en/ranking/2020>> accessed, 20 January, 2021

⁶⁹ Ranked 134th in the world in the 2020 World Press Freedom Index. See, note 62 above.

⁷⁰ Same as note 62 above

authorities tends to get a poor reception in sub-Saharan Africa, as seen in the one-year jail sentence passed on appeal on Baba Alpha, a TV journalist in Niger,⁷¹ who has a reputation for drawing attention to bad government practices. After completing his sentence, he was expelled to neighbouring Mali as a "threat to internal state security." Following the January 2021 presidential election in Uganda, Britain said it was concerned by a national internet shutdown that began the day before the vote. It said the shutdown constrained freedoms and clearly limited the transparency of the elections.⁷²

In Mali,⁷³ a local radio station was illegally shut down by the governor of the capital, Bamako, between the first and second rounds of the presidential election.⁷⁴

(x) Security Breaches

Constitutional coups are a leading factor of security challenges in sub-saharan Africa. Where the Constitution is manipulated to achieve the selfish goals of the incumbent, many citizens become discouraged and dissatisfied with government and take their frustration out on fellow citizens. Moreso, these incumbents during the elaborate campaign for constitutional amendments, engage thugs which they illegally arm, to intimidate their perceived opponents. However after the success or failure of such coup, they do not retrieve these arms. With failure of government to cater adequately for the basic needs of the citizenry such as creating

⁷¹ Ranked 57th in the world in the 2020 World Press Freedom Index. See, note 62 above.

⁷² Sara Goufou 'Ugandan President Yoweri Museveni Wins Sixth Term as Rival, Bobi Wine Alleges Fraud' *ABC News* (Kampala: 17 January, 2021) <<https://www.abc.net.au/news/2021-01-17/ugandas-museveni-wins-sixth-term-as-rival-alleges-fraud/13064610>> Accessed 19 January 2021

⁷³ Ranked 108th in the world in the 2020 World Press Freedom Index. See note 62 above

⁷⁴ Same as note 62 above

job opportunities, these thugs become militants, rogues, robbers and kidnappers in order to survive. Furthermore, monopolisation of power provides “an incentive for antagonistic politicking” which invariably leads to the ethnicisation of power contest. Such a process if not well managed could lead to ethnic conflict and civil wars.⁷⁵ Burundi's former president Pierre Buyoya, formerly the AU Special Representative for Mali, when asked what he thought about the third-term bid said: 'I don't agree with this business'. He added that he has a responsibility to speak out as one of the signatories of the Arusha agreement, which put an end to his presidency in 2003. 'If we carry on like this, we will return to civil war,' he warned ominously.⁷⁶

Former president of Zimbabwe, Robert Mugabe made a point while rejecting presidential term limits. He was of the opinion that it is another idea imposed by outsiders that will be 'a yoke around our necks'. 'In Europe they don't have two terms, so if people want you to stay on, why not?' However, he admonished his fellow African leaders who 'cause fights' by saying 'my first term doesn't count', a clear reference to late Nkurunziza of Burundi. 'Let us learn to be brotherly and principled and refuse to cause trouble for our people,' Mugabe concluded.⁷⁷ In Burundi, regrettably, Nkurunziza's controversial third term re-election in 2015, triggered political violence that led to the killing of at least one thousand two hundred

⁷⁵ Henry Anozie 'Which way for African democracy as more countries remove presidential term limit from their constitution?' *The African Courier* (Lagos, 16 May, 2016) <<https://www.theafricancourier.de/africa/which-way-for-african-democracy/html>> accessed 22 January 2020

⁷⁶ Quoted in Alessandra Prentice, 'What Limits? How African Leaders cling to power for decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

⁷⁷ Quoted in Liesl Louw-Vaudran, 'What Happened to the Third Term Debate?' *Institute of Security Studies*, Paper 156 (Cape Town, 4 August 2009)4. <<https://issafrica.org/amp/iss-today/what-happened-to-the-third-term-debate>> accessed 13 January, 2019

people and forced an estimated two hundred and eighty thousand others to flee their homes to neighbouring countries.⁷⁸

(xi) Lack of transparency and Accountability

Constitutional coups undermine transparency, integrity, and accountability among sub-Saharan African political leaders. Minimal accountability of government officials to citizens impedes good governance more than any other single factor. This is far from unique to Africa, but is pronounced in some countries on the continent, especially where government leaders do not derive their legitimacy from popular support.⁷⁹ Indeed some earned their positions through force and the legacy of electoral authoritarianism. By ascending within a dominant political party, or through elections of questionable legitimacy, they do not come into office on the back of popular support, and once in office do not depend on popular support especially when they have a monopoly on the use of force and engage in grand corruption.⁸⁰ Such leaders feel little pressure to respond to citizen demands and adapt to public sentiment. The lack, in many countries, of a functional and broad tax system especially where government revenues are derived largely from natural resources, compounds this problem. Citizens do not feel bought-in to government, because they pay little into government and get little out of it, while leaders do not need their tax payments to

⁷⁸ Kumar Peterson 'We have achieved a lot. God is our witness', *African News* (Bujumbura, 26 January 2020) <<https://www.africanews.com/2020/01/26/burundi-gen-evariste-ndayishimiye-chosen-to-replace-nkurunziza/>> accessed on 28 January, 2020

⁷⁹ Micha Wiebusch and Christina Murray 'Term Limits and the African Union' [2018] (17) (2)*Journal of African Law*; 1

⁸⁰ George Allen, 'Which Way for African Democracy as More Countries Remove Presidential Term Limit from their Constitution?' *The African Courier*, (Cape Town, 21 November, 2019.<www.theafricancourier.de/africa/which-way-for-african-democracy-as-more-countries-remove-presidential-term-limit-from-their-constitution/html>. accessed on 5 January 202

fill state coffers. All of these lead citizens to reduce their expectations of government, leaving some resigned to the notion that government will rarely deliver on their demands, and that it is not accountable to them.⁸¹

4.2 The Rwandan Alternative?

Rwanda's President Paul Kagame has been used as an example of a leader who is running an effective and efficient government that is unencumbered by democratic structures, which can be slow and rigid. President Kagame has been hailed as a leader who has managed to achieve economic development without being encumbered by democracy or its principles.⁸² In 1994, Rwanda went through a genocide when, in just one hundred days, close to one million Tutsi and their Hutu supporters were butchered. Under President Kagame, a Tutsi military leader who toppled the government, the country has been transformed. It has managed to grow year after year at near double-digit rates, according to official data.⁸³ Rwanda has been called a “development state” and Kagame has been lauded by aid agencies for bringing growth and cutting poverty. Paul Collier, Professor of Economics and Public Policy at Oxford University, says Mr Kagame has overseen “the fastest reduction of poverty Africa has ever seen”⁸⁴ and supporters of Kagame say the records speak for themselves.⁸⁵

⁸¹ Faith Azaba, 'Term Limits Safeguard Democracy' *Zimbabwe Independent*, (Harare, 6 December 2019) <<https://www.theindependent.co.zw/2019/12/06/term-limits-safeguard-democracy/>> accessed 3 February, 2020.

⁸² Alessandra Prentice, 'What Limits? How African Leaders cling to power for decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

⁸³ The World Bank, 'Rwanda Overview' (Washington,) <<https://www.worldbank.org/en/country/rwanda/overview/>> accessed 5 February 2020

⁸⁴ Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done about It* (Oxford University Press, 2007) 71.

However Kagame has been criticised by human rights groups for abuse: opponents of Paul Kagame's regime in Rwanda regularly end up dead or in exile.⁸⁶

So is the Rwanda model a viable alternative? Extending the control of the governing party over a country's economy is more likely to increase corruption and waste than to spur economic activity, Mr Nic Cheeseman says. "What this means is that if other countries on the continent try to implement the Rwandan model, the chances are that they will experience all of its costs while realising few of its benefits," he adds.⁸⁷ Mohammed Ibrahim, whose foundation supports democracy, says even if you give the benefit of the doubt to Rwanda, it remains the exception. Most autocratic governments in Africa have been disasters, he says. "You should not throw this example in our faces when we are arguing for democracy"⁸⁸ Also, Emmanuel Gyimah-Boadi, an executive director of Afrobarometer, vehemently challenges this proposal. "One should not forget, he said, that autocratic rule was the norm in Africa from 1960 until at least 1990. Now why is it that thirty years of authoritarian and autocratic rule in Africa did not produce the kind of developments we are seeing in Rwanda? The experience of one country cannot be allowed to override that gleaned by fifty two countries" he said.⁸⁹

⁸⁵ ibid

⁸⁶ ibid

⁸⁷ Nic Cheeseman, *Democracy in Africa: Successes, Failures and the struggle for Political Reform*, (Cambridge University Press, 2015) 67

⁸⁸ Quoted in Wanjiku Mwaura, 'Dealing with Autocratic Regimes in Africa' *Direct Impact* (Nairobi, 3 October 2016) <<https://www.dw.com/en/dealing-with-autocratic-regimes-in-africa/a-35925562>> accessed 5 February 2020.

⁸⁹ Emmanuel Gyimah-Boadi, 'Current Realities in Africa'. [2018] (2) (7)*Journal of Democracy*; 118

4.3 Judicial Response to Constitutional Coups

The judicial response to the prevention of constitutional coups in sub-saharan Africa has been largely poor. As mentioned earlier, most States that are involved in constitutional coups have intimidated Judiciary. The judges are cronies of the President and are more than willing to quickly rule in his favour. In 2012, the Senegalese Supreme Court gave its nod to former President Abdoulaye Wade to contest for the third time.⁹⁰ In 2015, the Rwandan Supreme Court approved a change in the Constitution which allowed President Paul Kagame to run for a third term.⁹¹ In 2015 also, the Constitutional Court of Burundi ruled in favour of late President Pierre Nkurunziza's bid to run for a third term.⁹² More recently, Guinea's Constitutional Council, the highest judicial body in the West African Nation, cleared President Alpha Condé to seek a third term in the October 18 2020 presidential election.⁹³

In contrast, the Constitutional Court of Colombia in 2010, displayed independence when it rejected as unconstitutional, a proposed referendum backed by Parliament that would have

⁹⁰ Peter Pham, 'Senegal Consolidates its Constitutional Democracy' *Africa Source* (Dakar, 29 March, 2016) <<https://www.atlanticcouncil.org/blogs/africasource/senegal-consolidates-its-constitutional-democracy/>> accessed on 23 January, 2020.

⁹¹ Alessandra Prentice, 'What Limits? How African Leaders cling to power for decades' *Reuters*, (New York, 18 October 2019) <<https://www.reuters.com>> accessed on 30 December 2019

⁹² Maud Jullien, 'Burundi Court Backs Nkurunziza on Third Term' *BBC Africa*, (Bujumbura, 5 May, 2015) <<https://www.bbc.com/news/world-africa-46971250>> accessed 15 May, 2020

⁹³ Saliou Samb, 'Guinea Constitutional Council Clears President Alpha Condé's Third Term Bid' *Reuters* (Conakry, 9 September, 2020) <<https://www.reuters.com>> accessed on 9 October 2020

asked voters whether to allow former President Álvaro Uribe to seek re-election for a third consecutive term⁹⁴

Upon his election to the presidency in 2002, Alvaro Uribe inherited a State that was on the brink of collapse. The country was plagued with internal violence and insecurity. Previous governments had demonstrated little success in exercising control over the country with multiple guerilla groups posing a direct challenge to State authority, and making Colombia at that time a near-failed State.⁹⁵ It is against this backdrop that the achievements of the Uribe administration in stabilizing Colombia's security situation must be judged. Uribe greatly increased the military budget and the size of the military doubled during his time in power with significant aid from the USA. He began pursuing the armed Marxist factions in the country much more aggressively in a strategy billed as "Democratic Security". With increased manpower, weaponry, and tolerance for casualties, his administration pushed the Revolutionary Armed Forces of Columbia⁹⁶ back into the Amazonian jungles and out of the major towns and villages.⁹⁷ During his two terms, kidnapping rates dropped by 84% and the homicide rate by 70%. The FARC, which numbered 20,000 fighters in 2002, had been thinned to 8,000 fighters by the end of his second term. As a direct result of these security

⁹⁴ Ximena Marinero, 'Colombia Constitutional Court Strikes Down Uribe's Third Term Referendum Law' *Jurist*, (Bogota, 27 February 2010) <<https://www.jurist.org/news/2010/02/Colombia-constitutional-court-strikes-down-uribe-s-third-term-referendum-law/>> accessed 22 May, 2020

⁹⁵ *ibid*

⁹⁶ Hereinafter, FARC

⁹⁷ Shamar Engerst, 'Colombian Court Blocks President's Bid for a Third Term' *New York Times*, (New York, 27 February, 2010) <<https://www.nytimes.com/2010/02/27/colombian-court-blocks-presidents-bid-for-a-third-term/>> accessed 22 May 2020

gains, the country witnessed impressive improvements in economic growth and investment.⁹⁸

However, these gains came at the cost of human rights and transparency. Numerous allegations of corruption were levied against the Uribe administration including illegal payoffs, wiretapping, and campaign-finance shenanigans. Despite these allegations, Uribe remained highly popular. He was re-elected by a wide margin in 2006 and enjoyed an unprecedented approval rating of 86% in 2008 after a successful rescue mission freed several high-profile kidnapping victims from the FARC including Ingrid Betancourt, a former senator and presidential candidate. In 2009, with only one year remaining in office, he sought to change the constitution yet again to secure a third term to continue his security campaign and consolidate the gains made during his administration.⁹⁹ He had already successfully amended the 1991 Colombian Constitution in his second year in office to include a previously-prohibited second presidential term, and he now sought an unprecedented third term.¹⁰⁰ Both houses of the Colombian Congress supported a proposed referendum that would have allowed the Colombian people to vote on whether to amend the Constitution further to give Uribe a third term.¹⁰¹

⁹⁸ Bill Gelfed, Preventing Deviations from Presidential Term Limits in Low and Middle Income Democracies (unpublished paper presented to the Department of Public Policy Analysis, Pardee Rand Graduate School, Santa Monica, California, August, 2018) 160

⁹⁹ *ibid*

¹⁰⁰ Ximena Marinero, 'Colombia Constitutional Court Strikes Down Uribe's Third Term Referendum Law' *Jurist*, (Bogota, 27 February 2010) <<https://www.jurist.org/news/2010/02/Colombi-constitutional-court-strikes-down-uribe-s-third-term-referendum-law/>> accessed 22 May, 2020

¹⁰¹ *ibid*

Given Uribe's popularity, many domestic and foreign observers believed the initiative likely to pass, but the Colombian Constitutional Court ruled that the proposed referendum was unconstitutional.¹⁰² The 1991 Constitution of Colombia, established the Constitutional Court as an independent body within the judicial branch distinct from the Supreme Court of Justice, to review matters pertaining specifically to the interpretation of the Constitution. While Colombia has had "a relatively independent judiciary since 1958," the Constitutional Court, in its current incarnation, has been one of the most active high courts in the world since its creation in 1991, regularly ruling against encroaching executive authority and declarations of emergency authority by different presidents, including Uribe himself.¹⁰³ While the Constitutional Court upheld the electoral reform law that allowed Uribe the opportunity to seek a second term in 2005, its decision in 2010 denied him the chance for a third term. The Constitutional Court was of the view that the proposed referendum contained substantial violations to democratic principles. Uribe accepted the court's verdict as the final word and stepped down peaceably at the end of his second term.¹⁰⁴ 'The Constitution lives!' stated one demonstrator's sign.¹⁰⁵ "Long live the Constitutional Court! We Liberals feel proud of our

¹⁰² Bill Gelfed, Preventing Deviations from Presidential Term Limits in Low and Middle Income Democracies (unpublished paper presented to the Department of Public Policy Analysis, Pardee Rand Graduate School, Santa Monica, California, August, 2018) 189, See Decision C-141 of 2010

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ Quoted in Shamar Engerst, 'Colombian Court Blocks President's Bid for a Third Term' *New York Times*, (New York, 27 February, 2010) <<https://www.nytimes.com/2010/02/27/colombian-court-blocks-presidents-bid-for-a-third-term/>> accessed 22 May 2020

institutions, which come out strengthened by this process," said Rafael Pardo, presidential candidate from the Liberal Party.¹⁰⁶

Thus, it is clear that the Colombian Constitutional Court was in fact, the key institution that prevented a third term. African courts have much to emulate from this decision. In interpreting constitutional provisions on term limits, our judges must avert their minds not only to the letter of the Constitution but more importantly to the intention of the drafters of the Constitution.

4.4 Viable Alternatives to Constitutional Coups

Term limits are justified and necessary in a democratic society for they are meant to prevent incumbents from taking advantage of their positions in order to remain in power and guarantee an even playing field for other candidates. Constitutional coups create the danger of having a republican monarch. Term limits aim to protect a democracy from becoming a *de facto* dictatorship. No matter how virtuous or exceptional a leader may be, he is not indispensable and irreplaceable.¹⁰⁷ Two terms are long enough for any exceptional leader to leave indelible footprints without sowing the seeds of dictatorship. It is a period which is sufficient to give a good leader time to leave his mark and short enough for people to tolerate a poor leader.¹⁰⁸ However there are certain incentives and measures that can be put in place to discourage constitutional coups.

¹⁰⁶ ibid

¹⁰⁷ Charles Fombad and Nathaniel Inegbedion, 'Presidential Term Limits and their Impact on Constitutionalism in Africa' in Charles Fombad and Christina Murray (ed's.) (Pretoria University Law Press 2010) *Fostering Constitutionalism in Africa*; 1-29

¹⁰⁸ ibid

One of these incentives is that there should be a constitutional provision preventing leaders from being prosecuted after they leave office for political purposes. Furthermore, where crimes committed by a former leader while in office are not morally reprehensible but are prohibited by the State, there should be immunity from prosecution in respect of such offences.¹⁰⁹

Also, the pension packages for former leaders should be attractive and befit their status as former Presidents. The packages apart from monthly remuneration to ensure their standard of living is maintained, should include medical, travelling allowances and security protection for their residence and person.¹¹⁰

Furthermore, presidents can also be motivated to vacate offices by making provisions for them to assume well funded international or regional positions or even reward them for good leadership.¹¹¹

Going forward, term limits need to be so entrenched as to make constitutional coups extremely difficult. Thus by making constitutional amendments cumbersome, presidents

¹⁰⁹ *ibid.* The Constitution of Burundi, 2005 and Constitution of Togo, 1992 (as amended) incorporates immunity for life for presidents. Whereas in article 153 (1) and (2) of the Constitution of the Republic of Mozambique 2004, a President can be tried for crimes committed in the performance of his functions, before the Supreme Court. For crimes committed outside the performance of his functions, the President of the Republic shall be tried before the ordinary courts at the end of his term in office.

¹¹⁰ Charles Fombad and Nathaniel Inegbedion, 'Presidential Term Limits' 27. For example, if late President Pierre Nkurunziza had been alive to finish his tenure in August 2020, he would have received \$540,000 (£440,000) retirement payout and a luxury villa. He would also have been entitled to a lifetime salary equal to that of a lawmaker in Burundi. See: Ferdinand Omondi, 'Burundi Election: Nkuruziza Set to Become Supreme Guide' *BBC News* (Bujumbura, 19 May 2020) <<https://www.bbc.com/news/world-africa-65432117>> accessed 30 May 2020

¹¹¹ Charles Fombad and Nathaniel Inegbedion, 'Presidential Term Limits' 27. For example, the title of 'supreme guide to patriotism' was awarded to late President Nkurunziza by an act of parliament in January 2020 as well as being his ruling party's 'eternal supreme guide' ahead of his scheduled vacation of office in August 2020.

may be discouraged from trying to prolong their stay in power. These restrictions may be in the form of requiring that any amendment to the Constitution is approved by the Parliament by two-third, four-fifth, or three quarter majority. Moreso, the amendment must not only be approved by a special parliamentary majority but must also be subjected to a referendum.¹¹²

Finally, as a viable alternative to constitutional coups, the amendment of term limits provisions for presidents, in Constitutions in Sub-saharan Africa, should be strictly prohibited. Such provisions should be captioned 'unalterable, 'irrevocable', 'unamendable', 'eternity clauses', 'immutable' etc.¹¹³ This ensures that not only the letter but also the spirit of the Constitution is adhered to by incumbents who will have no room to engage in constitutional coups to the detriment of other political actors and democracy at large.

4.5 The Benefits of Strong, Effective and Performing Democratic Institutions

Richard Joseph adopts the definition of democracy as one with a predictable periodic change government through the instrumentality of free and fair elections; and one with proper functioning institutions of accountability in the use of State power.¹¹⁴ Thus State institutions

¹¹² ibid

¹¹³ Yaniv Rosnai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017)16. For example, under article 290(1) of the 1992 Constitution of Ghana, a distinction is made between 'entrenched' provisions and non entrenched provisions. Furthermore, there are stringent procedures to follow in order to successfully amend the 'entrenched' provisions

¹¹⁴ Richard Joseph 'Democracy and Reconfigured Power in Africa' *Brookings*. (New York, 9 November 2019)<<https://www.brookings.edu/research/democracy-and-reconfigured-power-in-africa/>> accessed 4 February, 2020

that ensure accountability in the use of power must be 'effective' as that is the vital element that determines their proper functionality.¹¹⁵

To work effectively a democratic government, of whatever stripe and tenor, must be anchored on a set of institutions. It must follow the rules of the game that structure and condition actor-behaviour. How do the rules of the game come about? The most sustainable, way of establishing the rules of the game is through negotiation, compromise and, in some respects, co-optation of key political actors and their constituents. The essence is to arrive at some minimum political consensus that embodies the aspirations and wishes of key political actors and the wider public. This minimum consensus turns on the basic norms and beliefs about what is acceptable and what is considered outside the bounds of political activity and engagement. Without this it is not possible to sustain democratic governance.¹¹⁶

Furthermore, it is pertinent to note that there is a great difference between reelection and the human right to stand for election which is understood as part of the right to political participation. This raises the question of whether reelection is also a human right or a specific aspect of the functioning of the institutions concerned. It is important therefore, that a Constitution not only contains rights but makes provisions for the functioning of democratic institutions. Term limit provisions for presidents are found in chapters of Constitutions referring to the institution of the presidency, not in the bill of rights. A person who seeks reelection has already exercised his right to be elected, so term limits should not be interpreted *a priori*, as a violation of human right.

¹¹⁵ G. O. Arishe, *Developing Effective Legislature: The Country Specific Approach To Assessing Legislative Power*(Paclerd Press Ltd, 2017) 156

¹¹⁶ Kevin Eze, 'The Efficacy of Presidential Term Limits' (Unpublished paper presented at the Mandela Institute for Development Studies, Youth Dialogue, Dar es Salaam, Tanzania, August 3-4, 2016) 32.

In many sub-saharan Africa countries the Constitution is the primary source of the rules that translate into functional institutions, governmental bodies and state agencies. It usually declares itself as supreme over everybody and authority in the State, establishes the government, defines and restricts powers as well as functions of institutions it creates. In restraining political actors, the most important institutions are the rule of law, separation and of powers and checks and balances. Where the three aforementioned institutions exist, the other two arms of government will be strong and effective. In that way, both arms can counterbalance the enormous power and influence of the executive instead of being mere appendages of it. The power of a strong Legislature defeated the attempted constitutional coup in Nigeria and Malawi. The power of an independent Judiciary annulled President Uhuru Kenyatta's reelection on the basis of non compliance with the extant provisions of the 2010 Constitution of Kenya in September 2017 and Malawi's Constitutional Court annulled President Peter Mutharika's reelection in February 2020.¹¹⁷

According to Nic Cheeseman, the democratic quality of a political system influences the likelihood that incumbents will stand down at the end of their tenure.¹¹⁸

4.6 Conclusion

¹¹⁷ See, Golden Matonga and Joseph Cotterill "Malawi Court Overturns 2019 Presidential Election Result" *Financial Times*, February 6, 2020. Available at <<https://www.ft.com/content/fbd09b8e46bc-11ea-93289621>> last accessed 4th March 2020, Kimiko de Freytas- Tamura "Kenyan Supreme Court Nullifies Presidential Election" *The Conversation*, September 30, 2017. Available at <<https://theconversation.com/Kenyan-supreme-court-nullifies-election/>> Accessed 3rd March, 2020

¹¹⁸ Nic Cheeseman, 'African Elections as Vehicles for Change' [2010] (21) (2) *Journal of Democracy*; 40.

Constitutional provisions on presidential term limits in sub-saharan Africa, are not there by accident. The intention of the draftsman is to prevent the State from being personalized and therefore slip into the dangerous and unstable path of democratic backsliding. Constitutional coups blur the clear lines of democratic institutions such as the rule of law, separation of powers and checks and balances. The longer a president stays in power, the faster the lines of separation of powers fade. Constitutional coups are a direct affront to the spirit behind the constitution, promotes usurpation of the rule of law as well as the balance of power, undermines the effectiveness of independent legislatures, impartial judiciaries, neutral electoral authorities, and eliminates competitive, popular political participation. Forays into constitutional coups distract from state building, are a recipe for security breaches, contribute to high levels of corruption and poverty, reeks of democratic backsliding and ultimately leads to authoritarianism.

The entrenchment of term limits in our constitutions today is to safeguard the rule of law. The implementation of the rule of law depends on having strong, effective and performing democratic institutions with the political will to uphold and protect not just the letter but the spirit of the constitution too, thereby providing the much needed check on the enormous power and influence of the executive arm of government. However there are certain measures as highlighted above, that can be entrenched into Constitutions to discourage constitutional coups and encourage compliance with term limits. While there may be challenges in the practical implementation of these measures, since not all incumbents can be persuaded to adhere to term limits, they are still worth trying as viable alternatives to constitutional coups.

CHAPTER FIVE

SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.0 Summary

Constitutional coups have been a recurring knotty issue in sub-saharan Africa in recent years. Executive incumbents are increasingly seeking ways to prolong their stay in power. They do this in various ways, viz; narrow and undemocratic interpretation of the Constitution by making a distinction between an old Constitution and a revised one, abolishing age restrictions like what happened in Uganda, calling for a referendum to remove term limits, and forcing an intimidated Judiciary or a very weak Legislature to legalise their illegitimate bid. It is the finding of this research that countries with weak institutions which lack the will to resist the enormous power and influence of the executive arm of government are more vulnerable to constitutional coups. Sub-saharan leaders who stage constitutional coups do not do so in the interest of the nation in question, rather it is selfishness, greed and personal aggrandisement that drives such an ambition. This invariably leads, among other things, to gross plundering of state resources, corruption, poverty, human rights abuses, restrictions on press freedom, clamp down on opposition, security breaches, declining economies, poor developmental growth and democratic reversal.

While there are arguments that term limits are anti democratic because it restricts the freedom of the people to choose their leader even though such leader's mandate has expired, it is important to understand that the purpose of term limits is to preserve democracy. Additionally, when the people decide as a constituent power to adopt a presidential system, they also have the authority to decide the extent of the power and

term of office of the president. Thus it is the people who establish term limits and the prohibition of reelection is the expression of the people's decision in the exercise of their self determination to prevent a republican monarch. Presidential term limits are therefore a self imposed restriction on the power of the people to choose a leader whose tenure has ended, at their will contrary to the purpose of maintaining a democratic society where popular political participation is encouraged.

5.1 Recommendations

In the light of the challenges constitutional coups raise and in the realization that if left unaddressed, have the potentiality of wiping off even the minimum content of democracy we enjoy today in sub-saharan Africa, the following recommendations are made:

1. Rule of law: The constitution is the supreme law of the land which establishes the government, the system of government, as well as set out rights, duties and functions and responsibilities of various institutions. Every authority and person is subject to it. When interpreting constitutional provisions, the document must be read as a whole, in order to give a progressive and purposive meaning to it. The provisions of the constitution on term limits for Presidents should therefore be respected to prevent personalisation and autocracy which undermine democratic consolidation.
2. To curb constitutional coups, the democratic principles of separation of powers, and checks and balances must exist. This ensures that each arm of government is independent and able to check the excesses of the others if necessary. Realizing that the executive is the most ambitious of the three arms of government, the other two arms must live up to their constitutional duties. The power of a strong Legislature

and independent Judiciary cannot be overemphasized. A strong and performing legislature promotes actual popular participation leading to democratic consolidation. The Judiciary on the other hand, is one of the critical institutions that act as anchors to the Constitution. In countries where the Legislature is weak and acts in collision with the executive, an independent Judiciary can save the situation and prevent the will of a few persons from substituting the will of the people and exercising unfettered power. Furthermore even in situations where national referendums are held to pave way for constitutional coups, an independent Judiciary acts as a countermajoritarian institution that curbs the tyranny of the majority to prevent the democratic consolidation and welfare of the State from being sacrificed for the interest of few selfish individuals and a combination of the 'inattentive' public.

3. The principles of democracy have evolved as universal norms. Democratic practices should no longer be left to sovereign interpretation. It is time constitutional coups are seen by the international community for what they are. Since the international reaction to autocratic governments is normally to impose sanctions, and having clearly outlined the negative impacts of constitutional coups, depicting that such governments are really no different from autocratic government, then severe sanctions - political and economical, should be imposed on governments who stage constitutional coups. While conceding that usually such severe sanctions hurt the innocent citizens more than the targeted leaders and cronies due to their numerous offshore accounts and investments, social sanctions like travel bans on all government officials, their families and cronies whether for health reasons or otherwise, will go a long way to make other constitutional coup would be master minds, think twice. Thus there is a need for stronger cooperation among international

donors to prohibit all forms of development funding, save for humanitarian purposes through independent civil society.

4. The OAU, disbanded in 2002, was known as a dictators' club. Its successor, the AU, is committed to the ballot box in spite of the fact that its fifty four members include some old-fashioned autocrats. The African Charter, signed in 2007, commits its leaders to a political culture of change of power based on the holding of regular, free, fair and transparent elections; of course, that commitment is often honoured in the breach. The AU has to wake up from its slumber before it becomes irrelevant in politics in Africa. Having put in place legal instruments addressing unconstitutional changes of government, it is high time for the AU to take a stand and strike a blow for democracy by condemning constitutional coups and imposing sanction as provided under article 23 of the ACDEG. Furthermore the ACDEG should be amended to ensure loopholes are blocked. Thus a specific provision stating that, "when new Constitutions come into effect, the terms already served in office will be taken into account for the purpose of determining whether a person is eligible", will go a long way to curb constitutional coups.
5. ECOWAS, SADC, and the EAC must go ahead of the AU and develop a strong constitutional bent by proposing adherence to term limits for Presidents as a criteria for membership. Also political, economic and social sanctions should be imposed on States which derail.
6. One major factor fueling constitutional coups is the African 'Our turn to eat' orientation. Leadership is not about amassing illegal wealth but about bringing fundamental positive life changes to the people. The people are the focal point and their welfare is paramount. Thus, Sub-saharan Africa leaders need a psychological

and intellectual reorientation—a complete shift from the present selfish disposition. If our leaders are reoriented to put the welfare of the people and State first instead of themselves, families and cronies, thoughts of hanging on to power after term expiration will not arise, thereby effectively laying the problem of constitutional coups to rest.

7. In sub-Saharan Africa, a redefinition of our geopolitics is necessary if we must succeed in curbing constitutional coups. Why we have fragile democracies is due to the fact that most sub-saharan Africa countries are really autocratic regimes disguising as democracies. However If majority of the countries in sub-saharan Africa consistently adhere to term limits, thereby promoting popular participation and rule of law, this deepen their democratic values, and thus exhibit a high tendency to positively influence neighbouring countries to adhere to term limits.
8. To consolidate democracy in sub-saharan Africa and curb constitutional coups, we must grow beyond holding regular elections. Elections must be transparent, free and fair. Elections are mediums through which the downtrodden, weak, voiceless and poor speak. The power of a transparent and free election can overturn a constitutional coup already approved by the Legislature or Judiciary as it happened with Abdoulaye Wade of Senegal, who sought to be reelected for a third time in 2012, having been given the nod by the Judiciary, only to find out that sovereignty truly belonged to the people who resoundingly voted him out.
9. To discourage incumbent presidents from engaging in constitutional coups, amendments to the constitutional provisions pertaining to term limits can be made stringent by providing for cumbersome procedures for such amendments. This can be by providing for a special parliamentary majority threshold in addition to a

national referendum. On the other hand, provisions relating to presidential term limits should be firmly entrenched and any amendment relating to it, expressly prohibited under a distinct section in the Constitution, captioned any of the following titles--'unamendable', 'unalterable', 'irrevocable', or 'immutable'. This effectly shrinks the space available for incumbent presidents to engage in constitutional coups.

10. Curbing constitutional coups require a vibrant civil society and a relatively free Press. A flourishing civil society and unbiased Press, act as mediums to keep the citizens better informed about the state of affairs of a country. Furthermore, through active consultation with the branches and agencies of government and feedback to the populace, constitutional coups can be quickly nipped in the bud by staging peaceful protests and mobilizing international support as happened in Burkina Faso in October 2014 which forced former President Blaise Compaoré to resign and flee the country, thereby abandoning his third term bid.
11. Education is a prerequisite in the fight against constitutional coups. It is a massive force that can turn the tide in sub-saharan Africa. One cannot prevent or fight against something he knows little or nothing about. Education make people more aware of their rights and obligations as citizens while broadening their horizons as to the workings of government. It further affords one a clearer understanding of constitutionalism and democratic practices. With the citizens educated and social media offering them better platforms, to see how more mature democracies adhere to term limits, constitutional coups will quickly fade into history.
12. Courage: Challenging the status quo, especially in sub-saharan African countries, require courage because it is difficult to ask people to take such risks. Standing up to

these disguised autocrats is a dangerous decision. One can be arbitrarily arrested, tortured or worse still assassinated. However if constitutional coups are to be curbed, it is of utmost importance to surmount the culture of fear. When the people stand together, they stand strong and by so doing, they can effectively strike a blow for democracy that will write their names on the sands of time.

13. A significant ingredient in the recipe of constitutional coups is ethnicity and religion. Presidents Biya and Ismail Omar Guelleh of Djibouti are major beneficiaries here. Thus, if we must move forward in the fight against constitutional coups, then we must forget our ethnic and religious differences and embrace the intrinsic values of democracy, where a culture of tolerance promotes a competent state, a committed minority, courage, and adherence to term limits among other things.

5.2 Conclusion

The strength and greatness of a Country is not in its military or economic might as important as these may be. The strength and greatness of a Country truly lies in its ability to adhere to the rule of law. The Constitution, being the grundnorm and foundation of other laws in a Country, must be totally respected and upheld by all persons and authorities.

Term limits for presidents in sub-saharan African Constitutions is one constitutional safeguard to prevent personalisation of the state by the executive arm of government. The recent growing trend of staging constitutional coups in order for presidents to prolong their stay in power has very damaging impacts on democracy in sub-saharan Africa.

The sooner citizens, Non Governmental Organizations, regional, international and indeed all lovers of democracy in sub-saharan Africa take a stand against constitutional coups, the better the prospects of democratic consolidation in sub-saharan Africa will be.

No doubt, the journey to democratic consolidation may be long and labourious but it is possible if we all join hands together, forget our cultural, social, political, tribal and religious differences, muster the necessary political will and courage and strike a deathly blow to the antithesis of democracy-the constitutional coup.

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