

Prospects and challenges of enforcing presidential term  
limits in Africa through regional instruments

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## DECLARATION

I, Saoyo Tabitha Griffith, Student No. 12376605, do hereby declare that I understand what plagiarism entails and I am aware of the University's policy in this regard. I further declare that this research is my original work and that, to the best of my knowledge and belief, it has not been previously submitted, in its entirety or in part, to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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## ACKNOWLEDGMENT

In many ways, the work of an academic critic seems easy. They risk very little, yet enjoy a position of dominance over those who offer up their work and themselves to a critic's judgment. Generally, we like to think that a critic thrives on condemnation, by the stroke of their red pen a word is changed, a paragraph is deleted and a chapter is disapproved. But the truth that we scholars must face is that, there are times when a supervisor becomes more than a critic, he offers himself as a meaningful guide and a mentor particularly when the world seems unkind to our new ideas and creations. To say that my supervisor, Prof Kofi Quashigah has challenged all pre-concepts that I may have had of academic critics is a gross understatement. My sincere gratitude for taking your time out of your ever-so busy schedule as the Dean of the Faculty, to review my work, always on time, for steering me in the right direction and even suggesting alternative areas that I could explore.

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## DEDICATION

To all African leaders who yield power peacefully, I have great respect for you.

‘I leave to others the sublime delights of riding in the storm,  
better pleased with sound sleep and a warm berth below it encircled,  
with the society of neighbours, friends and fellow labourers of the earth rather than with  
spies and sycophants... I have no ambition to govern men. It is a painful and thankless  
office.’ *Letter by Thomas Jefferson to President John Adams on 28 Dec 1796.*

## LIST OF ABBREVIATIONS

AU	African Union
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
CDP	Congress for Democracy and Progress
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EU	European Union
FARC	Revolutionary Armed Forces of Colombia
M23	Mouvement du Juin 23
NDP	National Democratic Party
NRM	National Resistance Movement
OAS	Organization of the American States
OAU	Organization for African Unity
OSIWA	Open Society Initiative for West Africa
PAP	Pan-African Parliament
PSM	Patriotic Salvation Movement
RADDHO	Rencontre Africain pour la Defense des Droits de l'Homme
SADC	Southern Africa Development Community
SWAPO	South-West African Peoples' Organization
UN	United Nations
USA	United States of America

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

The cost of enforcing presidential term limits shall be much lower than the cost of a military intervention to remove a dictator from power.<sup>1</sup>

One of the significant changes that African countries experienced during the beginning of the 1990's was the so-called 'third wave of democratization.'<sup>2</sup> With this phenomenon came the closely linked constitutional revolution that saw the attempt to end perpetual rulership through the introduction of presidential term limits. In spite of their introduction, many African leaders continuously resist the call to retire peacefully and many have extended beyond their constitutionally allowed tenure in office.<sup>3</sup> Statistics indicate that, out of 204 African presidents who held power between 1960 and 2004, only 25 leaders retired voluntarily, while more than half were overthrown including Kwame Nkrumah, Idi Amin and Mobutu Sese Seko.<sup>4</sup> By 2008, 33 out of 48 Sub-Saharan countries had embraced presidential term limits as a means of encouraging a political culture of democracy and political competition.<sup>5</sup> Nations that have so far embraced term limits include those with a presidential system of governance such as Kenya, Tanzania and Zambia as well as those with a parliamentary system such as Ethiopia, Botswana and South Africa. It is noteworthy though that a handful of countries including Cape

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<sup>1</sup> C Omara 'Universal two-term limits will check petty tyrants' (2011) <http://www.monitor.co.ug> (accessed on 5 May 2012).

<sup>2</sup> Huntington defines 'a wave of democratization' as a group of transitions from non-democratic to democratic regimes that occur within a specified period. Three waves have occurred in modern day history. The first two occurred in North America and Western Europe each affecting a relatively small number of countries. The 'third wave of democratization' which occurred between 1974 and 1990 began in Southern Europe then in Latin America and Africa; SP Huntington *The third wave: Democratization in the late twentieth century*, (1992) 15.

<sup>3</sup> D Vencovsky 'Presidential term limits in Africa' (2007) in V Gounden *Conflict Trends* 15 in [http://www.accord.org.za/downloads/ct/ct\\_2007\\_2.pdf](http://www.accord.org.za/downloads/ct/ct_2007_2.pdf) (accessed 5 June 2012).

<sup>4</sup> C Fombad & N Inegbedion 'Presidential term limits and their impact on constitutionalism in Africa' in C Fombad & C Murray *Fostering constitutionalism in Africa* (2010) 6.

<sup>5</sup> D Shinn 'Presidential term limits for African Countries' <http://www.blogs.america.gov/bythepeople/2009/06/29/presidential-term-limits-for-african-countries/> (accessed 11 June 2012).

Verde, The Gambia, Sudan and Zimbabwe still resist enshrining presidential term limits.<sup>6</sup>

Scholars argue that presidential term limits foster accountability, transparency, constitutionalism and the rule of law.<sup>7</sup> Term limits facilitate a culture of political competition, encourage new ideas and ensure that a leader does not remain in power too long and therefore lose touch with his/her electorate.<sup>8</sup> Opponents of term limits however argue that, they are undemocratic and do not strengthen the democratic process.<sup>9</sup> According to them, term limits go against the wishes of the electorate to choose whoever they want as president. Opponents further argue that term limits are arbitrary as they prevent the best person for the job from serving. Moreover, it is argued that constant change in leaders can stall development when presidents are unable to complete projects before the end of their term in office.<sup>10</sup> With regard to African presidents, opponents believe that where the incumbent is the only leader capable of truly maintaining peace and stability in a fragile nation that has just emerged from civil strife, or a nation torn by ethnic clashes, then the incumbent ought to continue ruling devoid of limitation on their tenure. This justification has been used in the past to extend Presidents Sam Nujoma's and Yoweri Museveni's tenures.<sup>11</sup>

While term limits are deemed to be domestic matters regulated by national constitutions, it has generally been argued that there can be no absolute guarantee that the presence of a constitutional provision will ensure that a leader makes no attempt to prolong his stay in power.<sup>12</sup> Recent political developments in the continent have confirmed these arguments as was the case in Senegal in January 2012. Conventional wisdom dictates that it is not the role of regional bodies such as the African Union (AU)

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<sup>6</sup> Zimbabwe's new draft Constitution of 2012 has a clause on term limits but is yet to be adopted by the country.

<sup>7</sup> G Maltz 'The case of presidential term limits' (2007) *Journal of Democracy* 128-142  
<http://www.fsi.stanford.edu/people/gideonmaltz/> (accessed 5 May 2012).

<sup>8</sup> Fombad (n 4 above) 17.

<sup>9</sup> JA Okuku 'Beyond 'Third-term' politics; Constitutional amendments and Museveni's quest for life presidency in Uganda' (2005) 19 *Institute for Global Dialogue Occasional Paper* no. 48.

<sup>10</sup> As above.

<sup>11</sup> Fombad (n 4 above) 16.

<sup>12</sup> Fombad (n 4 above) 21.

or the Economic Community of West African States (ECOWAS) to dictate what nations should enshrine and protect in their constitutions. Notably though, these two bodies are inspired in their instruments by objectives such as good governance, popular participation and the rule of law and both have a clear zero tolerance for power obtained or maintained by unconstitutional means. An interpretation of this objective would mean that both bodies subsequently discourage governance which does not promote, nurture and strengthen the rule of law. This should therefore be interpreted to include prolonged tenures that do not foster citizen participation, transparency, accountability as well as amendments that seek to extend presidential tenure.

### **1.2 Statement of problem**

Despite enactment of presidential term limits by most African nations, enforcement has remained a thorny issue. Presidents such as Wade of Senegal, Obasanjo of Nigeria and Muluzi of Malawi have all unsuccessfully attempted to prolong their tenure. Others, such as Omar Bongo of Gabon, who ascended into power in 1967 and died while still in the presidential seat, have out rightly revoked term limits and declared themselves presidents for life. This study argues that presidential term limits are today recognized by scholars as fundamental and key components of a democratic polity. It is argued that term limits are crucial in fostering good governance, popular participation and accountability, values that the AU espouses under Article 3(g) of its Constitutive Act of 2001. This study further argues that the problem of enforcing presidential term limits has not been effectively redressed and can no longer be left in the hands of national mechanisms, in particular, weak judiciaries and manipulated parliaments. It is on this basis that the need to interrogate the role of regional bodies arises. This is done with a view of establishing the extent to which regional institutions can provide a durable solution to this problem which is prevalent in Africa.

### 1.3 Research question

The key research question is: To what extent can regional bodies instruct, guide and play a meaningful role in encouraging adherence to presidential term limits in Africa?

### 1.4 Study objectives

- (1) To conduct an in-depth study on the nature, scope and rationale for presidential term limits in African countries;
- (2) To review the general practice in nations that have enshrined term limits and whether there is a culture of adherence; and
- (3) To explore the potential of expanding the provisions of the ECOWAS Protocol on Democracy and Good Governance and the African Charter on Democracy, Elections and Good Governance to include the enforcement of presidential term limits.

### 1.5 Literature review

The rationale for term limits and the existing debates in favour of and against them has been widely addressed by various scholars including Cohen and Spitzer.<sup>13</sup> The focus of most scholars including Vencovsky,<sup>14</sup> Maltz<sup>15</sup> and Fombad<sup>16</sup> has however remained to a large extent a general and broad overview of presidential term limits, the practice in the world and the implications of Africa's current record regarding presidential term limits. With the exception of Maltz and Fombad, the question of how best to enforce term limits in Africa is in most instances not addressed.<sup>17</sup>

Vencovsky commences by giving consideration to the importance of term limits.<sup>18</sup> He argues that 'timely and responsible departure from power is a vital feature of a democratic polity and an integral component of responsible leadership.' He furthers

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<sup>13</sup> L Cohen and M Spitzer 'Term limits' (1992) in *Georgetown Law Journal* 478.

<sup>14</sup> Vencovsky (n 3 above).

<sup>15</sup> Maltz (n 7 above).

<sup>16</sup> Fombad (n 4 above).

<sup>17</sup> Maltz argues that if the culture of non-compliance is allowed to flourish, there is a danger that it will remove presidential term limits from the array of institutionalized practices that foster free and accountable governance.

<sup>18</sup> Vencovsky (n 3 above).

his arguments by suggesting that term limits prevent arbitrary and violent rule that is often associated with lifelong presidencies; power transitions orchestrated by the gun are as a result lessened. These arguments have similarly been embraced by Fombad. As regards enforcement of term limits, Maltz argues that the international donor community has so far done little to enforce compliance.<sup>19</sup> He suggests several tactics that could be used by the donor community to promote compliance. First, he proposes that the international community must deepen the norm of term limits. They must criticize any process that leans towards alteration of a nation's constitution in an attempt to fit a president's demands. They must no longer leave it to civil society and opposition parties to struggle alone against such regimes. The donor community must therefore, with utmost clarity, make it known that they support term limits as an element that fosters democratization. Secondly, Maltz suggests that the donor community consider using aid conditionality as a means of enforcing term limits.<sup>20</sup> Nevertheless, he is quick to add that this strategy might not be a guaranteed success but might stand a better chance at promoting term limits in Africa where donor aid is most needed.

Fombad alternatively suggests three ways to strengthen term limits.<sup>21</sup> First, he argues that the existence of a vibrant and enlightened civil society is of utmost importance. This view is similarly shared by Vencovsky who argues that an invigorating and vocal civil society was in the past able to keep the public alert to resist attempts by incumbents in Nigeria, Zambia and Malawi.<sup>22</sup> Second, Fombad argues, a view shared by Maltz, that nations must entice leaders with niceties such as the creation of immunities and privileges to act as incentives for incumbents to relinquish power. Fombad however acknowledges the possibility that this mechanism might not always be effective as has been the case in Zimbabwe where generous retirement packages and a handsome pension has failed to persuade President Mugabe to retire. Finally, he suggests that term limits must be entrenched in constitutions as to make them extremely difficult to amend. Vencovsky furthers the debate and proposes that, an active and united opposition

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<sup>19</sup> Maltz (n 7 above) 138.

<sup>20</sup> Maltz (n 7 above) 139.

<sup>21</sup> Fombad (n 4 above) 22.

<sup>22</sup> Vencovsky (n 3 above) 19.

together with increasingly independent media houses could also work towards enforcing presidential term limits. These authors however fail to address the idea of Africa utilizing regional institutions, particularly the African Commission on Human and Peoples' Rights (the African Commission), the AU and ECOWAS to enforce term limits. These three bodies are pegged upon principles and objectives that encourage the rule of law and democracy. The use of African sub-regional bodies such as ECOWAS and SADC in addressing national dilemmas has been addressed by Mchomvu who however restricts his research to the possibility of using these bodies in redressing electoral disputes in African nations.<sup>23</sup>

This dissertation will therefore further the research already conducted by various scholars. It will argue that besides the already suggested ways of enforcing compliance to presidential term limits, there is the feasibility of developing a regional culture of enforcing compliance against geriatric and dictatorial regimes that wish to remain in power beyond their recognised tenure. This regional culture would entail the use of the already existing bodies and in particular the African Commission, AU and ECOWAS.

## **1.6 Research methodology**

The writer will principally conduct research by use of secondary data acquired from textbooks, journal articles and reference to three main legal instruments namely: the African Charter on Human and Peoples' Rights (the African Charter), the African Charter on Democracy, Elections and Governance and the ECOWAS Protocol on Democracy and Good Governance. This research also makes reference to various constitutions of African states. Desktop research is furthermore carried out in order to have an insight into the recent events within the area of study. Recourse has also been made to media reports and newspaper articles. To add value to the research, interviews with persons relevant to this field of study who are resident in Ghana have also been conducted. Finally, a limited comparative study is conducted in order to examine how

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<sup>23</sup> FJ Mchomvu 'Prevalence of conflicts over the legitimacy of election results in Africa: can the regional economic communities (RECs) provide a panacea? A case study of ECOWAS and SADC' unpublished LLM Thesis, University of Pretoria, 2011.

other nations, particularly in Europe and the Americas endeavour to keep their leaders in check and what lessons Africa can draw from them.

### **1.7 Scope and limitations of study**

Whereas the question of enforcement of presidential term limits is a great challenge evident not only in Africa, but also in Latin America and Eastern Europe,<sup>24</sup> this research work is restricted to the enforcement of term limits in Africa. African nations that have not enshrined presidential term limits within their constitutions are not given primary focus but have been made reference to time and again as part of the illustrative examples. Similarly, African nations with a parliamentary system of governance, particularly Botswana, Ethiopia, Mauritius and South Africa have not been given primary consideration in the discussions.

### **1.8 Overview of chapters**

Chapter one of this research work is the introduction to the dissertation proposal. It covers the research background, statement of problem, the study objectives, research questions and literature review. Chapter two comprises of the historical background of presidential term limits in the Americas, Europe, and Africa. It furthermore discusses the rationale and justification for presidential term limits in Africa, the arguments advanced against term limits and a chapter conclusion. Chapter three is a review of recent practices in African nations in enforcing term limits. These practices range from voluntary adherence to term limits, abortive attempts at extending term limits and successful overriding of term limits. This chapter furthermore discusses the creative means utilized by incumbents to stay in power and conducts a case study of the use of the judiciary and legislature in Burkina Faso, Senegal, Namibia, Chad and Cameroon. This chapter therefore highlights the weaknesses of the two branches of government and discusses in detail why enforcement of term limits can no longer be left in their hands.

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<sup>24</sup> Countries such as Honduras, Venezuela and Ecuador have all had presidential term limits abolished by their respective presidents.

Chapter four considers the ideas already discussed by various scholars on how to ensure compliance with term limits and why most mechanisms are likely to fail in African nations. The chapter additionally debates the prospects and challenges of enforcing term limits through institutions such as the African Commission, ECOWAS and the AU and concludes with a comparative case study of Colombia and lessons that African nations can draw. Finally, chapter five covers a general summary of the research work, the conclusions drawn from each chapter, the recommendations and the way forward for Africa.



## CHAPTER TWO

### HISTORICAL BACKGROUND ON PRESIDENTIAL TERM LIMITS

#### 2.1 Historical background on presidential term limits in the world

##### 2.1.1 The Americas

The concept of term limits dates back to two of the earliest civilizations with elected office, namely Rome and Greece.<sup>25</sup> As opposed to hereditary monarchies, ancient Greek cities of Athens and Sparta both had a concept that involved rotation in office of its elected members. This therefore imposed a restraint on the tenure of any citizen to the Council of 500.<sup>26</sup> Similarly, the Romans passed laws which outlawed re-election to the office of the *ensor*, the *tribune of plebs*, the *aedile*, the *praetor* and the *consul* upon the exhaustion of certain durations of time in leadership.<sup>27</sup>

The history of term limits in modern nations however, indicates that the practice was adopted earlier in the Americas as compared to Europe and Africa. Indeed, in the era of modern democracy, scholars have traced the concept to have first evolved in Latin America.<sup>28</sup> This was in a bid to put an end to dictators who overstayed their tenure only to be ousted through coups d'état. Dictators such as Porfirio Diaz of Mexico, who was ousted in the 1910 revolution, were described as driven by political survival rather than service to their citizenry.<sup>29</sup> These autocrats were characterized as strong men who curtailed human rights and brutally crushed all dissent. By 1917, Mexican leader, Francisco Madero, popularized the slogan *sufragio efectivo, no reeleccion* which translated

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<sup>25</sup> 'Term Limits' in [http://www.en.wikipedia.org/wiki/Term\\_limit](http://www.en.wikipedia.org/wiki/Term_limit) (accessed 17 August 2012).

<sup>26</sup> 'History of term limits in the United States' in <http://www.actnowus.org/history%20of%20term%20limits.html> (accessed 17 August 2012).

<sup>27</sup> The Consul, Tribunes, Praetor, Censor and Aediles are titles of elected officials of the Roman Republic. The Consul was the highest executive office and the most prestigious in the Republic. It was equivalent to an elected prime minister and an individual could only serve for a year. This restriction was intended to inhibit the executive from amassing too much power. The Praetors acted as judges while the Censors had the financial duties and were deemed tax collectors in <http://www.roman-empire.net/republic/rep-offices.html> (accessed 18 August 2012).

<sup>28</sup> Maltz (n 7 above) 128.

<sup>29</sup> N Katers 'History of Mexican presidents' [http://www.ehow.com/about\\_5072830\\_history-mexican-presidents.html](http://www.ehow.com/about_5072830_history-mexican-presidents.html) (accessed 9 September 2012).

to 'elective suffrage, no re-election'.<sup>30</sup> This subsequently led Mexico to impose term limits on its members of congress under the 1917 Mexican Constitution.<sup>31</sup>

Term limits, as later seen in the United States of America (USA) are traced to amendment XXII passed by congress in 1947, and ratified by American states in 1951.<sup>32</sup> This amendment was introduced after the then president, Franklin Roosevelt, went contrary to the unspoken rule of voluntarily stepping down after the second term.<sup>33</sup> Roosevelt, whose tenure was the longest in American history, ruled for four consecutive terms. Prior to this, several factors had led the Americans into believing that the risk of having a perpetual ruler in office was minimal. To begin with, there was the prevailing precedent that had been informally established by the first president, George Washington, who refused to run for a third term and subsequently handed over to President John Adams.<sup>34</sup> This precedent was carried on by other presidents such as Thomas Jefferson, James Madison and Rutherford Hayes.<sup>35</sup> Coupled with this was the fact that, serving in congress in the earlier days was not accompanied by the perks and generous entitlements that today's congressman enjoys.<sup>36</sup> Notably though, many of the leading congressmen, including Thomas Jefferson, Roger Sherman and Richard Henry Lee had, at different times, previously opined that the absence of term limits was 'highly and dangerously oligarchic.'<sup>37</sup>

Besides Mexico and the USA, term limits are now common practice in the Americas. Today, El Salvador, Brazil, Panama, Guyana, just to mention a few, have all

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<sup>30</sup> Term Limits (n 25 above).

<sup>31</sup> Term Limits (n 25 above).

<sup>32</sup> Amendment XXII states that, '*no person shall be elected to the office of President more than twice...*'

<sup>33</sup> Fombad (n 4 above) 19.

<sup>34</sup> 'Term limits in the United States' [http://www.en.wikipedia.org/wiki/Term\\_limits\\_in\\_the\\_United\\_States](http://www.en.wikipedia.org/wiki/Term_limits_in_the_United_States) (accessed 9 September 2012).

<sup>35</sup> George Washington was the Republic's founding father while Jefferson, Madison and Hayes were the 3<sup>rd</sup>, 4<sup>th</sup> and 19<sup>th</sup> presidents. Roosevelt was the 32<sup>nd</sup> President.

<sup>36</sup> Term limits (n 25 above).

<sup>37</sup> Term limits (n 25 above). As early as 1776, Thomas Jefferson, expressing the need for term limits, had stated at the Continental Congress that term limits were necessary 'to prevent every danger which might arise to American freedom by continuing too long in office as members of Congress.'

adopted term limits and the 'caudillo'<sup>38</sup> culture so far seems to be stamped out. This is however not without exception. A few presidents have in the past attempted to either extend their tenure or completely lifted term limits.<sup>39</sup> Presidents Manuel Zelaya of Honduras and Colombia's Alvaro Uribe, for instance, both unsuccessfully attempted to run for a third term. During his eight years in power, Uribe maintained a stellar record and actively pushed policies against terrorism and drug cartels.<sup>40</sup> He argued that he needed continuity and tenure extension to crackdown on the Marxist guerrilla group; Revolutionary Armed Forces of Colombia (FARC). Uribe's efforts were however thwarted by the Constitutional Court of Colombia in 2010,<sup>41</sup> while Zelaya was exiled in the Dominican Republic.<sup>42</sup> Presidents in Venezuela, Bolivia and Ecuador have however, managed to lift term limits from their respective constitutions, arguing that they impede real change.<sup>43</sup> All three leaders remain popular amongst their electorate based on their wealth re-distribution policies that have seen more focus on sectors such as education, health and food subsidies.<sup>44</sup>

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<sup>38</sup> 'Caudillo' is a Spanish word for a strong national or local leader who wields great influence. The term is associated with military or dictatorial leaders in many areas of Latin America and is characterized by power loving, corrupt leaders who owe obedience to no one and whose powers are absolute. Re-known caudillos include Juan Manuel Rosas of Argentina and Antonio Lopez de Santa Anna of Mexico.

<http://www.mason.gmu.edu/~rberroa/Latinamerica.htm> (accessed 9 September 2012).

<sup>39</sup> S Wilson 'Term limits and constitutional tinkering in Latin America' 2009 in

[http://www.voices.washingtonpost.com/44/2009/06/29/term\\_limits\\_and\\_constitutional.html](http://www.voices.washingtonpost.com/44/2009/06/29/term_limits_and_constitutional.html)

(accessed 17 August 2012).

<sup>40</sup> 'Term limits strengthen Colombia's democracy' <http://www.fairvote.org/term-limits-strengthen-colombia-s-democracy#.UE3e48oqFtM> (accessed 5 September 2012).

<sup>41</sup> X Marinero 'Colombia Constitutional Court strikes down Uribe 3<sup>rd</sup> term referendum law' 2010 in

<http://www.jurist.law.pitt.edu/paperchase/2010/02/colombia-constitutional-court-strikes.php> (accessed 17 August 2012).

<sup>42</sup> Zelaya however returned home in 2011; 'Ex-Honduran president Zelaya returns from exile'

<http://www.reuters.com/article/2011/05/28/us-honduras-zelayaidUSTRE74R28120110528> (accessed 18 August 2012).

<sup>43</sup> Wilson (n 39 above).

<sup>44</sup> 'Latin American leaders look to repeal term limits' *The Washington Times* 17 November 2009 available at

<http://www.washingtontimes.com/news/2009/nov/17/latin-american-leaders-look-to-repeal-term-limits/?page=all> (accessed 9 September 2012).

### 2.1.2 Europe

Europe has always played a predominant role in global affairs and particularly in aspects of democratization.<sup>45</sup> The history of term limits in the continent however, differs from country to country. Western Europe's trend so far leans towards the strict enforcement of term limits. Nations such as Germany, Portugal, and Greece all have two five-year term limits thus encouraging presidential rotation.<sup>46</sup> Similarly, pursuant to the 2008 amendment of the Constitutional Law on the Modernization of the Institutions of the Fifth Republic,<sup>47</sup> France reviewed her Constitution to prohibit the president from serving more than two consecutive terms.<sup>48</sup> Most of Western Europe has so far had a culture of rotation in office even when constitutions have not expressly pronounced on it. In support of this, Fombad illustrates by giving the example of the United Kingdom (UK) and how former British Prime Minister, Margaret Thatcher, resigned upon indication that she had overstayed in power and had started losing touch with the supporters. This was despite the fact that the UK does not have term limits for its Prime Ministers.<sup>49</sup>

Nevertheless, this cannot be said of Eastern Europe where a number of the countries seem to have relaxed provisions on term limits in their constitutions including Belarus, Kazakhstan,<sup>50</sup> as well as Azerbaijan which in 2009 lifted presidential term limits from the its constitution.<sup>51</sup> Similarly, the current Russian Constitution merely bars

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<sup>45</sup> As argued by Huntington, the first wave of democratization, which occurred between 1828-1926, brought democracy to Northern America and Western Europe where nations such as Switzerland, France, Great Britain made the transition into democracies. Huntington (n 2 above) 17.

<sup>46</sup> 'List of political term limits' in [http://www.en.wikipedia.org/wiki/List\\_of\\_political\\_term\\_limits](http://www.en.wikipedia.org/wiki/List_of_political_term_limits) (accessed 18 August 2012).

<sup>47</sup> 'President of France' in [http://www.en.wikipedia.org/wiki/President\\_of\\_France](http://www.en.wikipedia.org/wiki/President_of_France) (accessed 17 August 2012).

<sup>48</sup> Between 1962 - 2000, the French president served for a fixed term of seven years. Presently, this term has been revised downwards to five years. TM Magstadt *Understanding politics: Ideas, Institutions and issues* (2011) 181.

<sup>49</sup> Similar to Margaret Thatcher, former Prime Minister Tony Blair was also forced to hand in his resignation to the Queen in June 2007 when the Labour Party increasingly perceived that he had stayed too long in power, i.e. a decade; see also N Assinder 'Why is Tony Blair stepping down?' *BBC News* 27 June 2007 in [http://www.news.bbc.co.uk/2/hi/uk\\_news/politics/6238194.stm](http://www.news.bbc.co.uk/2/hi/uk_news/politics/6238194.stm) (accessed 17 August 2012).

<sup>50</sup> T Ginsburg et al 'On the evasion of executive term limits' (2009) <http://www.law.uchicago.edu/audio/ginsburg101709> (accessed 17 August 2012).

presidents from serving for more than two *consecutive* terms.<sup>52</sup> This means that nothing in the Constitution prevents an incumbent from running again for another term once he/she has had a break period in between two terms. Russia's current president, Vladimir Putin, who began his third term in May 2012, used this loophole to his advantage when he stepped aside in 2008 to take up the role of Prime Minister, only to come back and vie for presidency in 2012.<sup>53</sup> Notably though, he has in the recent past called for an amendment to this provision, suggesting that parliament should delete the word 'consecutive' and simply restrict presidency to two terms. Putin has however been keen to add that his call would not apply to his tenure.<sup>54</sup>

### 2.1.3 Africa

Historically, prior to colonization, African societies had a known system of succession. Most chiefs or kings had a system in which a successor was chosen.<sup>55</sup> The Borana of Southern Ethiopia for instance, used to run an almost perfect form of governance believed to have evolved in the 1600's.<sup>56</sup> Every eight years, an 'Aba-Gada' was elected by an assembly of all Borana people. Throughout his tenure, the Aba-Gada would administer the tribe travelling around Borana territory, based on a set routine, spending a month at each stop.<sup>57</sup>

Post-independence, Africa's familiarization with the concept of term limits is mostly associated with the 'third wave of democratization.' This wave is described as having begun in European nations such as Portugal, Greece and Spain<sup>58</sup> then

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<sup>51</sup> M Robinson & M Antidze 'Referendum lifts two-term presidential limit' in <http://www.uk.reuters.com/article/2009/03/18/azerbaijan-referendum-idUKL158471320090318> (accessed 18 August 2012).

<sup>52</sup> 'Russia's Putin calls for two term limit on presidency-later' *Los Angeles Times* 11 April 2012.

<sup>53</sup> 'Putin supports term limits for future Russian presidents' in <http://www.voices.yahoo.com/vladimir-putin-supports-term-limits-future-russian-11221960.html> (accessed 18 August 2012).

<sup>54</sup> *Los Angeles Times* (n 52 above).

<sup>55</sup> JS Warioba 'political succession in East Africa' in CM Peter & F Kopsieker *Political succession in East Africa. In search for a limited leadership* (2006) 1.

<sup>56</sup> Ethiopian Tourist Trading Enterprise '*Discovering Ethiopia*' (1997) 24.

<sup>57</sup> As above.

<sup>58</sup> Huntington (n 2 above) 21.

subsequently moved to Latin America's Ecuador, Peru and Bolivia.<sup>59</sup> The wave is deemed to have gained momentum in Africa in the mid 80's and early 90's. It is through this wave that Africa began witnessing the collapse of authoritarian regimes and a transition towards more democratically elected governments.<sup>60</sup> Electoral politics, enactment of new constitutions, multi-partyism and constitutional changes in government became quite common.<sup>61</sup> Previously drafted constitutions that had been handed to African nations at the end of western colonial rule did not however place any limits on how long a president's tenure was to be.<sup>62</sup> Between the mid 60's and early 80's, African politics was characterized by totalitarian regimes and single party states where constitutions were often viewed as merely documents; words on paper.<sup>63</sup> They simply became tools that aided incumbents to consolidate personal power and the other two arms of government remained suppressed.<sup>64</sup> As explained by Nwabueze, due to insufficient constitutional, political and social restraint upon presidential power,<sup>65</sup> it therefore became common practice for dictatorial leaders to simply stand for re-election at the end of their tenures. The third wave of democratization thus, saw some form of liberalization in Africa's politics, albeit small. Short lived civilian rule was witnessed in Nigeria while loosening of autocratic rule began to occur in several nations.<sup>66</sup> By the 1990's, military leaders begun handing over power to elected civilian leaders,<sup>67</sup> the South African government began expanding political participation to the black majority,<sup>68</sup>

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<sup>59</sup> Huntington (n 2 above) 21.

<sup>60</sup> CM Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' presented in a seminar at the South African Institute for Advanced Constitutional Public Human Rights and International Law (SAIFAC) Johannesburg 21 July 2005.

<sup>61</sup> 'Africa democracy-explanations of Africa's democratization' in <http://www.science.jrank.org/pages/8962/Democracy-Africa-Explanations-Africa-s-Democratization.html> (accessed 18 August 2012).

<sup>62</sup> Fombad (n 4 above) 1.

<sup>63</sup> Okuku (n 9 above) 12.

<sup>64</sup> Okuku (n 9 above) 12.

<sup>65</sup> BO Nwabueze *Presidentialism in Commonwealth Africa* (1974) 1 in Fombad (n 4 above) 1.

<sup>66</sup> Huntington (n 2 above) 25.

<sup>67</sup> These include JJ Rawlings who seized power in Ghana in 1981 through a coup d'état. He ruled the nation using the Provisional National Defence Council until 1992 when he was compelled to hand power over. He subsequently won the elections under the 1992 Constitution and retired in 2000 after his second term.

<sup>68</sup> Huntington (n 2 above) 25.

eventually leading to the nation's first ever multi-racial elections in 1994. Likewise, Kenya amended its Constitution and repealed Section 2(a) thus allowing for multi-party politics.

The trajectory of the third wave in Africa is however described as complex and uneven.<sup>69</sup> Today, authoritarian grip still persists in many of the 'new democracies' and the same leaders, whom Fombad refers to as the so called 'born-again' democrats, still remain in power. 'It is evident that leaders such as Paul Biya of Cameroon, Yoweri Museveni of Uganda and Robert Mugabe of Zimbabwe reluctantly adopted some of the symbolisms of democracy but their commitment to democracy and constitutionalism remain in doubt as they continue to rule more than twenty years since the wave hit Africa.'<sup>70</sup> A worrisome trend has thus evolved.<sup>71</sup> Africa seems to be reversing the gains made in the early 90's. Leaders seem to be rolling back the constitutional provisions that impose term limits.<sup>72</sup> To illustrate this, the late Gnassingbe Eyadama of Togo abolished term limits in 2002, followed closely by presidents Omar Bongo of Gabon in 2003 and Yoweri Museveni of Uganda in 2005 amongst many others who recently abolished term limits from their constitutions hence allowing them to run for office for unlimited number of terms.<sup>73</sup> The current practice in African nations shall however be discussed in detail in chapter 3 of this research paper.

## 2.2 Rationale for presidential term limits

A significant amount of literature exists as regards term limits in the American legislature and the merits of rotation in office.<sup>74</sup> In contrast, there are questions as to whether term limits make a strong case that warrants enforcement in developing

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<sup>69</sup> Explanations of Africa's democratization (n 61 above).

<sup>70</sup> Fombad (n 4 above) 15.

<sup>71</sup> Maltz (n 7 above) 128.

<sup>72</sup> Maltz (n 7 above) 128.

<sup>73</sup> 'No one has monopoly of good ideas in Africa' *The Citizen* 18 June 2012 in

<http://www.thecitizen.co.tz/editorial-analysis/20-analysis-opinions/23278-no-one-has-monopoly-of-good-ideas-in-africa.html> (accessed 18 August 2012).

<sup>74</sup> B Armstrong 'Ne touché pas ma constitution: Pressures and presidential term limits' Unpublished Honors Thesis North Western University (2001) 13.



nations, particularly in Africa, or whether the unique circumstances of the continent merit the extension of tenure. Under this sub-heading, we will first explore the rationale for term limits and what proponents of term limits argue. Thereafter, sub-chapter 2.3 will discuss in detail the opponents' views on term limits.

To start with, the conventional rationale for presidential term limits, as discussed by various scholars, is that they promote rotation in office which is central to democratic theory.<sup>75</sup> Term limits are argued to be a definitional element of what democracy ought to constitute. They foster constitutionalism, accountability and sustainability of constitutional governance.<sup>76</sup> Vencovsky argues that:

[T]imely and responsible departure from power is a key feature of a democratic polity. It constitutes a vital component of what truly responsible leadership should entail.<sup>77</sup>

Therefore, no leader, no matter how competent and effective they may be should be considered indispensable.<sup>78</sup> With the exception of a few countries such as Botswana, Ethiopia and South Africa, a great number of African nations follow the presidential system of government. As elaborated by Okuku,<sup>79</sup> while parliamentarism entails grant of immense powers to parliament, such that they inhibit the executive from flouting the constitution, presidentialism however entails the production of strong presidents, voted in power directly by the people and who are less accountable to the legislature. It is through this system that most African presidents have hence acquired the unimaginable powers that they now have. The presidential system is formulated in such a way that impeaching a president is a much more tedious and prolonged process as opposed to the vote of no confidence which could easily be passed in parliamentary systems.<sup>80</sup> Due to the accumulation of powers and the lack of a strong accountability system, most African presidents have subsequently developed a culture of impunity thus rarely

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<sup>75</sup> Fombad (n 4 above) 17; Maltz (n 7 above) and Vencovsky (n 3 above) 15.

<sup>76</sup> Fombad (n 4 above) 17.

<sup>77</sup> Vencovsky (n 3 above) 15.

<sup>78</sup> Fombad (n 4 above) 16.

<sup>79</sup> Okuku (n 9 above) 6.

<sup>80</sup> A Lijphart *Parliamentary versus presidential governments* (2000) 11.



yielding power willingly.<sup>81</sup> In light of this, it is therefore argued that term limits ensure that elected leaders do not get tempted to become presidents for life. Rotation in office is therefore vital in order to help break potential dictatorship cycles. Oloka-Onyango argues that, Africa in particular, is in dire need of term limits due to the continent's past history, a history that has shown the tendency of ambitious leaders to extend their tenure and at times even declare themselves 'president for life' to the detriment of their nations.<sup>82</sup> Such potential permanence in office is therefore evidence of the need for the limitation of tenure. Maltz furthers this debate by arguing that the dangers of an individual holding onto power for too long have traditionally justified term limits.<sup>83</sup> There is always the fear that when an incumbent holds onto power for too long, there is not only the risk of dangerously accumulating power, but an even greater risk of abusing it. Often, as a result of such massive power, there is a lower probability of the incumbent being held accountable and with time, a higher likelihood that such an incumbent will equally become arrogant and corrupt as he owes no explanation to the electorate.<sup>84</sup>

Second, term limits in Africa also avert civil strife, violence, attempted assassinations and coups d'état that are often associated with lifelong presidencies.<sup>85</sup> Absence of a clear mechanism through which orderly alternation of power is to be effected may often lead to frustration and aggravation.<sup>86</sup> Such irate electorates see no other way to oust the incumbent other than through coups d'état as happened to Idi Amin, Kwame Nkrumah and Mobutu Sese Seko's regimes. More recently, Ben Ali of Tunisia, Hosni Mubarak of Egypt and Muammar Gaddafi of Libya were all ousted from

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<sup>81</sup> Okuku (n 9 above) 9.

<sup>82</sup> See Uganda Constitutional Commission of 1993 (Odoki Commission) in Okuku (n 9 above) 11.

<sup>83</sup> Maltz (n 7 above) 130.

<sup>84</sup> Vencovsky also argues that prolonged tenure also creates an accountability deficit that allows for corruption to thrive (n 3 above) 16.

<sup>85</sup> Vencovsky (n 3 above) 16.

<sup>86</sup> Fombad (n 4 above) 17.

power having served 24, 30 and 42 years respectively.<sup>87</sup> Transition by the bullet rather than by the ballot dis-integrates democracy and peaceful processes of a nation.

Third, rotation in office creates meaningful opportunity for opposition victory. Although term limits may not always guarantee success for the opposition, three case studies have shown this as a viable consequence.<sup>88</sup> Maltz gives the examples of Kenya and Croatia in which the opposition parties only had a chance of winning upon the incumbent being forced by the constitutional requirements to step down.<sup>89</sup> Similarly, opposition candidate, John Kufour of the New Patriotic Party (NPP), was only able to win the elections in Ghana after President Rawlings stepped down following 19 years in power. Term limits therefore serve not only the interest of the voters but also prospective contenders especially in African countries where elections are in most instances not free or fair.<sup>90</sup> Whereas elections are often seen as a disciplinary tool for ousting non-performing parliamentarians, they can never be a successful tool in Africa where they are largely manipulated by incumbents, who directly appoint and interfere with electoral commissions, thus always enabling them to succeed themselves.<sup>91</sup> Consequently, an all powerful president who has a firm grip on all governmental institutions including the electoral body has better chances of staying in power if not limited by a constitutional provision. It can therefore be argued that term limits facilitate healthy political competition and enhance the prospects of a regime change. Political competition furthermore improves the prospects of a greater variety of contenders with new ideologies and fresh perspectives.

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<sup>87</sup> 'Africa's 7 longest serving presidents-who will be deposed next?' in <http://www.ugandapicks.com/2011/11/africas-7-longest-serving-presidents-who-will-be-deposed-next.html> (accessed 18 August 2012).

<sup>88</sup> Maltz (n 7 above) 131.

<sup>89</sup> Maltz (n 7 above) argues that 'the cases of Croatia in 2000 and Kenya in 2002 illustrate the role of presidential term limits in reducing incumbency advantages and promoting political-party alternation. In Kenya, Daniel Arap Moi had ruled since 1978, with his party, the Kenya African National Union (KANU). In the early 1990s, Moi agreed to term limits as part of the democratic reforms and due to domestic and international pressure, he bowed to them in 2002. Moi's designated successor, Uhuru Kenyatta, lost resoundingly to Mwai Kibaki, of the opposition.

<sup>90</sup> Armstrong (n 74 above) 16.

<sup>91</sup> Okuku (n 9 above) 9.

Closely linked to this is Tabarrok's 'shirking -deviation' theory,<sup>92</sup> in which he argues that excessive presidential powers lead to automatic control of vital public bodies and more likelihood of election manipulation. As a result of constant manipulation of public bodies, the electoral process becomes predictable and the voter turnout grows lower each electoral period. With such poor turnout, political participation by the citizenry fizzles out and the incumbent begins to shirk his responsibilities and deviate from the citizens' wishes.<sup>93</sup> With time, the absence of term limits results in the leader failing to deliver his campaign promises and also losing touch with his supporters.<sup>94</sup> Other arguments that have been advanced in favour of term limits in Africa include that term limits can contribute to the rotation of presidency amongst various tribes in a country rife with ethnic tension.<sup>95</sup> This prospect of change in government thus helps alleviate the feeling of political marginalization amongst the different tribes.

In conclusion, as well put in the report of the Uganda Constitutional Commission of 1993 (the Odoki Report), 'the danger in Africa is that personal ambition by some leaders might tempt them in the future to alter laws in their favour so as to continuously secure the polls.'<sup>96</sup> Presidential term limits therefore prevent the creation and furtherance of bloated and inefficient bureaucracies, prevent corruption and the privatization of public property, promotes accountability, reduces manipulation of government institutions and furthermore protects against the closure of political space in a country.<sup>97</sup>

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<sup>92</sup> A Tabarrok 'A survey, critique and new defense of term limits' (1994) *The CATO Journal* available at <http://www.cato.org/pubs/journal/cjv14n2-9.html> (accessed 18 August 2012).

<sup>93</sup> As above.

<sup>94</sup> Fombad (n 4 above) 15.

<sup>95</sup> Vencovsky (n 3 above) 16. He argues that in the case of Nigeria, term limits can contribute to the rotation of the presidency among the country's three main geo-ethnic-political zones, thus alleviating the danger of one of the groups feeling politically marginalized.

<sup>96</sup> Okuku (n 9 above) 11.

<sup>97</sup> Maltz (n 7 above) 135.

### 2.3 Arguments advanced against presidential term limits

Whenever a leader wants to extend his tenure in Africa, several reasons will often be cited by his loyalists and allies as to why the incumbent ought to stay in power. As illustrated by Okuku, below are four main justifications often utilized by opponents of term limits to argue why they ought to be abolished.<sup>98</sup>

First, the most common justification for removal of term limits is that they are undemocratic.<sup>99</sup> Opponents argue that term limits prevent voters from retaining an incumbent despite the wishes of the people, who exercise their wish through the electoral process. Accordingly, democracy dictates that the government must be informed by the choice of the public because democracy entails ‘a government of the people, for the people and by the people.’<sup>100</sup> Opponents furthermore argue that a difficulty with almost all arguments in favour of term limits is that they do not explain why the public continually re-elects the incumbent.<sup>101</sup> According to opponents, a majority of voters elect incumbents because the voters believe they are doing a good job. It is only natural for a voter to express his satisfaction by re-electing the incumbent back into office. They thus argue that, where an incumbent is re-voted back in office, then this is a perfectly legitimate reflection of the people’s will and should not be hindered by a clause limiting the terms that an incumbent can serve.

A second argument propounded by opponents is that, in nations that are rife with ethnic tension or have had a history of civil strife, the stepping down of an incumbent is often feared to lead to re-lapse into war. Campaigners in favour of amending the Ugandan Constitution argued that Museveni was an exceptional leader who had delivered Uganda from the hole that it had sunk to during Idi Amin’s regime.<sup>102</sup> It was argued that the need to maintain the peace and stability that Uganda had so far enjoyed over the years was more vital than a fresh set of ideas from a new

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<sup>98</sup> Okuku (n 9 above) 20.

<sup>99</sup> Armstrong (n 74 above) 15; E Elhauge ‘Term limits: voters aren’t schizophrenic’ *Wall Street Journal* 14 March 1995.

<sup>100</sup> A phrase made famous by former President of the USA, Abraham Lincoln, in his Gettysburg address of 1863.

<sup>101</sup> Tabarrok (n 92 above).

<sup>102</sup> Okuku (n 9 above) 20.

president. Similar rationale has been used in the recent past by Rwanda's Internal Security Minister, Sheikh Musa Fazil Harerimana, who has called on parliament to amend the Rwandan Constitution and allow President Kagame, who is praised for his role in ending the 1994 genocide and maintaining the nation's stability, to extend his tenure for a third term.<sup>103</sup>

An additional argument advanced by opponents is that besides depriving a nation of a unique leader, there are also times when a nation has no other alternative leader experienced enough to fit in the incumbent's boots. Such incumbents often exude an aura that they are indispensable and irreplaceable.<sup>104</sup> In this regard, Fombad gives the example of Nigeria's President Obasanjo who in his attempts to secure a third term argued that he alone could rescue Nigeria from the brink of disaster. Similarly, Namibia's Premier did not hesitate to tell Parliament that they needed to extend President Sam Nujoma's tenure because 'Namibia has no alternative to Nujoma.'<sup>105</sup>

Finally, opponents of term limits argue that constant replacement of leaders destabilizes the continuity of development projects.<sup>106</sup> They argue that when a leader commences implementing his long term projects, he is often cut short because his time is up and this subsequently affects the development of a nation and the completion of such projects, which may often not be the priority of an incumbent's successor. They therefore argue that term limits ought to be repealed if already enshrined in a constitution and where not enacted, the constitution ought not to be tampered with.

#### **2.4. Chapter conclusion**

All in all, it can be concluded that the arguments propounded by the opponents of term limits are weak, unsound and cannot hold any water. Scholars such as Armstrong, Fombad and Okuku argue that the questions presented by the opponents cannot stand

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<sup>103</sup> 'Rwanda's Kagame backs calls to change constitution , allow him 3<sup>rd</sup> term' in <http://www.globalpost.com/dispatch/news/regions/africa> (accessed 20 September 2012).

<sup>104</sup> Fombad (n 4 above) 15.

<sup>105</sup> Fombad (n 4 above) 16.

<sup>106</sup> Okuku (n 9 above) 21.

any critical examination. Okuku illustrates this by first countering the argument that term limits are undemocratic.<sup>107</sup> The assertion that term limits are undemocratic is flawed as it is based on a partial understanding of what term limits entail. Term limits are in fact not undemocratic but simply act as a form of deterrence against indefinite rule. They do not prohibit the right of the majority to choose their leader but rather the people's right to choose a specific leader is limited to a fixed term after which they may choose another president, thus expanding their choices to include a fresh set of new faces and new ideas.<sup>108</sup> Armstrong alternatively argues that 'political competition is not developed enough in Sub-Saharan Africa to support the type of perfect democratic choice that elections without term limits imply.'<sup>109</sup> Africa's accountability records are shaky and not strong enough to allow the electorate to vote out an undesirable leader. Therefore, although term limits restrict democratic choices, they still remain the best option for Africa's politics as they promote democratic competition.<sup>110</sup>

As regards the argument that where there is a history of civil strife and instability, an incumbent ought to be allowed to stay on, Fombad argues that similar sentiments have been expressed by almost all African leaders ever since independence. Notably though, no country has ever collapsed simply because a president willingly stepped down at the end of their tenure.<sup>111</sup> He therefore dismisses this argument as weak and flawed. He similarly disputes the opponents' third argument which contends that some presidents are unique and irreplaceable. No leader, no matter how effective they are should be seen as indispensable.<sup>112</sup> Certainly, as argued by Justice Warioba,<sup>113</sup> Africa is not bankrupt of good leaders. Leaders such as Mwalimu Nyerere, Nelson Mandela and even Joachim Chissano, who all left office voluntarily were excellent leaders, yet they allowed others the chance to lead and bring new perspectives to the table. Lastly, as regards stalling of development, Okuku strongly argues that a good

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<sup>107</sup> Okuku (n 9 above) 20.

<sup>108</sup> Okuku (n 9 above) 20.

<sup>109</sup> Armstrong (n 74 above) 15.

<sup>110</sup> Armstrong (n 74 above) 15.

<sup>111</sup> Fombad (n 4 above) 16.

<sup>112</sup> Fombad (n 4 above) 16.

<sup>113</sup> Warioba (n 55 above) 1.

leader ought to be able to build institutions that transcend beyond his tenure and whose continuation should not be pegged on the tenure of the incumbent.<sup>114</sup> Okuku attributes this dependency of projects to personalization of public affairs which is a common practice in African countries where presidents deem public property as part of their personal assets.

In conclusion therefore, most of the arguments put forward by opponents of term limits are weak, flawed and unreasonable. They cannot stand the test of time. Impermanency in office is a fundamental democratic principle that needs to be zealously guarded in African nations as the only way to break deep seated patterns of failure to comply with term limits.<sup>115</sup>

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<sup>114</sup> Okuku (n 9 above) 21.

<sup>115</sup> Fombad (n 4 above) 17.

## CHAPTER THREE

### ADHERING TO PRESIDENTIAL TERM LIMITS- RECENT TRENDS IN AFRICA

#### 3.1 Introduction

Ours is not a mere change of guard but a fundamental change...the problem of Africa in general and Uganda in particular is not the people but leaders who want to over stay in power. For us in the National Resistance Movement, we shall be here for only four years, after which we shall hand over power to a free and fairly elected civilian government. – *President Yoweri Museveni at his swearing-in ceremony, 1986.*<sup>116</sup>

There was a time in Africa's post independence history when succession was either by coup d'état or upon the death of an incumbent.<sup>117</sup> Presidents Jomo Kenyatta, Samora Machel and Ahmed Sekou-Toure died while in office whereas nations such as Benin, Burkina Faso, Ghana, Nigeria, Mali and Uganda at some point, all experienced succession by coup d'état.<sup>118</sup> With time however, unconstitutional changes of government have become unfashionable, and are presently prohibited under the African Charter on Democracy, Elections and Governance (African Charter on Democracy). The trend set in Africa in the early 90's was one that illustrated African politics as actually advancing towards democracy. There was increased political change, multi-party elections became frequent, constitutions were re-written and the political space opened up.<sup>119</sup> Along with these democratic gestures came the concept of presidential term limits that was rapidly adopted across Africa.<sup>120</sup> Statistics indicate that a near simultaneous adoption of term limits happened in approximately 35 Sub-Saharan states during this era.<sup>121</sup>

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<sup>116</sup> Okuku (n 9 above) 5.

<sup>117</sup> K Sturman 'Niger: Who needs presidential term limits' (2009) <http://www.allafrica.com/stories/200908170007.html> (accessed 5 September 2012).

<sup>118</sup> 'African leaders after independence' [http://www.southerncenter.org/AF\\_L2\\_A2\\_handout\\_2\\_3\\_p82.pdf](http://www.southerncenter.org/AF_L2_A2_handout_2_3_p82.pdf) (accessed 5 September 2012).

<sup>119</sup> J Vorrath 'African development: political trends in recent elections in Sub-Saharan Africa'(2011) German Development Institute <http://www.die-gdi.de> (accessed 5 September 2012).

<sup>120</sup> Fombad (n 4 above) 2.

<sup>121</sup> K McKie 'How to be a president for life: party competition and executive term limit enforcement across Sub-Saharan Africa' *Ruling Politics: The formal and informal foundations of power in new democracies* Conference at Harvard University, November 21-22, 2011.



As argued by Maltz however, today, Africa has begun witnessing a worrisome trend.<sup>122</sup> Recent years have seen leaders purposely reverse the gains that were made in the 90s. Presidents are rolling back constitutional provisions that limit presidential tenure by either using ‘creative’ interpretative language executed by the courts, extending their tenure through parliament or by simply abolishing term limits all together.<sup>123</sup> Indeed, among the African presidents whose mandated tenure recently lapsed, 14 have campaigned to have term limits abolished and out of whom, 11 have been successful.<sup>124</sup> Leaders such as the late Gnassingbe Eyadama of Togo abolished term limits in 2002,<sup>125</sup> while the late Omar Bongo of Gabon also abolished term limits in 2003. Similarly, Paul Biya of Cameroon, Yoweri Museveni of Uganda, Idriss Deby of Chad, Ismail Omar Guelleh of Djibouti, Abdelaziz Bouteflika of Algeria amongst others, have all in the recent past abolished term limits from their constitutions.<sup>126</sup> The irony is that, most of these leaders who constantly attempt to have term limits abolished are the very same leaders who over-saw the initial adoption of the provision in their constitutions.<sup>127</sup>

As a result of backsliding on previously attained progress in democratization, Africa’s overall ranking in most democracy indices has continuously dwindled. The Economist Intelligence Unit (EIU) Democracy Index of 2011, for instance, indicated that the only African nation that qualified as a full democracy was Mauritius, ranking 24<sup>th</sup> out of 165 nations.<sup>128</sup> Most African nations were classified as either hybrid or authoritarian regimes. According to the Index, Africa’s decline in democracy was due to constant human rights abuses, rampant corruption as well as the presence of long

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<sup>122</sup> Maltz (n 7 above) 128.

<sup>123</sup> Maltz (n 7 above) 128.

<sup>124</sup> McKie (n 121 above) 2; By June 2012, the following African nations had abolished term limits: Togo, Guinea, Niger, Uganda, Cameroon, Gabon, Chad, Algeria, Tunisia and Djibouti. It is also noteworthy that Namibia amended its Constitution in 1999 specifically to extend a third term to Sam Nujoma hence making a total of 11 countries that have altered their constitutions to extend presidential tenures. Three incumbents have unsuccessfully attempted to amend their constitutions in Nigeria, Malawi and Zambia.

<sup>125</sup> It is however noteworthy that the group set up to bridge differences between Togo’s President and the country’s opposition adopted a proposal in September 2012 which calls for a two-term limit for the head of state, marking a major step forward for the nation. See [http://www.zeenews.india.com/news/world/togo-group-adopts-2-term-limit-for-president\\_799905.html](http://www.zeenews.india.com/news/world/togo-group-adopts-2-term-limit-for-president_799905.html) (accessed 30 September 2012).

<sup>126</sup> No one has monopoly of good ideas in Africa (n 73 above).

<sup>127</sup> McKie (n 121 above) 2.

<sup>128</sup> EIU Democracy Index 2011 ‘Democracy under stress’ <http://www.eiu.com> (accessed 30 September 2012).

geriatric leaders who still cling on to power.<sup>129</sup> Similarly, the 2011 Mo Ibrahim Index of African Governance echoed these sentiments. In an excerpt from the Index founder, Mo Ibrahim argues as follows:

We are delighted to see the evident economic growth across Africa but we are concerned about the stagnation, and in many cases the reversal, in the rule of law and citizens' rights.<sup>130</sup>

Certainly, we cannot argue that Africa has completely failed in adherence to term limits. Africa has been privileged to have John Kufour, Ali Hassan Mwinyi, Benjamin Mkapa, Alpha Oumar Konare and Festus Mogae who all voluntarily stepped down upon the determination of their tenures. This positive development however remains the exception rather than the rule.<sup>131</sup> It is increasingly evident from an analysis of Africa's recent political trends that while multi-party elections are frequently conducted and presidential term limits have been enacted in most nations, these symbols of democracy remain a façade used for the benefit of the ruling party and the incumbent. Basic respect for term limits is still lacking and where there has been succession, evidence indicates that it has come from inside the same ruling party, essentially leaving the structures of power and exploitation intact, even if some of the names have changed as was the case in Namibia with Hifikepunye Pohamba succeeding Sam Nujoma in 2004.<sup>132</sup>

In order to understand these recent trends, it is fundamental that we examine some of the individual countries that have been in the middle of these tenure controversies. The discussion below will therefore look at four trends that have developed in Africa as regards succession patterns. These include: first, the use of the judiciary to creatively interpret term-limits in favour of an incumbent. Second, engineering parliamentary amendments to extend beyond the mandated tenure without abolishing term limits, third, abolishing term limits either through referenda or

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<sup>129</sup> As above, 15.

<sup>130</sup> 'Mo Ibrahim Index of African Governance 2011' <http://www.moibrahimfoundation.org/en/section/the-ibrahim-index> (accessed 5 September 2012) 2.

<sup>131</sup> Fombad (n 4 above) 7.

<sup>132</sup> P Dorrie 'Burkina Faso: How much longer can Compaore rule last?' *Think Africa Press* <http://www.thinkafricapress.com/burkina-faso/rule-another-francois-blaise-compaore-25-years> (accessed 3 September 2012).

parliament and finally, it would also be interesting to look at the developing trend of 'heir grooming' which despite the blow that the 'Arab Spring' dealt to it, has increasingly gained momentum amongst incumbents in the past few years.

### **3.2 Creative interpretation by the courts**

The use of the judiciary to creatively interpret the constitution in favour of an incumbent is among the methods that have been utilized by different African regimes to contravene term limits. Maltz describes this manipulation as 'soft contravention' aimed at staying in office beyond the mandated tenure though not targeted at entirely eliminating term limits.<sup>133</sup> These 'constitutional coups' have successfully been utilized by Burkina Faso's incumbent, Blaise Compaore, and more recently by Abdoulaye Wade of Senegal in January 2012. Leaders who use the courts to extend their tenure without necessarily calling for the abolition of term limits implicitly acknowledge the value of term limits and are aware that they ought not to be in power.<sup>134</sup> Such leaders have managed to skillfully exploit their weak judicial institutions that are mainly composed of presidential appointees. In the discussion below, we examine the developments in these two nations which share similar experience as regards the use of the courts by incumbents to contravene term limits.

#### **3.2.1 Burkina Faso**

Burkina Faso gained its independence in 1960. In 1987, Army Captain, Blaise Compaore rose to power through a coup d'état that saw the death of the then president, Thomas Sankara.<sup>135</sup> In 2000, Burkina Faso's Parliament amended the Constitution and introduced the concept of two-term limits while reducing the tenure of the president from seven to five years.<sup>136</sup> Surprisingly, in 2005, during the nation's first ever elections since the

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<sup>133</sup> Maltz (n 7 above) 128.

<sup>134</sup> Maltz (n 7 above) 129.

<sup>135</sup> 'Freedom in the world 2012- Burkina Faso'

<http://www.freedomhouse.org/report/freedom-world/2012/burkina-faso> (accessed 3 September 2012).

coming into force of the amendment, the Constitutional Council, whose judges are presidential appointees, ruled that the 2000 amendment did not apply retrospectively.<sup>137</sup> The Council argued that President Compaore's prior tenure could not be counted as part of his 'legitimate two terms' under the amendment, giving Compaore the green light to run for his 'first term' in 2005 which he won through the ruling party, Congress for Democracy and Progress (CDP).<sup>138</sup>

In November 2010, Compaore run again for re-election, winning by a wide majority of more than 80%, despite the elections being internationally reported as marred by chaos and fraud.<sup>139</sup> As argued by Dorrie, the incumbent's exploitative ability to stay in power this long has been aided by the lack of a formidable judicial system that has so far remained in the shadows of the executive.<sup>140</sup> There have been no instances where the judiciary has overruled the presidency on issues of substance.<sup>141</sup> Its independence remains weak despite constitutional guarantee enshrined under Article 129 of the nation's Constitution.<sup>142</sup> Substantial powers remain vested in the President hence making the judiciary susceptible to interference. In this regard, the 2012 Report on International Property Rights Index ranked Burkina Faso's judicial independence as 115 out of 130 countries.<sup>143</sup> The African Commission has similarly in the past reprimanded Burkina Faso for its lack of a transparent judicial system as evidenced in the case of

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<sup>136</sup> 'U.S Department of State background note: Burkina Faso'  
<http://www.state.gov/r/pa/ei/bgn/2834.htm> (accessed 3 September 2012).

<sup>137</sup> As above.

<sup>138</sup> 'Freedom in the world 2011-Burkina Faso Freedom House Report' (2011)  
<http://www.unhcr.org/refworld/country,,FREEHOU,,BFA,,4dcbf5202a,0.html>  
(accessed 3 September 2012).

<sup>139</sup> 'Burkina's Compaore wins by landslide' <http://www.voanews.com/content/burkinas-compaore-wins-by-landslide--110841789/156921.html> (accessed 3 September 2012).

<sup>140</sup> Dorrie (n 132 above).

<sup>141</sup> 'Freedom House, countries at the crossroads 2011 - Burkina Faso' (November 2011)  
<http://www.unhcr.org/refworld/country,,FREEHOU,,BFA,,4ecba651c,0.html> (accessed 6 September 2012).

<sup>142</sup> International Commission of Jurists 'Burkina Faso: Attacks on justice 2000'  
[http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=21279](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=21279) (accessed 5 September 2012).

<sup>143</sup> <http://www.internationalpropertyrightsindex.org/profile?location=burkina%20faso>  
(accessed 3 September 2012).

*Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*.<sup>144</sup> Today, Burkina Faso remains amongst the poorest nations in the world.<sup>145</sup> The continued periods of peace that were experienced by the nation in the past have slowly been replaced by social tension since 2011.<sup>146</sup> Recent events indicate a wave of frustration and unrest in the country marked by continuous demonstrations, strikes and military mutiny due to delayed salaries.<sup>147</sup> November 2012 marks 25 years of President Compaore's rule and 2015 will mark the final term for which Compaore will be eligible to run under the Burkinabe Constitution. Whether CDP will call upon Parliament to revise Article 37 to allow Compaore to run again remains to be seen.

### 3.2.2 Senegal

In the year 2000, President Abdoulaye Wade was elected to office under the 1963 post-independence Constitution of Senegal. Through his own initiative, Wade introduced a new Constitution in 2001 with the view to limit the terms of office a president can serve. This was enacted as part of the popular changes he had promised the people of Senegal in his quest for presidency.<sup>148</sup> The demand for change was further motivated by the country's previous history of one party rule by both Presidents Leopold Sédar Senghor and Abdou Diouf serving extended presidential tenures of about 20 years each.<sup>149</sup> Accordingly, Wade was expected in 2012 to fulfill the change that he had so strongly advocated for. It was, therefore, a matter of regret that he subsequently announced his candidature for the presidency.

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<sup>144</sup> Paragraph 38, the African Commission considered the State's failure to give legal reasons to justify the retention of the punishment meted out to two magistrates. The two were among a number of magistrates who had been suspended, dismissed or forced to retire in 1987. Communication No. 204/97, decision adopted during the 29th Ordinary session, 23 April – 7th May 2001.

<sup>145</sup> Freedom House, countries at crossroads 2011-Burkina Faso (n 141 above).

<sup>146</sup> Dorrie (n 132 above).

<sup>147</sup> Dorrie (n 132 above).

<sup>148</sup> NE Lawler 'Abdoulaye Wade' in <http://www.britannica.com/EBchecked/topic/633754/Abdoulaye-Wade> (accessed 6 September 2012).

<sup>149</sup> Para 12 of *RADDHO v Senegal* ECOWAS Community Court Case No. ECW/CCJ/APP/03/12.

On 27 January 2012, the Constitutional Council, composed of the President's appointees,<sup>150</sup> made a decision as regards the interpretation of the Constitution. The issue of how many terms the constitution allowed the incumbent to run for was at the core of the dispute based on the construal of two key provisions namely Articles 27 and 104 of the Constitution.<sup>151</sup> President Wade argued that his election in 2000 and his subsequent rule up to 2007 could not be regarded as his first term under the new Constitution and that the provision on two-terms ought not to apply retrospectively. Amidst resistance from opposition parties, civil society and religious leaders, the Council confirmed Wade's candidacy. It legitimated the argument that the changes enacted in 2001 were not to be applied retrospectively arguing that the President's first term should be rightly considered as the one between 2007-2012.<sup>152</sup> This therefore meant that President Wade could run for a 'second term', which in essence was rather a third term.

The Senegalese system of executive dominance is no different from Burkina Faso's. As described in the 2007 USAID Corruption Report, Senegal is a nation where one finds an extreme concentration of power in the executive.<sup>153</sup> Many of the institutional arrangements suffer from serious limitations in what orders they can execute and the judiciary remains heavily oriented towards maintaining executive power with few provisions to ensure its autonomy.<sup>154</sup> Bingham, in questioning the capacity of the Senegalese courts to prosecute former Chadian President, Hissene Habre, shares the sentiments expressed in the USAID Report. She begins by quoting Samba Alaar as follows:

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<sup>150</sup> The Constitutional Council is composed of five judges appointed by the President from senior magistrates, eminent academics or attorneys <http://www.state.gov/r/pa/ei/bgn/2862.htm> (accessed 3 October 2012).

<sup>151</sup> Article 27 reads 'The duration of the term of office of the President is five years. The term is renewable once.' While Article 104(1) expressly states that 'the incumbent president shall complete his term of office.'

<sup>152</sup> Lawler (n 148 above).

<sup>153</sup> USAID Corruption Assessment: Senegal (August 2007) available at [http://www.pdf.usaid.gov/pdf\\_docs/PNADK548.pdf](http://www.pdf.usaid.gov/pdf_docs/PNADK548.pdf) (accessed 3 October 2012).

<sup>154</sup> As above.

*C'est le President qui decide et le ministre de la Justice fait descendre les instructions chez les magistrates. Ces derniers d'executer comme dans l'Armee. Separation des pouvoirs version senegalaise, quoi.*<sup>155</sup>

Bingham argues that it is the President who decides and the Minister of Justice merely forwards the instructions to the magistrates. She describes the Senegalese judiciary as one that bears a fundamental flaw, deficit of independence and easily susceptible to manipulation. Fortunately, the Senegalese citizenry was able to see through this manipulation of the courts by Wade. Upon failure to acquire the requisite 50% majority vote, Wade was defeated by opposition leader and current President, Macky Sall in the March 2012 run-offs.<sup>156</sup>

Both Burkina Faso and Senegal exude a similar trait of weak judicial institutions that are easily manipulated by incumbents. Both scenarios call for reforms to the judiciaries, not only in the two nations, but in most African states. The *raison d'être* behind the concept of separation of powers as originally proposed by Montesquieu was to create three separate branches of government which could limit the powers of each other and inhibit one branch from encroaching on the powers of the other two.<sup>157</sup> Certainly, Montesquieu did not envisage the president hand picking judges, dictating their work, curtailing their jurisdiction and terminating them at will. This remains the practice in most African states and has led to a situation where incumbents do not respect term limits, aware that they may at any time use the courts to secure an extension of their tenure. A clear construction of the Preamble of the Senegalese Constitution, Articles 104(1) and (2), the public statements made by Wade himself and the provisions of the ECOWAS Protocol on Democracy and Good Governance to which Senegal is a member state ought to have guided the Constitutional Council in reaching a different decision. The Preamble makes reference to the rule of law, equality before the

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<sup>155</sup> L Bingham 'Trying for a just result? The Hissene Habre affair and judicial independence in Senegal' (2009) *Temple International and Comparative Law Journal* 77.

<sup>156</sup> 'Senegal's President Macky Sall wins National Assembly' <http://www.bbc.co.uk/news/world-africa-18719787> (accessed 5 September 2012).

<sup>157</sup> 'Baron de Montesquieu' in <http://www.rjgeib.com/thoughts/montesquieu/montesquieu-bio.html> (accessed 6 September 2012).



law and commitment to democratic principles; values that the decision of the Council failed to take insight of. Furthermore, Article 104(1) expressly states that ‘the incumbent president shall complete his term of office.’ This provision, read together with the transitional clauses in the Constitution suffice as clear indications that the drafters intended for the President’s term of 2000 to be included in the number of terms he could run. Moreover, Wade’s public statements after his re-election in 2007 such as ‘I can run for no more terms as I have locked the Constitution’ draw the conclusion that he knew that he was bound to step down and by manipulating the courts to allow him to run for a third term, he was in essence breaching the very democratic principles enshrined in the letter and spirit of the Constitution.<sup>158</sup> The Courts ought to have taken all these factors into consideration prior to making their decision.

### **3.3 Engineering tenure extension through parliament**

The use of parliament to extend presidential tenures, just like the use of the courts, is not uncommon in Africa. Through the ruling parties which often compose the majority in parliament, incumbents have in many instances tabled proposals in the legislature to simply scrap term limits from the nation’s constitution. The use of the legislature to extend an incumbent’s rule without necessarily abolishing term limits has only been utilized in a few nations.<sup>159</sup> Namibia remains among the few countries that have in the past extended the tenure of an incumbent by using parliament but not abolished term limits from the provisions of their constitution.

#### **3.3.1 Namibia**

On 21 March 1990, Samuel Nujoma was sworn in as the first President of independent Namibia. The nation held its first post-independence presidential elections in 1994

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<sup>158</sup> A detailed discussion is in the submissions made by the author and her colleague, Mr Dennis Armah to the ECOWAS Court of Justice in Paras 12-26 of *RADDHO v Senegal* (n 149 above).

<sup>159</sup> It is noteworthy that unlike Namibia which specifically extended the term limit for Nujoma without abolishing term limits, Idriss Deby of Chad and Paul Biya of Cameroon were both able to capitalize on their dominant political parties in their respective parliaments to pass motions abolishing term limits.



which resulted in an overwhelming victory for Nujoma.<sup>160</sup> In 1998, the ruling party, South-West African Peoples' Organization (SWAPO), endorsed a proposal in Parliament to allow the extension of Nujoma's tenure on grounds that his initial term, 1990-1994, was not one elected by popular mandate but rather by the then constituent assembly.<sup>161</sup> It was argued that the proposed amendment of Article 29(3) of the Constitution was however specially tailored for Nujoma and limitations on executive tenure would remain applicable to all future presidents. Upon successful passing of Amendment 34 of 1998, Nujoma was re-elected for a third term in the 1999 elections.<sup>162</sup> His term expired in 2004 upon which he stepped down amidst speculation and fears of instability upon his departure from power.<sup>163</sup>

Nujoma's critics argue that while in authority, he succeeded in concentrating power on himself, became increasingly defensive about criticisms against his rulership and continuously misappropriated international aid to enrich himself.<sup>164</sup> To date, despite his departure, SWAPO, which was re-branded as SWAPO Party of Namibia, still has a strong grip on power. Hifikepunye Pohamba, Nujoma's hand-picked successor, rules under the same domineering political party. The line between SWAPO in government and SWAPO as a political party is blurred and over the years there has been an increasing willingness to override democratic checks and balances at the whims of the ruling party.<sup>165</sup> As argued by Totemeyer, SWAPO has entrenched its political domain since independence and commands support in almost the whole of Namibia.<sup>166</sup> Its growth as the dominant party in Namibia has steadily increased over the years and

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<sup>160</sup> 'African elections database-elections in Namibia' <http://www.africanelections.tripod.com/na.html> (accessed 5 September 2012).

<sup>161</sup> 'Namibia constitution and political system' <http://www.iss.co.za/AF/profiles/Namibia/Politics.html> (accessed 5 September 2012).

<sup>162</sup> African elections database (n 160 above).

<sup>163</sup> Namibia constitution and political system (n 161 above).

<sup>164</sup> In 1992, Norway decided to stop drought relief to Namibia in protest against the purchase of an expensive new presidential jet and two new helicopters. The luxuries were bought just few weeks after Nujoma had appealed to the international community for drought aid. [http://en.wikipedia.org/wiki/Sam\\_Nujoma](http://en.wikipedia.org/wiki/Sam_Nujoma) (accessed 9 September 2012).

<sup>165</sup> Namibia constitution and political system (n 161 above).

<sup>166</sup> G Töttemeyer 'The management of a dominant political party system with particular reference to Namibia' The Management of dominant political parties, Contribution to an international seminar held between 10 - 12 December (2007) Mozambique.

stood at 75.8% in 2004.<sup>167</sup> Totemeyer argues that the danger of having such a dominant party lies in its potential abuse of power, self-enrichment by party leaders, nepotism, patronage, mis-use of public resources and claiming positions due to party affiliation. Doubts exist as to whether this ruling party will not amend the Constitution once more in the future for yet another ruler. As indicated by Fombad, nothing stops the precedent already existing from being repeated and a 'special reason' being fabricated to allow yet another SWAPO incumbent to extend his tenure.<sup>168</sup>

### **3.4 Overriding term limits-successful constitutional amendments**

In 2001, before the end of his second term in office, President Frederick Chiluba attempted, albeit unsuccessfully, to initiate changes to the Zambian Constitution to allow him to run for a third term. Similarly, in 2002, towards the end of his final term in office, Bakili Muluzi of Malawi introduced the 'Open Term Bill' which was geared towards amending Section 83(3) of the Malawian Constitution and removing limitations on the number of terms a president could stand for re-election.<sup>169</sup> Just like Chiluba, Muluzi was unsuccessful.<sup>170</sup> Olusegun Obasanjo of Nigeria was similarly unsuccessful in his attempt to extend his tenure in office in 2006.<sup>171</sup>

Many more African leaders have however succeeded in amending their constitutions in order to extend their tenure. A review of statistics indicates that between 2000 and 2012, ten leaders<sup>172</sup> successfully managed to abolish term limits from their constitutions. Most of these leaders often come to power with great promises of change

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<sup>167</sup> As above, 2.

<sup>168</sup> Fombad (n 4 above) 12.

<sup>169</sup> Fombad (n 4 above) 7.

<sup>170</sup> Upon failure of the Open Term Bill, the UDF Party moved the same motion in parliament under a different title 'Third Term Bill' but was also unsuccessful

<http://www.malawidemocrat.com/politics/khwauli-regrets-moving-open-term-bill-advises-overzealous-politicians/> (accessed 5 September 2012).

<sup>171</sup> Fombad (n 4 above) gives a detailed discussion on Obasanjo's attempt to prolong his stay in office in pages 9-12.

<sup>172</sup> Lansana Conte of Guinea (2001), Gnassingbe Eyadama of Togo (2002), Zine El Abidine Ben Ali of Tunisia (2002), Omar Bongo of Gabon (2003) Yoweri Museveni of Uganda (2005), Idriss Deby of Chad (2006) Paul Biya of Cameroon (2008), Abdelaziz Bouteflika of Algeria (2008), Mamadou Tandja of Niger (2009) and Ismail Omar Guelleh of Djibouti (2010).

and raise the expectations of the citizenry, only to initiate suggestions of a tenure extension nearing their last terms in office.<sup>173</sup> Niger's former president, Mamadou Tandja, for instance, was elected to office in 1999 through elections that were generally deemed free and fair. Prior to Mamadou's take over, Niger's economy under Ibrahim Baré Maïnassara's regime had been stagnating, largely from a series of inflation rates and the government's mis-management of public assets.<sup>174</sup> The nation experienced some of the lowest living standards and Mamadou's ascent to power therefore gave Nigeriens hope that this would change. After being in power for ten years, Mamadou however, began undermining the democratic institutions of Niger.<sup>175</sup> He attempted to tighten his grip on the presidency by pushing through a new constitution that saw him extend his presidential tenure beyond the two term limit through a referendum in August 2009.<sup>176</sup>

Incumbents who have succeeded in abolishing term limits have relied on several factors. First, there are those who have capitalized on their dominant political parties in parliament to quickly pass their motions. Idriss Deby of Chad was able to replace the two term limit with an open term in 2006 through a parliament dominated by the ruling party, Patriotic Salvation Movement.<sup>177</sup> Similarly, Cameroon's dominant ruling party, Cameroon's People's Democratic Party, was also able to overwhelmingly pass a bill that amended Law 96/08 to allow Paul Biya an open term.<sup>178</sup> In addition to the use of dominant political parties, incumbents take advantage of certain weaknesses in order to easily secure themselves an extended tenure. These weaknesses often include weak and divided opposition parties that lack the unity to resist parliamentary motions, flawed judicial and electoral institutions that are often controlled by the incumbent and a generally passive civil society that does not keep the populace sensitized on the consequences of voting for such amendments in referenda. There are also those who

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<sup>173</sup> See also clause 3.2.2 on Senegal's Abdoulaye Wade who came into power in 2000 under the popular motto 'sopi' (Wolof for change) promising changes to the Senegalese economy.

<sup>174</sup> AC Miller 'Debunking the myth of the 'good' coup d'état in Africa' (2011) *African Studies Quarterly* 57.

<sup>175</sup> As above, 58.

<sup>176</sup> Despite passing the new constitution through a referendum, Mamadou was ousted from power in February 2010 by the junta, *Conseil Suprême de Restauration de la Démocratie* (CSRD).

<sup>177</sup> Fombad (n 4 above) 12.

<sup>178</sup> Fombad (n 4 above) 13.

have capitalized on their popularity and ability to keep the nation stable following a coup d'état or civil strife as an excuse to extend their term limits.

As a result of all these factors the late Lansana Conte of Guinea in 2001, the late Gnassingbe Eyadama of Togo in 2002, Zine El Abidine Ben Ali of Tunisia in 2002, the late Omar Bongo of Gabon in 2003, Yoweri Museveni of Uganda in 2005, Idriss Deby of Chad in 2006, Paul Biya of Cameroon in 2008, Abdelaziz Bouteflika of Algeria in 2008, Mamadou Tandja of Niger in 2009 and Ismail Omar Guelleh of Djibouti in 2010 have all succeeded in the removal of term limits from their constitutions.

### **3.5 The evolving trend of 'heir grooming'**

The recent promotion of Muhoozi Kainerugaba, a son of the president, to the rank of Brigadier in the Ugandan Army has set tongues wagging; that Yoweri Museveni is grooming his son to succeed him,<sup>179</sup> just as many believe that it was inevitable for Ian Khama to become President of Botswana since he had been groomed for office during his father's reign.<sup>180</sup> The above situation is beginning to set a peculiar 'heir grooming' trend. African leaders, in a classical attempt to stay in power, have devised a new strategy ideally termed as 'heir succession.' This trend has so far seen three sons of former African presidents ascend to power upon the death of their fathers; Joseph Kabila of the DRC, Faure Gnassingbe of Togo and Ali Bongo of Gabon. Incumbents have become so blinded by their quest to stay in power such that they think that it is only they (and their kin) who have monopoly over sound solutions to Africa's problems.<sup>181</sup> Indeed, a close look at recent events indicates that incumbents have been busy strategically positioning their offspring or siblings to succeed them.

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<sup>179</sup> G Madanga & P Ofoi-Atta 'Museveni's speedy promotion of son and a new African trend' <http://www.theafricareport.com/index.php/news-analysis/museveni-s-speedy-promotion-of-son-and-a-new-african-trend-501817794.html> (accessed 5 September 2012).

<sup>180</sup> T Motlogelwa 'Fatshe leno la bone' <http://www.mmegi.bw/index.php?sid=10&aid=26&dir=2012/October/Thursday4> (accessed 30 September 2012).

<sup>181</sup> No one has monopoly of good ideas in Africa (n 73 above).

First, observers argue that prior to the ‘Tahrir Square’ revolts in Egypt that ousted Hosni Mubarak, the incumbent had been grooming his son, Gamal Mubarak, to take over from him.<sup>182</sup> Critics argue that there was evidence of Mubarak’s tireless efforts to raise his son’s stature in international politics by engaging him directly in the Israeli-Palestinian negotiations with Washington and furthermore propelling him to the enviable position of Deputy Secretary General of the ruling National Democratic Party (NDP) and General Secretary of the Policy Committee, which is NDP’s third most powerful position.<sup>183</sup> A similar trend was witnessed in Senegal where former president, Abdoulaye Wade’s motives were questioned after he assigned his son, Karim Wade, an influential ministerial position that saw Karim control portfolios such as energy, air transport, infrastructure etc.<sup>184</sup> Karim’s attempt to run for Mayor of Dakar was seen as the first phase of catapulting him to political stardom. When that failed, President Wade attempted to lower the threshold for winning the presidential election to 25% subsequently making it extremely easy for any unpopular candidate, such as Karim, to win elections with minority support.<sup>185</sup> One is forced to conclude that these events demonstrate Wade’s acute knowledge that he was bound to exit the presidency in 2012 and now sought to position his son to succeed him. Other presidents who have been seen to groom their heirs for succession include Obiang Nguema Mbasogo of Equatorial Guinea who has appointed his son, Teodoro Nguema Obiang, in May 2012, as the second Vice President of the country,<sup>186</sup> while Libya’s former president, Muammar Gaddafi was also seen to be pushing his son, Seif Al-Islam to political limelight. Ironically, Bingu wa Mutharika, former president of Malawi who passed away in 2012, had actually endorsed his brother, Peter Mutharika to succeed him in the 2014 general

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<sup>182</sup> R Dassie ‘The end of dynastic presidential politics in Africa?’ in <http://www.talkafrique.com/issues/dynasty-politics-frica> (accessed 6 September 2012).

<sup>183</sup> ‘Aljazeera Profile: Gamal Mubarak’ <http://www.aljazeera.com/focus/2009/12/2009126113730937103.html> (accessed 6 September 2012).

<sup>184</sup> Dassie (n 182 above).

<sup>185</sup> A Tall & N Hoffman ‘Senegal in danger: The view from the ground’ <http://www.aljazeera.com/indepth/opinion/2012/02/201224101919348700.html> (accessed 6 September 2012).

<sup>186</sup> ‘President Teodoro appoints son as vice-president despite his lavish lifestyle’ [http://www.thevoicemagazine.com/newsdetails.asp?id=627&cat\\_id=3](http://www.thevoicemagazine.com/newsdetails.asp?id=627&cat_id=3) (accessed 6 September 2012).

elections.<sup>187</sup> There are also strong indications that Burkina Faso's Blaise Compaore is grooming his brother, Francois, to succeed him when his current term expires in 2015.<sup>188</sup>

Whether the above events indicate a new trend where political succession will be turned into a family affair remains to be seen. It is however hoped that the speculations in Equatorial Guinea, Uganda, Burkina Faso and other nations where 'heir grooming' has been witnessed will not come to pass as this could easily reverse the democratic gains made by Africa in the early 90's. Political succession ought to be based on merit. With a few exceptions such as Lesotho, Morocco and Swaziland, African nations are not hereditary monarchies to be inherited by an incumbent's heir.

### **3.6 Chapter conclusion**

The steady decline of coups d'état in Africa as a means of political succession since the 90's was because of the reaction that they received. They provoked negative reviews from both the local citizenry and the international community. Once the African population had attained the satisfaction of democracy, they became more fervent to its defence; they were more willing and determined to fight to maintain democracy. Elected governments have today replaced military rule. However, the trend that has developed in Africa since 2000, as regards adhering to term limits, is one that indicates a reversal of the gains made in the early 90's. Just as Africa fought to replace the bullet with the ballot, so should its populace fight for the adherence of term limits. Africa must shun extension of tenures. It must fight with the same zeal against leaders who want to mischievously use the courts or parliament to stay in power. The electorate must not be afraid to let go of good leaders in the fear that they have no one to replace them. Leaders must be made aware that nations are not hereditary kingdoms to be taken over by their groomed heirs but democracies that will only accept leaders who have been tested through the ballot box.

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<sup>187</sup> No one has a monopoly over good ideas in Africa (n 73 above).

<sup>188</sup> Dorrie (n 132 above).

## CHAPTER FOUR

### PROSPECTS AND CHALLENGES OF ENFORCING PRESIDENTIAL TERM LIMITS IN AFRICA THROUGH REGIONAL BODIES

#### 4.1 Introduction

In 2006, the Mo Ibrahim Foundation initiated the Prize for Achievement in African Leadership, an award to any head of state who demonstrates the values of superior leadership, delivers the core functions of the state, serves their term within the enshrined limits and democratically transfers power to their successors.<sup>189</sup> The award is worth an initial amount of \$5million and an additional sum of \$200 000 annually for the rest of the leader's lifetime.<sup>190</sup> Despite the lucrative sum, only three African leaders have so far received the prize.<sup>191</sup> The years 2009, 2010 and 2012 ostensibly lacked any viable contenders, indicating the quality of leaders that Africa still possesses.<sup>192</sup>

A close examination of the events highlighted in chapter three reveals that the two branches of government namely, judiciary and parliament, that ought to regulate executive power have proved not to be effective avenues for restraining incumbents as one would expect. On the contrary, there is sufficient evidence to indicate that there is lack of an effective balance of powers between these three branches of government.<sup>193</sup> African parliaments have remained in the shadows of the executive hegemony and continue to merely rubber stamp decisions already made by the executive.<sup>194</sup> As argued by Prempeh, during the reign of dictators and military regimes in Africa, most legislatures suffered substantial gaps in their institutional lives and had very little

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<sup>189</sup> The Ibrahim Prize' <http://www.moibrahimfoundation.org/en/section/the-ibrahim-prize> (accessed 30 September 2012).

<sup>190</sup> As above.

<sup>191</sup> These are Joaquim Chissano of Mozambique, Festus Mogae of Botswana and Pedro Pires of Cape Verde; 'Past winners of the Mo Ibrahim Prize' in <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/capeverde/8817993/Past-winners-of-the-Mo-Ibrahim-Prize.html> (accessed 30 September 2012).

<sup>192</sup> 'Mo Ibrahim prize for African leadership: No winner' in <http://www.bbc.co.uk/news/world-africa-19946106> (accessed 3 October 2012).

<sup>193</sup> HK Prempeh 'Progress and retreat in Africa: Presidents Untamed' (2008) *Journal of Democracy* 114.

<sup>194</sup> As above.



experience in autonomy.<sup>195</sup> 'Due to the absence of a culture of legislative autonomy, and because the executive had far too long been accustomed to governing without any credible counterbalance, most of Africa's legislatures today lack a view of what their prerogatives ought to be.'<sup>196</sup> As a result, the executive's pattern of dominance continues to reign even in today's multi-party politics. Similarly, judiciaries also continue to suffer from the same handicaps that undermine legislative effectiveness.<sup>197</sup> As seen in Burkina Faso and Senegal, judiciaries have interpreted provisions on term limits in a manner that favors extension of presidential tenure rather than boldly advocate for democratic respect of term limits.<sup>198</sup> As a result of these flaws, the executive has remained dominant thus leading to perpetual incumbency in most nations. This is therefore a strong indication of the need for alternative institutional designs for the enforcement of term limits.

In an attempt to restore this crucial element of democracy whose usage has been eroded, scholars have proposed different mechanisms for the enforcement of term limits in Africa. There are those who have challenged civil society to actively put up a stronger resistance against constitutional alterations,<sup>199</sup> others have made suggestions that term limits be entrenched in constitutions as to make their amendment extremely difficult.<sup>200</sup> A common thread that however emanates in all the mechanisms that have been suggested is that most have not explored the option of utilizing African regional bodies to promote compliance with term limits. In order to address these issues, this chapter is broadly divided into three parts. The first part sets out to discuss mechanisms and strategies that have been proposed by various scholars on how to enforce term limits in Africa. This sub-heading will look at the flaws of some of the suggested institutional designs and why they may not be workable in Africa. The second part focuses on the prospects and challenges of utilizing African regional and sub-regional bodies in the quest to promote compliance with term limits. This is with particular

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<sup>195</sup> Prempeh (n 193 above) 114.

<sup>196</sup> Prempeh (n 193 above) 114.

<sup>197</sup> Prempeh (n 193 above) 118.

<sup>198</sup> See detailed discussion in subtopics 3.2.1 and 3.2.2.

<sup>199</sup> Fombad (n 4 above) 22.

<sup>200</sup> Maltz (n 7 above) 140.



reference to the AU, the African Commission and ECOWAS. The third part will highlight the possible lessons that Africa can draw from other continents as regards enforcement of term limits and will be followed finally by a conclusion of the chapter.

## **4.2 Mechanisms proposed by various scholars in enforcing term limits**

### **4.2.1 Entrenching term-limit provisions in constitutions**

In the contribution towards enforcement of presidential term limits, various authors have argued that the first port of call should be the enactment of term limits within the constitutions. Scholars argue that, in order to be effective, drafters must ensure that not only is the prohibition against prolonged tenure enshrined in the constitution but also framed in a manner that makes its amendment extremely difficult.<sup>201</sup> In support of this, Fombad argues that while a number of the newly enacted post 1990 constitutions make pronouncements on term limits, most drafters however classify provisions on term limits in the same category as all other provisions, with no extra requirements as to their modification, hence leading to scenarios as witnessed in Chad, Cameroon and Uganda. To illustrate how best to entrench term limits, Fombad gives the example of Ghana's Constitution, which under Articles 290 and 291 distinguishes between 'entrenched' and 'non-entrenched' provisions. Article 290 gives a list of nineteen provisions whose amendment shall first be referred by the Speaker to the Council of State for their advice, then published in the *Gazette* and thereafter only introduced to Parliament upon the expiry of six months after publication in the *Gazette*. Article 290(4) furthermore provides that any amendment to an 'entrenched' provision shall be submitted to a referendum throughout Ghana and must gather at least 75% votes in favour of it. Indeed, such a process is rigorous, cumbersome, stringent and complex and makes it unlikely to make any alterations without the active participation of the people.<sup>202</sup> Similarly, the 2010 Kenyan Constitution provides under Article 255(2) that any amendment relating to the term of

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<sup>201</sup> Fombad (n 4 above) 27; Maltz (n 7 above) 140.

<sup>202</sup> Fombad (n 4 above) 27.

office of the president must be approved by a referendum supported by a simple majority of the citizens.<sup>203</sup>

While the above provisions indicate rigorous processes that need to be satisfied prior to the amendment of term limits, it can however be argued that this solution is not infallible. There are many instances where presidents have still managed to alter their constitutions despite the entrenchment of term limits in the constitutions. Cunning and ambitious leaders such as Hugo Chavez who portray themselves as exceptional and indispensable leaders have still managed to legally secure the required votes at referenda. Therefore, there is a real likelihood that where an incumbent can easily meet the stringent terms set in the constitution and more so, manipulate the terms by securing majority votes in a referendum, then this proposed mechanism may not be effective in curbing incumbency.

#### **4.2.2 Existence of vibrant civil society and opposition parties**

A second enforcement mechanism is the use of an enlightened and vibrant civil society.<sup>204</sup> It is argued that, vocal civil societies<sup>204</sup> are able to sensitize the public not only on their constitutional rights but also the consequences of voting (or not) during the referenda conducted to determine the amendment of constitutions. As highlighted by Vencovsky,<sup>205</sup> through the efforts of vibrant civil societies in Zambia, Malawi and Nigeria, the attempts to push for third terms by incumbents in these three nations failed. It is also recalled that in 2012, as a result of the active, united and vocal resistance of organisations such as M23 and RADDHO in Senegal, former president Abdoulaye Wade was unsuccessful in forcing his third term agenda.<sup>206</sup> It is additionally appreciated that not only is there need for a vibrant civil society, but also vibrant opposition parties that keep the government in check. The effectiveness of united opposition parties was

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<sup>203</sup> A referendum shall be considered approved only if 20% of the registered voters in each of at least half of the counties vote in the referendum **and** the amendment is supported by a simple majority of the citizens.

<sup>204</sup> Fombad (n 4 above) 22.

<sup>205</sup> Vencovsky (n 3 above) 20.

<sup>206</sup> 'Senegal opposition urges more resistance after riots' <http://www.reuters.com/article/2012/01/28/us-senegal-election-idUSTRE80ROLN2012012B> (accessed 30 September 2012).

observed in Nigeria in 2006, where amidst heavy bribing, intimidation and blackmail, they were able to mobilize, articulate and protect their interests against alteration of term limits.<sup>207</sup>

However, it ought to be noted that, this strategy will depend upon a variety of factors. Where civil society or opposition parties have neither developed a culture of dedication to constitutionalism nor commitment to values such as good governance or respect for the rule of law, then the possibility of an enlightened and sensitized electorate dwindles. Similarly, in instances where non-governmental organisations are easily compromised due to heavy reliance on funding from the state, then the ability of such organisations to actively take part in protests is further in doubt. Finally, the effectiveness of opposition parties, as argued by Vencovsky is also dependent on the ability of the incumbent to suppress resistance.<sup>208</sup> In this regard, the monopoly of political space in Uganda and the heavy handed suppression of political pluralism have managed to allow Yoweri Museveni to comfortably remain in power.<sup>209</sup> As a result of suppression, many opposition leaders in Uganda such as Kizza Besigye have been unable to freely criticize the government and have at one point been forced into exile for challenging Yoweri Museveni's domination and myth of invincibility.<sup>210</sup> Okuku describes the political climate in Uganda as follows:

The National Resistance Movement has no experience in democratically handling people with opposite fundamental beliefs. It has no culture of tolerating dissidents within its ranks as such persons are considered 'subversives.' Besigye had to be dealt with the only way Museveni... knew how, as in the bush days – neutralized.<sup>211</sup>

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<sup>207</sup> Fombad (n 4 above) 10.

<sup>208</sup> Vencovsky (n 3 above) 20.

<sup>209</sup> Okuku (n 9 above) 16. Article 269 of the 1995 Ugandan Constitution provides 'On the commencement of this Constitution and until Parliament makes laws regulating the activities of political organisations in accordance with Article 73... political activities may continue except - (a) opening and operating branch offices, (b) holding delegates conferences, (c) holding public rallies, (sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections ...'

<sup>210</sup> Okuku (n 9 above) 18.

<sup>211</sup> Okuku (n 9 above) 18.

Certainly, where civil society or political opposition is completely suppressed as is illustrated above, then the ability to actively advocate for the enforcement of term limits is curtailed.

#### **4.2.3 Creation of immunities against prosecution**

An additional factor that hinders the effective implementation of term limits in most African states is the fear by incumbents of prosecution upon stepping down. As argued by Posner and Young,<sup>212</sup> it seems a fair assumption that leaders stay in power longer as they expect to benefit more as opposed to worrying about prosecution. In support of this, Fombad additionally argues that, sometimes, fear by incumbents that they will suffer marginalization, vilification, humiliation and persecution from a successor, especially if from the opposition party, acts as an incentive to stay in power.<sup>213</sup> This fear is supported by events such as the extradition and prosecution of Alberto Fujimori of Peru and Augusto Pinochet of Chile.<sup>214</sup> Closer home, the extradition of Hissein Habre of Chad and Liberia's Charles Taylor has also reinforced incumbents' fears of their fate if they yield power. For these reasons, Fombad suggests that constitutions ought to guarantee former leaders a certain minimum level of personal protection against politically motivated persecution.<sup>215</sup> He further proposes that, while criminal immunity may not be appropriate, immunity from civil suits, administrative and executive actions taken during an incumbent's rule could be granted.<sup>216</sup> African constitutions that have so far provided for such qualified immunity include Article 31(3) of the Namibian Constitution and Article 43(3) of the Zambian Constitution.<sup>217</sup>

Notably though, the idea of outgoing presidents receiving legal immunity is admittedly controversial.<sup>218</sup> The benefits and privileges of constitutional immunity need

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<sup>212</sup> D Posner & D Young 'The institutionalization of political power in Africa' (2007) *Journal of Democracy* 135.

<sup>213</sup> Fombad (n 4 above) 23.

<sup>214</sup> T Ginsburg et al 'On the evasion of executive term limits' (2011) *William and Mary Law Review* 1865.

<sup>215</sup> Fombad (n 4 above) 23.

<sup>216</sup> Fombad (n 4 above) 23.

<sup>217</sup> Fombad (n 4 above) 24.

<sup>218</sup> Maltz (n 7 above) 140.

be carefully drafted in order not to shield incumbents who have utilized their powerful position to violate human rights. Moreover, because the use of this strategy is limited to civil suits only, leaders such as Yahya Jammeh of The Gambia, Omar Al-Bashir of Sudan or Robert Mugabe of Zimbabwe who have been accused of brutalities, corruption and poor records in the protection of human rights<sup>219</sup> might not be persuaded to retire peacefully due to their concerns about the overwhelming risks of stepping down.

#### 4.2.4 Generous retirement packages

Where civil society remains weak and not actively involved in the fight for rotation in office, scholars have suggested the option of incentivizing incumbents to leave office.<sup>220</sup> The incentives that have been suggested include not only well remunerated, prestigious international job positions but also generous retirement packages that assure incumbents of a reasonably comfortable standard of living.<sup>221</sup> In support of this, Botswana's Presidential (Pensions & Retirements Benefits) Act provides a retired president with a tax free pension, a private secretary, security guards, a fully equipped office, a furnished house, medical insurance amongst other entitlements.<sup>222</sup> Similarly, the Kenyan Presidential Retirements Benefits Act of 2003,<sup>223</sup> which is credited as amongst the reasons for retired president Daniel Arap Moi's acceptance to hand over power, entitles him to a monthly tax free pension, fuel allowance, free housing, security guards, office space and a supply of four vehicles.<sup>224</sup> Other countries with noteworthy provisions on gratuities and remuneration to be paid to retired presidents include South Africa's Remuneration of Public Office Bearers Act of 1998 and Nigeria's Remuneration of

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<sup>219</sup> J Norman 'The World's enduring dictators: Yahya Jammeh, Gambia' [http://www.cbsnews.com/8301-503543\\_162-20069027-503543.html](http://www.cbsnews.com/8301-503543_162-20069027-503543.html) (accessed 3 October 2012).

<sup>220</sup> Ginsburg (n 214 above) 1864.

<sup>221</sup> Fombad (n 4 above) 25.

<sup>222</sup> Fombad (n 4 above) 25.

<sup>223</sup> Act 11 of 2003 available at [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php) (accessed 3 October 2012).

<sup>224</sup> Upon the end of his tenure, President Mwai Kibaki is set to receive the same perks with an additional one-off gratuity payment of Kshs 50 Million. 'Kibaki to get Shs 50 Million gratuity' <http://www.jambonewspot.com/kibaki-to-get-sh50million-gratuity/> (accessed 30 September 2012).

Former Presidents and Heads of State (and Other Ancillary Matters) Decree No. 32 of 1999.

While the above economic benefits may have been successfully utilized to push for Kenya's Daniel Moi to finally relinquish power after 24 years in office, they may however be insufficient to entice all African presidents to retire. The utility of incentives heavily depends on the 'sweetness' of the inducements relative to the potential gains to remain in office.<sup>225</sup> For incumbents of resource-rich economies such as Equatorial Guinea which is among the largest oil producers in Africa, retirement packages are not likely to induce departure particularly if compared to the perks gained from corruption and shoddy procurement tenders while in power.<sup>226</sup> Furthermore, leaders who, due to their reputations lack prospects of being appointed by international organisations, foresee that relinquishing power would mean their loss of respect, income and influence, are likely not to relinquish power.<sup>227</sup> This mechanism may therefore also prove faulty in promoting compliance with presidential term limits.

#### **4.2.5 Increasing pressure from the international donor community**

Presidential term limits are a crucial instrument of democracy.<sup>228</sup> Because of their importance, term limits warrant robust international support and therefore, there is much that the international donor community can do to address non compliance.<sup>229</sup> Concerted efforts could go a long way in promoting compliance through the following ways. First, the donor community must further deepen the democratic norm of term limits by putting up a spirited fight in their defence.<sup>230</sup> Maltz criticizes the mild manner in which the donor community has so far reacted with little or no concern to the

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<sup>225</sup> Ginsburg (n 214 above) 1865.

<sup>226</sup> M de la Baume 'A French shift on Africa strips a dictator's son of his treasures' *The New York Times* [http://www.nytimes.com/2012/08/24/world/europe/for-obiangs-son-high-life-in-paris-is-over.html?\\_r=0](http://www.nytimes.com/2012/08/24/world/europe/for-obiangs-son-high-life-in-paris-is-over.html?_r=0); 'Equatorial Guinea profile' <http://www.bbc.co.uk/news/world-africa-13317174> (accessed 3 October 2012).

<sup>227</sup> Fombad (n 4 above) argues that while the AU is increasingly appointing former presidents to serve as mediators, it is difficult to see how leaders such as Paul Biya, Robert Mugabe or Omar Al- Bashir could, on their retirement, be used as mediators or guardians of democracy in the continent.

<sup>228</sup> Maltz (n 7 above) 141.

<sup>229</sup> Maltz (n 7 above) 141.

<sup>230</sup> Maltz (n 7 above) 138.

elimination or alteration of term limits.<sup>231</sup> Instead, he recommends that donor nations impress upon African presidents that term limits are a core component to democratic institutions. He further proposes that the donor community could use aid conditionality as a tool to enforce term limits.<sup>232</sup> Infact, he argues that term limits deserve greater donor priority than most other political reforms because they form a fundamental core to a healthy democratic functioning.<sup>233</sup>

Notably though, aid conditionality is not guaranteed to succeed in all African states. The ability of donors to impose their will often depends on the extent to which a country relies on foreign aid hence indicating the extent to which a nation is susceptible to donor pressure.<sup>234</sup> Countries that receive high levels of aid are more likely to adhere to the demands of the international community unlike their counterparts such as Libya, Equatorial Guinea and Gabon, who are significant oil exporters thus financially stable.<sup>235</sup> It may therefore be concluded that, like all the above strategies advocated for the enforcement of term limits, donor leverage only matters where there is heavy dependence on financial aid, but where the incumbent has sufficient resources to sustain his power, the donor community cannot do much to impress upon the incumbent to step down.

In summary, whereas the strategies suggested above could work, they may not always be readily available in all nations, particularly where there is no basic respect for parliament, no need for donor aid or where harassment of civil society still exists. It is in such instances that external actors need to adopt a stronger regional approach to enforce term limits.<sup>236</sup> In the following discussion, we explore the prospects of utilizing the African Commission, the AU and ECOWAS as alternative approaches to enhance the compliance of term limits in Africa.

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<sup>231</sup> Maltz illustrates this using the comments of the UK Development Minister, who declared rather mildly that President Museveni's effort to eliminate term limits, like other proposed changes to the constitution, was for Ugandans to decide. Maltz (n 7 above) 138.

<sup>232</sup> Maltz (n 7 above) 139.

<sup>233</sup> Maltz (n 7 above) 140.

<sup>234</sup> Posner & Young (n 212 above) 136.

<sup>235</sup> Posner & Young (n 212 above) 136.

<sup>236</sup> Vorrath (n 119 above).



### 4.3 The enforcement of presidential term limits through regional bodies

#### 4.3.1 The African Commission

The African Commission was established pursuant to Article 30 of the African Charter on Human and Peoples' Rights (the African Charter).<sup>237</sup> While the mandate of the Commission is provided for under Article 45 of the Charter, its detailed functioning is regulated by its Rules of Procedure.<sup>238</sup> Overall, the Commission's mandate is two- fold; protection and promotion of human and peoples' rights.<sup>239</sup> The protective mandate of the Commission mainly consists of entertaining and determining communications (complaints).<sup>240</sup> As argued by Viljoen, strictly speaking, only communications and on-site investigations fall under the protective mandate of the Commission, nevertheless, other mechanisms such as the adoption of resolutions can also be termed as aiming to 'protect' human rights.<sup>241</sup> There is therefore no watertight definition of what the Commission's protective mandate ought to include.

As regards the adoption of resolutions, Article 45(1)(b) of the African Charter empowers the Commission to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights.'<sup>242</sup> The Commission has over time stretched itself and progressively employed this provision in a more imaginative and productive way to issue concise, clearly articulate and adequately substantiated resolutions on a wide variety of issues.<sup>243</sup> These resolutions have been classified as thematic, administrative or country-specific.<sup>244</sup> As a result, resolutions of the Commission have evolved to be important normative tools that today inform states of their obligations whilst protecting human rights in Africa.<sup>245</sup> Country-specific resolutions for instance, have served a vital function particularly in instances where

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<sup>237</sup> C Heyns & M Killander *Compendium of key human rights documents of the African Union* (2010) 29.

<sup>238</sup> In May 2010, the Commission adopted new rules that are now in force. The 2010 Rules of Procedure now include provisions on the Commission's relationship with the African Court.

<sup>239</sup> R Murray *The African commission on human and peoples' rights and international law* (2000) 14.

<sup>240</sup> F Viljoen *International human rights law in Africa* (2007) 317.

<sup>241</sup> As above.

<sup>242</sup> 'Resolutions' in <http://www.achpr.org/resolutions/> (accessed 30 September 2012).

<sup>243</sup> Viljoen (n 240 above) 402.

<sup>244</sup> Resolutions (n 242 above).

<sup>245</sup> Viljoen (n 240 above) 402.



human rights continue to be violated in the absence of individual complaints against such states. In the past, resolutions have been adopted to address situations in states such as Uganda, Eritrea, Sudan, Ethiopia, The Gambia and Zimbabwe.<sup>246</sup> It is noteworthy that unlike the findings of the Commission on complaints, resolutions of the Commission do not require the Assembly's prior authorization before publication.<sup>247</sup> This is a progressive step particularly considering the likelihood of resistance that the resolutions would meet if they were to be scrutinized by heads of states first before publication. Resolutions of the Commission have in the past been used to reinforce calls made at global level by bodies such as the UN as was in the case of Sudan and Zimbabwe where much criticism of these nations had been streaming in from outside Africa.<sup>248</sup> The Commission's resolutions thus not only reinforced international calls but also drew much publicity on the on-going violations.

Considering that most state parties, in ratifying the African Charter without any reservation,<sup>249</sup> have thus agreed to accept the authority of the Commission in the protection of human rights, it may be argued that the Commission could adopt a general thematic resolution addressed to all African states indicating the Commission's position as regards compliance with presidential term limits. It is the author's view that due to the previous backlash of resistance that the Commission has faced from states such as Zimbabwe and Ethiopia upon adopting country-specific resolutions, it is advisable that the Commission adopt a general thematic resolution that cannot be interpreted as 'an assault on the sovereignty' of any particular state.<sup>250</sup> In the past, the Commission has adopted several thematic resolutions to expound on standards already set by the African Charter or to address emerging issues within the continent.<sup>251</sup> Thematic resolutions on areas such as HIV/AIDS, access to essential medicines, terrorism and the impact of

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<sup>246</sup> Viljoen (n 240 above) 403.

<sup>247</sup> Viljoen (n 240 above) 404.

<sup>248</sup> L Guma 'War of words in parliament over African Commission report' in <http://davidcoltart.com/2006/02/war-of-words-in-parliament-over-african-commission-report/> (accessed 30 September 2012).

<sup>249</sup> With the exception of Zambia and Egypt which entered reservations; Murray (n 239 above) 10.

<sup>250</sup> Viljoen (n 240 above) 403.

<sup>251</sup> See Resolution on the Right to Recourse and Fair Trial adopted at 11<sup>th</sup> Session of the Commission in Tunisia expounding on Article 7 of the African Charter.

extractive industries have been adopted.<sup>252</sup> In the same light, in cognizance of the important progress that has been made internationally as regards democracy, electoral processes, leadership and good governance, the Commission has not shied away from adopting resolutions towards these themes. As a result, the Commission has in the past adopted resolutions commending African governments on the organisation of successful elections<sup>253</sup> and additionally called upon governments to recognise the existence of multi-party democracy, guarantee independence of electoral institutions, respect the rule of law and put the general interest of their people in the forefront.<sup>254</sup>

It is argued that adherence to presidential term limits constitutes an important dimension in the prevention of conflicts in Africa, promotes principles of good governance and deepens norms such as accountability, transparency and the rule of law, all of which the Commission has in its previous resolutions attested to. For instance, in its resolution 213 adopted at the 51<sup>st</sup> Ordinary Session in May 2012,<sup>255</sup> the Commission invoked the objectives of the AU as stipulated in its Constitutive Act to call on the AU and the international community to ensure that democratic governance is respected in the continent. Indeed, this is sufficient evidence that the Commission is committed towards the principles of good governance and great leadership and if persuaded, can adopt a resolution that takes a clear and unequivocal stance that no African state should be able to deprive its people of an alternative leader and no incumbent should stay in power beyond his legally recognised tenure.

Moreover, the fact that African nations have in the past taken issue with some of the Commission's resolutions and vehemently resisted their publication underscores the importance of the Commission's resolutions despite their non-binding nature.<sup>256</sup> If wisely utilized, a resolution on presidential term limits could be far reaching and would

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<sup>252</sup> Heyns & Killander (n 237 above) 361, 406, 421 and 423 respectively.

<sup>253</sup> Resolution on Electoral Process and Participatory Governance (1996) in Heyns & Killander (n 237 above).

<sup>254</sup> Resolution on Elections in Africa (2008) in Heyns & Killander (n 237 above) 415.

<sup>255</sup> '213: Resolution on the Unconstitutional Change of Governments' The African Commission 51<sup>st</sup> Ordinary Session held from 18 April - 2 May 2012 in <http://www.achpr.org/sessions/51st/resolutions/213/> (accessed 3 October 2012).

<sup>256</sup> Interview with Prof EVO Dankwa, former Chairperson of the African Commission, on 3 October 2012 University of Ghana at 1630hrs.

remind incumbents that actors beyond their boundaries are watching and will hold them to account. This resolution could be strengthened further if the AU's organs such as the Pan-African Parliament, The AU Commission, the Permanent Representatives Committee and Peace and Security Council similarly reaffirm their position to support presidential term limits as discussed below.

#### 4.3.2 The African Union

The Constitutive Act establishing the AU was adopted in July 2000 and entered into force in May 2001. The AU subsequently replaced the defunct Organisation of African Unity (OAU) that had overall, been successful in achieving only one objective; freeing Africa from the vestiges of colonialism.<sup>257</sup> Over time however, the OAU had proved weak, unresponsive and incapable of addressing contemporary African problems, especially human rights abuses.<sup>258</sup> Whilst some scholars welcomed the formation of the AU and its agenda on democracy and human rights, there are those who remain skeptical and see its instruments as merely 'decorative blueprint' drawn up by the same geriatric dictators to act as a smokescreen against international criticism and a convenient mask to disguise their despotic practices.<sup>259</sup> Alternatively, there are those who applaud the AU for its recognition that democracy and good governance are prerequisites for successful economic stability of the polity. The starting point therefore is to acknowledge that whilst the AU has made great strides in introducing instruments that enshrine democracy on paper, there still exist a sizeable number of authoritarian, monarchical and pseudo-democratic regimes, all which form part of the AU. Nevertheless, this discussion will conclude that the organs of the AU can still make impressionable steps towards the enforcement of term limits just as they have already made in the fight against unconstitutional changes of government.

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<sup>257</sup> B Ankomah '10 years of the AU: what has it achieved?' (July 2012 issue) *NewAfrican Magazine* 4.

<sup>258</sup> CM Fombad 'The African Union, Democracy and Good Governance' in H Melber *AU, NEPAD and the APRM Democratisation efforts explored* (2006) 9.

<sup>259</sup> As above, 10.

To begin with, the framework for the promotion of democracy in the AU is primarily laid down in its Constitutive Act.<sup>260</sup> More recently, the AU has adopted the African Charter on Democracy, Elections and Good Governance (the Democracy Charter) that espouses and further develops ideals and principles of good governance desirable in Africa.<sup>261</sup> In its objectives as spelt out under Articles 3(g) and (h) of the Constitutive Act, the AU emphasizes the important place that is accorded to democracy and good governance by the regional body. Additionally, Article 4(m) of the Act espouses amongst the AU's principles the respect for human rights, rule of law and good governance. These principles and objectives rightly reflect the position that has been taken not only by the AU but also by other regional bodies worldwide which have similarly recognised the worth of committing to such principles.<sup>262</sup> Moreover, Articles 3 and 4 of the Constitutive Act not only emphasize the genuine importance placed on democratic and good leadership but also reflect common values that the regional body expects all African governments to adhere to. Of relevance to this discussion are three organs of the AU namely; the Assembly of Heads of State, the Pan- African Parliament and the Peace and Security Council which may be considered as vital players in the crucial role of enforcing term limits.

First, the Assembly of the Union is established under Article 6 of the Constitutive Act as the body responsible for determining the common policies of the Union, monitoring implementation of policies and ensuring compliance by all member states. Where member states fail to comply with its decisions and policies, there is a possibility of sanctions. In the past, where states have had unconstitutional changes of government, Rule 37(4) of the AU Assembly Rules of Procedure has provided for an elaborate procedure that the AU Chairperson ought to take to condemn the coup and urge for speedy return of constitutional order.<sup>263</sup> In exercising this right, the AU has in the past

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<sup>260</sup> Fombad (n 258 above) 19.

<sup>261</sup> The African Charter on Democracy, Elections and Good Governance came into force on 15<sup>th</sup> February 2012.

<sup>262</sup> Fombad (n 258 above) 20 argues that similar clauses have begun to appear in the constituent instruments of international organisations such as the Organization of the American States, the European Union and the Commonwealth.

<sup>263</sup> Fombad (n 258 above) 26.

shown its firm stance as regards undemocratic changes in government by suspending Guinea due to the military take over a day after the death of President Lansana Conte.<sup>264</sup> Similarly, in March and April 2012, the AU suspended Mali and Guinea-Bissau respectively from the bloc following the coups d'état that saw the presidents of the two countries ousted from power.<sup>265</sup> This is evidence that the AU places notable emphasis on entrenching in the continent a political culture of change of power based on popular participation and democracy. The AU has in the recent past also shown great involvement in the affairs of its member states as regards matters of governance as seen in the AU emissaries sent to Ivory Coast and more recently to Senegal amid electoral tension.<sup>266</sup> In the same light, the AU ought to utilize this vibrancy to condemn incumbents who fail to relinquish power willingly upon termination of their tenure.

The AU may enforce term limits using the Assembly of Heads of States which could either issue on its own motion, a declaration on the enforcement of term limits in the continent or alternatively, adopt the resolution already passed by the African Commission on the same matter and add its voice to the call upon incumbents to yield power. Critics may argue that asking the Assembly of Heads of State to adopt a resolution on term limits while the Assembly is composed of the very incumbents whom the resolution would be targeting is an impossible task. Prof Dankwa however disagrees.<sup>267</sup> He is of the view that such pessimistic arguments are based on an assumption that incumbents will resist the adoption of the declaration yet heads of states have in the past managed to surpass the expectations of many and adopted precedent setting conventions in Africa. Indeed, he gives the example of the 2003 Maputo Protocol on the Rights of Women<sup>268</sup> which was adopted by a male dominated Assembly of Heads of States that was generally associated with patriarchy and

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<sup>264</sup> E Harsch 'Africa defends democratic rule' <http://www.un.org/en/africarenewal/vol24no1/defending-democratic-rule.html> (accessed 3 October 2012).

<sup>265</sup> 'African Union suspends Guinea Bissau after coup' <http://www.modernghana.com/news/389549/1/african-union-suspends-guinea-bissau-after-coup.html> (accessed 30 September 2012).

<sup>266</sup> 'Senegal: Former Nigerian leader Obasanjo in peace bid' <http://www.bbc.co.uk/news/world-africa-17124850> (accessed 3 October 2012).

<sup>267</sup> Interview with Prof Dankwa (n 256 above).

<sup>268</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

chauvinism and which was in all likelihood expected to resist concepts such as polygamy. Yet, state parties overcame this assumption and enacted the Protocol that today guarantees women equality and protection against discrimination. It is therefore reasonable to expect for the same heads of states to adopt a declaration that would encourage a culture of adherence to presidential term limits as well as impress upon states that have not enacted term limits to do so.

Alternatively, the AU can further develop the culture of adhering to term limits vide the Pan- African Parliament (PAP). PAP is established under Article 17 of the AU Constitutive Act. Article 3 of the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament provides the objectives of PAP as ‘encouraging good governance, transparency, accountability and promoting the principles of human rights and democracy in Africa.’ PAP comprises of five members of parliament from the national parliament of each member state and an allowance is made for states such as Libya which has no parliament.<sup>269</sup> Given that PAP is vested with powers to examine or express an opinion on any matter on its own initiative, PAP may be considered a viable organ to make recommendations on the enforcement of term limits as part of its objectives to consolidate a culture of democracy in Africa. Indeed, this step would draw the attention of the continent to incumbents who refuse to yield power willingly. Moreover, since PAP’s composition is reflective of the diverse political opinions in the different national parliaments,<sup>270</sup> there is a lower likelihood of political influence from the incumbents. This means that PAP’s composition increases the probability of harmonizing tenure policies of different nations with much more ease.

#### **4.3.3 Utilizing ECOWAS to enforce term limits**

At its inception, the objective of ECOWAS, just like most regional economic bodies, was economic integration, acceleration of social development and the improvement of the

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<sup>269</sup> Article 4(2) of the Protocol establishing PAP.

<sup>270</sup> Article 4(3) of the Protocol establishing PAP.

standards of living in the bloc.<sup>271</sup> With time however, principles such as the protection of human rights, consolidation of democracy and the rule of law have gradually gained importance alongside the initial aim of economic integration. By 2005, the ECOWAS Community Court of Justice had extended its jurisdiction to matters regarding human rights violations in member states.<sup>272</sup> Additionally, with the realization of the importance of principles such as popular participation, accession to power through free and fair elections and strict adherence to democratic values, ECOWAS consequently adopted the Protocol on Democracy and Good Governance which entered into force in 2008.<sup>273</sup> The Protocol contains eight constitutional convergence principles shared by all 15 member states including independence of the judiciary, zero tolerance of power obtained by unconstitutional means and strengthening of national parliaments.<sup>274</sup> The motivation to enact this Protocol was based on: first, the history of the region as one of the most volatile and unstable belts of Africa,<sup>275</sup> second, the realization that the proliferation of conflicts constituted a threat to peace and security in the region and third, that conflicts undermined the very efforts of ECOWAS to improve economic integration.<sup>276</sup> Against this background, the Protocol clearly prohibits unconstitutional changes in governments and goes further to stipulate the sanctions that such acts would warrant.

So far, ECOWAS has managed, albeit with minor difficulties such as those in Mali and Guinea Bissau, to maintain relative peace and stability. ECOWAS has been extremely vocal where unconstitutional changes in government have taken place in the region. Indeed, its condemnation of Mali and Guinea Bissau in 2012 follows a precedent set by the body when it had in the past actively involved itself in the affairs of its members with respect to democracy. In Togo, ECOWAS vehemently denounced the imposition of Faure Gnassingbe as president following the death of his father and

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<sup>271</sup> Viljoen (n 240 above) 497.

<sup>272</sup> S Ebobrah & A Tanoh *Compendium of African sub-regional human rights documents* (2010) 200.

<sup>273</sup> As above, 220.

<sup>274</sup> Article 1 of the Protocol on Democracy and Good Governance

<sup>275</sup> 'The Politics of succession in West Africa democracies' The Council for the Development of Social Science Research in Africa (CODESRIA) and the Open Society Initiative for West Africa (OSIWA) Advanced Policy and Research Dialogue in Benin 24 and 25 September, 2007.

<sup>276</sup> Viljoen (n 240 above) 514.



exerted pressure that led to the holding of elections.<sup>277</sup> Similarly, in March 2012, amidst the chaos and protests in Senegal due to Abdoulaye Wade's attempts to run for a third term, ECOWAS sent an envoy led by Olusegun Obasanjo to negotiate with the incumbent on how best to resolve the matter amicably.<sup>278</sup> Where circumstances have called for it, ECOWAS has intervened in its member states such as Sierra Leone and Liberia and managed to preserve a semblance of order and prevent the states from total annihilation.<sup>279</sup> All these events suggest the existence of political will to apply the Protocol towards enforcing commitment to democratic governance.

In the same light, ECOWAS should utilize these principles and expand this Protocol to impress upon its 15 member states the following: First, that all member states ought to adopt term limits and secondly, encourage adherence to term limits in states where leaders have continued to hold power for more than two terms despite constitutional limits. Genuine democratic consolidation and advanced economic integration of ECOWAS can only be fully established where ECOWAS realizes the value of leaders ruling for a limited number of years. The commitment made by this body so far has been impressive and the extension of the Protocol to include term limits could go a long way in ensuring the much needed stability in the West African bloc.

#### **4.4 Lessons from other nations- a case study of Colombia**

Between 1970 and 1990, most Latin American nations were renowned for two things: Drug cartels and military coup d'états, in fact, nations such as Argentina, Brazil, Chile, Mexico, Peru and Nicaragua all experienced coups d'état at one point.<sup>280</sup> Colombia has so far remained among the few nations with least military rule having experienced its

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<sup>277</sup> Viljoen (n 240 above) 514.

<sup>278</sup> 'Senegal: Former Nigeria leader Obasanjo in peace bid' <http://www.bbc.co.uk/news/world-africa-17124850> (accessed 3 October 2012).

<sup>279</sup> GA Sarpong 'ECOWAS, statehood and intervention: Reflections on the Liberian crisis' *University of Ghana Law Journal* (1996-1999) 121.

<sup>280</sup> 'List of successful coups d'état' [http://en.wikipedia.org/wiki/List\\_of\\_successful\\_coups\\_d'%C3%A9tat](http://en.wikipedia.org/wiki/List_of_successful_coups_d'%C3%A9tat) (accessed 3 October 2012).



sole coup in 1953 when Gustavo Rojas Pinilla overthrew Laureano Gome.<sup>281</sup> Today, the region's democratic record has slightly improved and the concern is no longer coups d'état but more on the quality of democracy. As regards the enforcement of presidential term limits, the region has had a mixed record. There are those presidents who have successfully abolished term limits in Venezuela, Ecuador, Nicaragua and Bolivia,<sup>282</sup> while others such as Manuel Zelaya of Honduras have failed in the attempt to extend their tenures. In the midst of all this is Colombia, whose Constitutional Court has so far remained an impressive pillar of democracy with a remarkable record on various issues. The Court has over the years gained fame for its decisions in matters such as euthanasia, abortion and the right of same sex couples.<sup>283</sup>

In 2010, the then president, Alvaro Uribe attempted to run for a third term in office. Uribe had been first elected in 2002 and spent his first term restoring order to a nation that had been devastated by drug cartels and paramilitary activities.<sup>284</sup> The populace appreciated his efforts and contrary to the constitutionally provided one term, he was allowed to run again as a result of an amendment to the 1991 Constitution.<sup>285</sup> Indeed, Uribe won the hearts of many investors with his policies and restoration of security. He spurred the fastest economic growth that Colombia had experienced in 30 years and by 2010, his popularity still ranked above 70% and therefore, he sought a third term arguing that he needed to continue the progressive trend that he had set in the past eight years and rid the nation completely of the guerrilla paramilitary groups. In order to amend the Constitution to allow him to vie for a third term, a national referendum needed to be held with the authority of the Constitutional Court. The Court's answer was a resounding no. The Court's President, Mauricio Gonzalez, justified the decision arguing that the president's third term endangered institutional checks and balances as

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<sup>281</sup> As above.

<sup>282</sup> 'Uribe's legacy' <http://www.thedailybeast.com/newsweek/2009/12/10/uribe-s-legacy.html> (accessed 3 October 2012).

<sup>283</sup> 'Constitutional Court of Colombia' <http://www.english.corteconstitucional.gov.co/> (accessed 3 October 2012).

<sup>284</sup> N Drost 'Colombia gets ready for life after Uribe' <http://www.time.com/time/world/article/0,8599,1968848,00.html>(accessed 3 October 2012).

<sup>285</sup> As above.

protected in the Constitution.<sup>286</sup> What is even more impressive is the fact that, during Uribe's second term, the incumbent had not only strengthened his hand in the National Electoral Council, but also the Central Bank and the Supreme Court and would have easily won the referendum if the Court had allowed it to happen.<sup>287</sup>

The above events demonstrate the fundamental role that a national court can play in the enforcement of term limits. The Court's decision was not influenced by the loyalty of the judges to the President despite the fact that three out of the nine judges are nominated by the President.<sup>288</sup> Moreover, while the Court recognised Uribe's stellar record during his tenure, it also acknowledged that Colombia has a life after Uribe and there were many viable candidates to take over the legacy of 'Uribismo' as has now become commonly known. The Court recognised that if allowed, this could encourage monopoly of power by one leader and hence erode the principles of democracy.<sup>289</sup>

Like most African nations, Colombia offers a classic example of a developing country that suffers from poorly functioning political institutions and whose presidents in the past have dominated policy making processes.<sup>290</sup> African nations therefore ought to learn important lessons from this. First, that appointment by the President does not mean a compromise of the judge's integrity and professionalism. Second, that judges, when called upon to decide on matters of presidential tenure, must always put the interest of the nation first as opposed to those of the incumbent. Third, African leaders must learn to humbly respect the decisions of their judiciaries as Uribe did and lastly, Africa ought to realize that even good leaders such as Uribe must end their tenure despite their remarkable records in restoring peace and enhancing economic growth. Geriatric leaders such as Yoweri Museveni and Robert Mugabe still utilize this reason as

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<sup>286</sup> Drost (n 284 above).

<sup>287</sup> Drost (n 284 above).

<sup>288</sup> The Court is composed of 9 magistrates, elected by the Senate of Colombia. The President of Colombia, the Supreme Court and the Council of State of Colombia each nominate three potential magistrates. See J Glade 'Constitutional Court elects new president' <http://www.colombiareports.com/colombia-news/news/14247-constitutional-court-elects-new-president-and-vice-president.html>. (accessed 4 October 2012).

<sup>289</sup> Drost (n 284 above).

<sup>290</sup> D Landau 'Political institutions and judicial role in comparative constitutional law' (2010) *Harvard International Law Journal* 321.

a valid excuse for their stay in power. Leaders such as Paul Kagame and Joseph Kabila whose second terms are almost ending ought to also realize that while Rwanda and DRC are fragile democracies that have emerged from civil strife and are in need of strong focused leaders, they must willingly yield power and allow other prospective candidates to try their hand at leadership. Bold, progressive African judiciaries will certainly help avert the crisis seen in Burkina Faso and Senegal.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Conclusions

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.<sup>291</sup>

The need for presidential term limits in Africa is dire. Given the continent's history of one-party states, long line of dictators and leaders who often declared themselves 'president for life', there is an extreme urgency for the continent to instill institutional designs and mechanisms that not only promote democratic values, but also ensure timely departure of incumbents. The reality however is that, African politics to date is filled with life long career politicians who have consolidated unimaginable and frightening levels of power. These leaders constantly by-pass their parliaments and judiciaries, two organs which have so far remained in the shadows of the executive. In a continent where there is extremely slow growth of a culture of political accountability, presidential term limits form a fundamental element in the democratic polity. Term limits foster constitutionalism and accountability. They promote values such as good governance and the rule of law. They ensure that leaders are not tempted to become over ambitious, they prevent arbitrary rule and avert civil strife ignited by a frustrated electorate. As seen in Ghana and Kenya, rotation in office creates meaningful opportunity for political competition and enhances chances of success for opposition parties. Term limits furthermore increase the probability of a greater variety of leaders with new ideologies and fresh perspectives.

Having said that, the trend established in the past decade has increasingly shown that African leaders are willing to reverse the gains made in the 90's at the expense of their electorate. A certain portion of African leaders have become blinded by their quest to gratify their insatiable thirst for power to an extent of compromising on democratic principles by altering their constitutions to override provisions on term limits. They have managed to undermine and erode the concept of term limits by using the two

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<sup>291</sup> Fombad (n 4 above) 28.

alternative institutions that ought to check on executive power, namely; the judiciary and the legislature. A close examination of the events in Burkina Faso and Senegal under chapter three of this research reveals that incumbents have managed to skillfully exploit weak judicial institutions mainly composed of presidential appointees. Similarly, the abolition of term limits in Chad and Cameroon through the use of the legislature indicates the aggressive and ambitious extents that some leaders have gone to exploit the dominance of their ruling parties in parliament for their personal advantage.

As a result of these handicaps, leaders such as the late Lansana Conte of Guinea, the late Gnassingbe Eyadama of Togo, Zine El Abidine Ben Ali of Tunisia, the late Omar Bongo of Gabon, Yoweri Museveni of Uganda, Idriss Deby of Chad, Paul Biya of Cameroon, Abdelaziz Bouteflika of Algeria, Mamadou Tandja of Niger and Ismail Omar Guelleh of Djibouti have managed to abolish term limits from their constitutions in the time span between 2000-2012. Additionally, leaders such as Olusegun Obasanjo, Frederick Chiluba, Bakili Muluzi and Abdoulaye Wade have all unsuccessfully attempted to extend their tenure in office upon the determination of their mandated tenure. This worrying trend has therefore led to the question whether Africa is reverting back to autocratic rule as witnessed in the early 80's. What does the future hold for term limits?

## **5.2 Recommendations**

The future of presidential term limits in Africa will depend on a combination of factors. First, adherence to term limits will require strong and independent judiciaries that are able to unchain themselves from the control of the executive. Judiciaries must be able to exercise their discretion and strict professionalism as independent arms of governments in order to enforce term limits. The existence of an independent judiciary capable of controlling and restraining executive abuses forms an essential element of constitutionalism. Holding government accountable entails rejecting attempts by an incumbent to extend their tenure and when called upon to determine such matters, the judiciary ought to, without fail, secure all democratic principles for the nation's

citizenry. Towards this end, it is recommended that African judiciaries draw lessons from their counterparts such as the Colombia Constitutional Court which has so far managed to effectively reduce government impunity and reject calls to extend the tenure of Alvaro Uribe, despite his sterling performance and despite a number of the Court judges being presidential nominees.

Secondly, adherence to term limits in Africa will depend on the presence of enlightened civil society and strong opposition parties that are able to resist the attempts by an incumbent to overstay in power. A great lesson is drawn from the case of Senegal in 2012 where organisations such as M23 and RADDHO continuously resisted Abdoulaye Wade's attempts to extend his tenure. Without a doubt, public outcry by the civil society can only be effective if accompanied by strong external pressure from sub-regional bodies, the international community and most importantly, the African Union.

Third, durable and stable democracies in Africa will require greater effort on the part of the international community which must insist on peaceful change of power in African nations. The international community must take a more active role as opposed to the mild criticisms that have been witnessed in the past. Where the international donor community may have little or no effect, particularly in economically stable or resource rich nations such as Equatorial Guinea, Gabon and Libya, sub-regional and regional organisations, more particularly ECOWAS and the AU must in no uncertain terms add their voice to the condemnation of geriatric leaders who resist peaceful handover of power. Undoubtedly, the attempt to enforce term limits through regional bodies has to start from the African Commission. It is therefore recommended that the African Commission adopt a general thematic resolution encouraging African nations that have not adopted term limits to do so. At the same time, the resolution must, in clear, unambiguous and firm terms demand that member states undertake, individually and collectively, to take every appropriate step to prohibit the amendment or abolition of term limits in their respective territories.

In addition to this resolution, it is further recommended that the AU, through the Assembly of Heads of State, the Peace and Security Council and the Pan-African Parliament, strengthen its commitment to democratic principles by undertaking to protect, preserve and defend term limits. These organs must adopt policies and declarations geared towards entrenching the concept of term limits in Africa. The AU has so far taken credible steps in thwarting extralegal takeovers in countries such as Togo, Mali and Guinea Bissau which is a positive step towards furthering democratic principles. Furthermore, the AU has in the past adopted instruments such as the African Charter on Democracy, Elections and Good Governance which is geared towards cultivating a culture of good governance and the rule of law in Africa. In the same scope, the AU could also expand its instruments and push for the peaceful stepping down of geriatric leaders such as Robert Mugabe, Yoweri Museveni, Paul Biya, Isaias Afwerki and many more. Critics who doubt the viability of the AU to implement this concept ought to be reminded that the AU has in the past, amidst doubts, adopted the Maputo Protocol on the Rights of Women in Africa at a time when there was no female president in Africa and the Assembly of Heads of States was perceived as propagating the stereotype that the African male is patriarchal, chauvinist and incapable of granting equality to both sexes.

Lastly, in the wake of a sub-region that has in the past gained notoriety for coups d'état and military rule, it is recommended that West Africa's ECOWAS further extend its frontiers in democratic principles beyond unconstitutional changes in government and also demand for political reforms aimed at rotation in office. It is so far commendable that ECOWAS has enshrined the Protocol on Democracy and Good governance, a progressive step in instilling a culture of transparency, rule of law and good leadership. Notably, though, the urgency of tenure reforms in this region is underscored by the growing discontent and protests in nations such as Niger, Burkina Faso and Senegal. The bloc's transition from coups d'états in the 80's to electoral pluralism in the 90's is commendable. However, failure to adhere to term limits in some of the bloc's nations continues to threaten these gains. Certainly, the current record held by Teodoro Nguema Obiang of Equatorial Guinea as the longest serving African

president is not worth boasting about. In the words of Bertrand Russell,<sup>292</sup> we must not forget that power is sweet, it is a drug, the desire for which increases with a habit. The use of the African Commission, the AU and ECOWAS might as well be the axe that Africa needs to curb this unappeasable quest by incumbents to hang onto power. It is a starting point.

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<sup>292</sup> B Russel (1872-1970) Saturday Review 1951 in  
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