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1. Constitutional protections of electoral democracy in Africa:
a review of key challenges and prospects

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1. Constitutional protections of electoral democracy in Africa: a review of key challenges and prospects



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Introduction

In 2015 several African countries continued to face challenges in the quest to consolidate their respective constitutional democracies. In Burundi, President Pierre Nkurunziza successfully defied constitutional term limits (Kitonga 2015). In Kenya, the opposition Coalition for Reforms and Democracy (CORD) attempted to address perceived imbalances in the management of the country's elections through a popular constitutional amendment (Simiyu 2016). Meanwhile, in Zambia, the ruling Patriotic Front party ushered in a new Constitution designed to incentivize national coalition-building through majoritarian presidential elections.

These three examples are instances of key recent developments that have affected several African electoral democracies over the last two decades: (a) how to limit the allure of personalistic life presidencies; (b) how to deal with the challenge of competitive politics in an environment where ethnicity continues to be a key organizing principle of politics; and (c) how to enhance the process of democratic consolidation by institutionalizing the principle of popular sovereignty.

Exploring these questions is important for three main reasons. First, despite positive trends in democratic consolidation in sub-Saharan Africa (Posner and Young 2007), significant autocratic pockets remain in the region (Diamond 2015). This phenomenon continues to pose a serious challenge to continued democratic consolidation via negative neighbourhood effects. The entrenchment of democratic norms such as term limits, civilian control over the military, and free and fair elections, among others, is an ongoing effort, the success of which partly depends on having sufficient regional democratic density (Pevehouse 2002).

Second, while the institutionalization of politics is gaining traction in the region (Opalo 2012; Posner and Young 2007), emerging challenges suggest that this process cannot be taken for granted. Changes in the structure of global geopolitics, the increasing securitization of interstate relations and domestic politics, and declining economic fortunes mean that proponents of institutionalized democratic politics do not always have willing allies on the global stage (Colaresi 2014).

Third, after more than two decades of democratic experimentation, some African countries are now in a position to redesign their constitutional electoral democracies with the experiences of the past two decades in mind. Such constitutional changes hold considerable promise since they are home-grown, rather than adaptations of models from elsewhere. Constitutional orders tend to be more stable—and therefore self-enforcing—when they reflect the existing balance of power in society (Greif and Laitin 2004; North and Weingast 1989). For example, in order to incentivize cross-ethnic alliances at the national level and boost the legitimacy of elected leaders, the vast majority of African countries with presidential systems have adopted majoritarian rules for presidential elections. Some countries have also taken the step of entrenching the principle of popular sovereignty in their constitutions.

This chapter examines how these dynamics affected constitutional events in Burundi, Kenya and Zambia in 2015. In Burundi, President Pierre Nkurunziza successfully managed to stay in power despite significant domestic and international opposition to his decision to violate term limits. He was able to achieve this partially because two of his counterparts in the region—Paul Kagame of Rwanda and Yoweri Museveni of Uganda—had also successfully violated term limits or were planning to do so. In addition, Burundi is a significant contributor of troops to the African Union (AU) peacekeeping mission in Somalia, which gave it significant leverage with respect to the wider international community. The lack of regional and broader international support meant that the spirited domestic opposition to Nkurunziza, which included a brief coup, came to naught. As a result, the norm of term limits faces a serious challenge not only in East Africa, but also in the wider Central African region.

Since constitutional amendments are inevitable in the process of democratic consolidation—especially as it applies to electoral laws—Kenya offers important lessons on such processes. The Kenyan Constitution provides for popular initiatives to amend it via extra-parliamentary means. But while this provision preserves the popular basis of constitutional electoral democracy, it also risks being hijacked by well-organized political interests and groups in a manner that may threaten constitutional stability and overall institutional

development. The Kenyan case provides a cautionary tale of the risks posed by popular amendment initiatives. If left unchecked, populist politicians can exploit popular amendment provisions—with significant negative consequences for state institutions, fiscal stability and general democratic stability.

The Zambian case offers an interesting example of an attempt to stabilize and legitimize presidential tenures through a majoritarian constitutional requirement. Over the last five elections Zambia's first-past-the-post (FPTP) system has ensured that its presidents won with the support of very small proportions of the electorate (Opalo 2012; Cheeseman and Hinfelaar 2008). In 2001 Levy Mwanawasa garnered 29.2 per cent of the vote, or a mere 19.8 per cent of registered voters. Similarly, in 2008 Rupiah Banda won 40.6 per cent of the vote on a turnout of 34.5 per cent (his supporters thus comprising 18.4 per cent of registered voters). In 2011 Michael Sata was elected with 42.8 per cent of the vote, which comprised a mere 23.1 per cent of registered voters in Zambia. Most recently, Edgar Lungu was elected president in early 2015 with 48.3 per cent of the vote, but with a paltry turnout of 32.4 per cent (his supporters representing just 15.6 per cent of registered voters).¹ Realizing the need to boost the legitimacy of the winners of presidential elections, Zambia sought to incentivize presidents to seek their mandate from a broader segment of the electorate through a constitutional change that introduced a majoritarian requirement.

Curbing autocracy: democratic constitutionalism and term limits in Africa

This section addresses the importance of constitutional protections of term limits with a focus on the case of Burundi in 2015. President Pierre Nkurunziza's successful extension of his rule in 2015 illustrates the wider threat to presidential term limits in sub-Saharan Africa. Indeed, presidents who attempt to extend their stay in office are usually successful. Since 1990, 80 per cent of presidents who have attempted to circumvent constitutional limits to their tenure have succeeded.²

Regular change of leadership is a critical component of democratic government (Weingast 1997; Maltz 2007). At the same time, competitive democratic elections marked by a non-trivial element of uncertainty over the outcome are crucial both for keeping elected officials responsive to voters' needs (Dropp and Peskowitz 2012) and ensuring continued support for democracy as a normatively preferable form of government (Przeworski 2005; Fearon 2011). Systems without presidential term limits go against these defining features of responsive constitutional democratic government for two main reasons.

First, by virtue of their being in office, incumbent presidents typically have enormous advantages relative to their challengers. On account of their extensive executive prerogatives, they control the implementation of budgets and laws, and can manipulate them to meet their specific electoral objectives. The phenomenon of political budget cycles, in which incumbents increase government spending close to elections, is well documented in Africa (Block 2002). A context of limited horizontal accountability—due to weak legislatures—accentuates these advantages, making incumbent presidents virtually unbeatable. This is the case in many sub-Saharan African states (Opalo 2014; Barkan 2009), and is the main reason why constitutional provisions for term limits are so vital for the continued consolidation of competitive electoral democracy in the region.

For example, since 1990 a total of 294 elections in which the chief executive position was contested have been held in Africa. Leadership turnover occurred in less than one-quarter of these contests. The vast majority of these cases were elections in which presidents were either term limited or otherwise unable to run and therefore did not contest elections. Incumbent African presidents seldom lose when they contest elections. Over the same period, sitting African presidents lost elections in only eight instances—Kenneth Kaunda of Zambia (1991), Aristides Pereira of Cape Verde (1991), Mathiu Kerekou of Benin (1991), Nicephore Soglo of Benin (1996), Rupiah Banda of Zambia (2011), Abdoulaye Wade of Senegal (2012), Joyce Banda of Malawi (2014) and Goodluck Jonathan of Nigeria (2015).

This suggests that term limits not only enable leadership transitions, but also increase the odds of opposition parties winning elections. Thus, if implemented, term limits hold the promise of deepening constitutional electoral democracy in Africa. Democratic theory suggests that the consolidation of electoral democracy is more likely to occur if opposition parties and politicians believe they have a chance of winning elections (Przeworski 2005).

Second, the lack of term limits increases the odds that power will be concentrated in the hands of one individual (or a small, tightly knit circle). Yet the essence of democracy is the dispersal and limitation of power via constitutional checks and balances. The longer an individual serves as president, the more likely interest groups are to cease investing in institutions and instead focus on the individual holding power. In the long run, this leads to institutional decay (Maltz 2007). Term limits therefore serve the important role of ensuring that power never rests in the hands of a few individuals for too long, thereby incentivizing investment in institutions. Indeed, three-quarters of Africans (on average) support constitutional term limits for executive office holders (Dulani 2015).

The case of Burundi illustrates the challenges of introducing constitutional term limits in sub-Saharan Africa, including weak judicial systems, insufficient international support for democratic principles, and incumbents' proclivity to use political violence as a tool of control. On paper, President Nkurunziza's victory against the Constitution seemed improbable. Burundi's post-conflict Constitution (2005) provided a robust array of checks against such an eventuality.³ Due to the ethnic character of previous conflicts in Burundi (Lemarchand 1996), the Constitution explicitly sought to limit the power of any single individual or ethnic group. Article 164 required the National Assembly to have a 60–40 split between the Hutu majority (85 per cent) and the Tutsi minority (14 per cent), and the Senate to be shared 50–50. Article 300 significantly raised the hurdle for constitutional amendments—supermajorities of 80 per cent in the National Assembly and two-thirds in the Senate. Article 257 required a 50–50 Hutu–Tutsi split in the military.

Nkurunziza was able to run roughshod over these institutional checks, but not without a fight. First, he failed to pass a constitutional amendment in the National Assembly that would have allowed him to run for a third term. Second, he was unable to obtain a favourable ruling on whether he could run for a successive third term from the Constitutional Court—even though it was composed of his own appointees. The court later reversed its decision under intense pressure, but by this time the public already knew the nature of its initial ruling (Nduwimana 2015). Third, the military's post-conflict reforms helped motivate the armed forces to step in and launch a coup to forcefully remove Nkurunziza from power. That Nkurunziza survived all these institutional and extra-constitutional checks on his power is a testament to the difficult challenges faced by constitutional democracies in Africa.

What might the drafters of Burundi's Constitution have done differently? Two important lessons are apparent. First, the drafters ought to have avoided any ambiguity over the question of what constitutes a full term in office; Nkurunziza exploited this uncertainty in court. Article 96 of the Constitution set the term limits (to five years, renewable once) and specified that the president must be elected via universal suffrage. However, because the country was just emerging from conflict, Nkurunziza was elected by the legislature under article 302, which was explicit about the special circumstances of the election. But these circumstances did not mean that his first five years in office did not constitute a valid five-year term. Articles 96 and 302 must therefore be read together.

Article 302 explicitly refers to the first five-year period after the special election as 'the first post-transition period' and expressly bans the president from dissolving the first post-transition parliament. That being said, the

ambiguity inherent in the wording of articles 96 and 302 allowed Nkurunziza to create the illusion of uncertainty and therefore mount a constitutional challenge against term limits. Nkurunziza's 'soft' violation of term limits had precedents in Burkina Faso (Blaise Compaore), Namibia (Sam Nujoma) and Senegal (Abdoulaye Wade), where sitting presidents also exploited constitutional ambiguities to run for third terms. Therefore, in anticipation of such challenges to constitutional term limits, the language and intent of specific clauses in constitutions should be simple and clear.

The second lesson in the Burundi case is that the wider international community ought to have done more to support democratic principles. Once the coup was underway, the international community—including the East African Community (EAC)—had an opportunity to step in on the side of democratic constitutionalism. However, a lack of regional consensus on the right response, as well as Burundi's important role in sending peacekeepers to Somalia, provided Nkurunziza with international cover for his domestic constitutional transgressions. The EAC, in particular, was in a singularly weak position with respect to Nkurunziza since two of its member presidents—Paul Kagame of Rwanda and Yoweri Museveni of Uganda—were themselves long-serving autocrats hostile to presidential term limits. In addition, Burundi's troop contribution to peacekeeping in Somalia gave it leverage with both the AU and the United Nations Security Council (Ambrosetti, Birantamije and Wilen 2015). The lesson here is that African constitutional democracies face higher risks in regions lacking democratic density, and in cases where other international priorities trump the need to protect constitutional electoral democracies.

Engineering legitimacy: the case for majoritarian systems in Africa

Legitimacy is a central component of representative democratic government. While citizens may have varied preferences regarding candidates vying for public office, the legitimacy of electoral democracies rests on the assumption that the processes of determining the winners of elections are legitimate (Saffon and Urbinati 2013). In turn, the legitimacy of electoral processes rests on their ability to approximate the true intent of a majority of voters. For this reason, robust political participation—in the form of a high voter registration and turnout—is a normatively preferable condition (Gallego 2014).

Similarly, the legitimacy (and effectiveness while in office) of election winners is closely correlated with the size of the base of their support (Morrow et al. 2008). Leaders who derive support from a relatively broad base enjoy greater legitimacy. They are also more likely to effect programmatic (as

opposed to targeted or clientelist) policies, thereby granting the government even greater legitimacy. Nowhere is the question of how to engineer greater legitimacy and public confidence in the electoral process more salient than in young democracies in which ethnicity is the main principle of organizing politics (Posner 2003). In such situations, a normative preference for broad-based multi-ethnic parties and coalitions can be implemented through constitutional provisions for majoritarian elections.

This is the case in much of Africa. About two-thirds of African countries have majoritarian (two-round system) requirements for presidential elections.⁴ Since in many African countries no single ethnic group comprises over half the population, such requirements guarantee the building of cross-ethnic alliances around elections. Some countries also have minimum geographic thresholds at the subnational level, which further incentivizes political candidates to seek a broad base of support across ethnic groups concentrated in different parts of the country. Only 15 per cent of African countries currently have pure FPTP rules for presidential elections.

The case of Zambia illustrates why many African countries have sought to force presidential candidates to seek a broad base of support. The country has 72 different ethnic groups, divided into four main language and cultural groups (Posner 2003). Since 2001 the country's electoral map has ensured that successful candidates have typically won with very small shares of the electorate. Between 2001 and 2015, winning presidential candidates garnered an average of only 40.8 per cent of the votes cast, with an average turnout of just 54 per cent of registered voters over the same period. Clearly, Zambia needed to increase voter participation and boost the legitimacy of winning presidential candidates by providing constitutional incentives for a more broad-based political campaign strategy.

The results of this effort are enshrined in the Constitution of Zambia (Amendment) Act No. 2 of 2016.⁵ Under the new electoral rules, the winning presidential candidate must garner at least 50 per cent plus one of the valid votes cast (article 47 (1)).⁶ This provision will ensure that Zambian presidents devise electoral campaign strategies that seek to energize a broader base of voters. It will also force candidates to seek cross-ethnic and cross-language group alliances. The biggest language group—the Bemba—comprises just over 40 per cent of the country's population.

In line with constitutions in other majoritarian two-round electoral systems, Zambia's new Constitution also strengthens the office of the vice president by making election to the office concurrent with that of the president. This provision allows for credible commitment in alliance building, and ensures

that, once in office, the president cannot fire the vice president. Previously, the vice president of Zambia served largely at the pleasure of the president, and Zambian cabinets were characterized by ministerial musical chairs of frequent reshuffles (Von Soest 2007). The new Constitution also obviates the need to have by-elections in the event that a president leaves office before the end of his or her term: article 106 stipulates that the sitting vice president serves out the remainder of the presidential term. This measure is particularly relevant, because Zambia has recently had two presidential by-elections, after sitting presidents died in office, in 2008 and 2015, respectively.

The Constitution also gives the Zambian vice president legislative powers akin to those of a prime minister (albeit a very weak one): the office holder is the official leader of government business in parliament (article 74), serving as the main link between the executive office of the president and the National Assembly (article 86 (2)). This will ensure that the alliances between presidents and their vice presidents are backed by credible constitutional guarantees of shared authority in the making of government policy. This role also gives the vice president broad discretionary powers over the ruling party's legislative agenda. Furthermore, because the president cannot fire the vice president, this measure disperses power within the executive branch in a manner that is likely to strengthen the cabinet, thereby providing checks on presidential power.

Therefore, Zambia's new electoral rules incentivize credible cross-ethnic alliance building in presidential elections, and make such coalitions more credible. Having two names on the ticket will also increase the legitimacy of the president and encourage higher voter turnout, which will be further reinforced by the majoritarian two-round constitutional requirement.

Popular democracy or populism? Referenda in African democracies

Another development in constitutional democracies in Africa in 2015 was the attempt to exercise the sovereign power of the people. While strong institutions are central for the consolidation of electoral democracies, such institutions also need to be adaptable and responsive to the will of the public (Huntington 1965). In other words, institutions must be able to adapt to changes in public opinion and general popular will. One mechanism of ensuring this happens is through regular elections—in which the public populates state institutions with their preferred candidates, who promise to implement their preferred policies. However, in some instances representative state institutions may become too far removed from the popular will of the public, or elected officials may collude to deny the general public the chance

to change the manner in which they are governed. For this reason, some constitutions provide for popular amendments that originate from unelected citizens not serving in public office. Such provisions are meant to ensure that elected officials and institutions reflect the popular will of the public (Habermas 1994), and may include varying degrees of direct democracy (Lupia and Matsusaka 2004). One such example is the provision for popular constitutional amendment in article 257 of the Kenyan Constitution, which provides for extra-institutional (popular) origination of referendum questions by unelected citizens.⁷ Proposed amendments by popular initiative must be backed by at least one million signatures from registered voters and at least half of the 47 counties. This provision was designed to give civil society organizations (CSOs) and regular citizens a chance to provide checks and balances with respect to elected officials who already possess institutional means of changing the Constitution (via article 256).

However, Kenya's experience has shown how elected officials can use such a provision as a political football. Instead of giving a voice to extra-institutional interests—including regular citizens and CSOs—the provision for popular amendment was hijacked by CORD. Despite having significant representation in the legislature (with 38 per cent of seats), CORD leaders opted to pursue an extra-institutional channel to amend the Constitution. While perfectly in line with the Constitution, this action by a sizeable parliamentary opposition party raises two important questions.

First, does the use of extra-institutional amendment channels by parliamentary parties rob such measures of their legitimacy? This is an important question, because the original intent of the provision was to empower extra-institutional interests, thereby providing a check on elected officials. This was in line with the Constitution's overall emphasis on the popular origins of sovereignty in Kenya (article 1). However, by leaving this mechanism open to political parties with existing representation in the legislature, the framers of the Constitution exposed it to strategic manipulation in the practice of everyday politics. Having lost political contests in the legislature, political parties may be incentivized to explore a populist 'popular' path to constitutional amendment.

Second, does the option of initiating populist amendments disincentivize parliamentary parties from investing in legislative institutional strength? The Kenyan experience shows that parliamentary parties can exploit popular amendment provisions. Their existence therefore bodes ill for the institutionalization of legislatures. Research shows that the institutionalization of legislatures is conditional on their being the main forum of intra-elite contestation (Opalo 2014). For this to occur, the outcomes of legislative

contests must be binding. When they are not, this discredits the institution's rules and outcomes, leading to the erosion of both public trust and the political power of legislatures as the pivotal representative institutions of the state. With these observations in mind, the availability of outside options (for parliamentary parties) in the form of (relatively) low-cost popular referenda may hinder the process of democratic consolidation.

The Kenyan case is a telling example. In a country of 22 million eligible voters, the constitutional threshold for initiating a popular referendum is just one million registered voters. While this may have been considered a high threshold for CSOs, it is a low bar for organized political parties.⁸ Furthermore, making this option available to political parties exposes the Constitution to frequent populist amendments. While the bulk of the CORD Alliance's proposed amendments related to Kenya's electoral rules, in order to make the changes attractive to the wider public the alliance added populist riders with non-trivial fiscal implications. For example, CORD promised to devolve more funds to the country's 47 county governments without considering their absorptive capacity and the potential governance challenges that would arise. Kenya's county governments so far have had a chequered record of fiscal discipline and transparent management of fiscal resources (Mbaka 2016).

Conclusion

These three cases illustrate that the battle for democratic consolidation in Africa has entered a new phase, with its own challenges and implications. On the positive side, many African states have amended their constitutions to suit their 21st-century domestic political realities. In the majority of cases, term limits have been introduced and respected by sitting presidents. The majority of African countries have majoritarian two-round system electoral rules for presidential elections, thereby incentivizing cross-ethnic political alliances at the national level. Finally, a few countries have tried to experiment with the idea of a popular basis of sovereignty that institutionalizes the power of the people, and not just their elected representatives. All these examples provide opportunities for continued constitutional experimentation informed by lived experiences in the quest to consolidate electoral democracy in Africa.

However, significant challenges remain. The most important of these is the fact that the international community's commitment to democratic promotion has waned. Security and geopolitical concerns have instead occupied centre stage, making it ever harder (from a normative standpoint) for progressive political forces in African countries to have international allies. In addition,



the lack of a critical mass of democratic countries in the various subregions of Africa has deprived many of the continent's nascent democracies of the demonstration effects they badly need. An important challenge for the next phase of democratic development and consolidation in Africa will be how to entrench popular sovereignty in a context of weak institutions. Huntington's (1965) warning still applies: expanding the political space to include direct popular participation without sufficient institutionalization will threaten the very idea of democratic stability in Africa. For constitutional democracy to endure in the region, the process of popular inclusion must be predicated on an elite commitment to strengthening democratic institutions such as legislatures. This means protecting democratic institutions from the threat of populism masquerading as direct popular democracy.

For a long time, the biggest challenge to competitive democratic elections in Africa has been the dearth of credible alliances among elites. Once in power, African presidents have often focused on weakening institutions of credible commitment to fellow elites, including parties and parliaments (Opalo 2014); and opposition leaders have lacked the necessary mechanisms to credibly commit to one another and form alliances to challenge incumbent presidents (Arriola 2012). Changes that allow for credible commitment and the formation of alliances among elites, especially those that cut across ethnic lines, will therefore improve the prospects of democratic consolidation in the region. This is the context in which efforts to reinforce constitutional term limits, introduce majoritarian two-round constitutional requirements for presidential elections and constitutionalize the popular origins of sovereignty in Africa should be viewed. The importance of elite consensus on 'the rules of the game' cannot be overstated in discussions of the consolidation of constitutional electoral democracies in Africa.

Notes

- 1 Figures calculated from the African Elections Database, available at <<http://africanelections.tripod.com/>>.
- 2 Data for this calculation based on Hyde and Marinov (2012).
- 3 For the full text of Burundi's 2005 Constitution see the Constituent Project website, <https://www.constituentproject.org/constitution/Burundi_2005?lang=en>.
- 4 Calculations based on data from International IDEA's Electoral System Design Database, <<http://www.idea.int/esd/search.cfm>>.
- 5 For the full text of the Constitution of Zambia (Amendment) Act No. 2 of 2016 see <[http://www.parliament.gov.zm/sites/default/files/documents/amendment_act/Constitution%20of%20Zambia%20%20\(Amendment\),%202016-Act%20No.%202_0.pdf](http://www.parliament.gov.zm/sites/default/files/documents/amendment_act/Constitution%20of%20Zambia%20%20(Amendment),%202016-Act%20No.%202_0.pdf)>.
- 6 However, there is no minimum threshold of votes at the subnational level (i.e. in Zambia's 10 provinces), as is the case in other countries in Africa. Kenya, for example, requires winning presidential candidates to also garner at least 25% of the votes cast in at least 24 of the country's 47 counties. See Constitution of the Republic of Kenya, article 138 (4).
- 7 For the full text of the Kenyan Constitution see <<http://www.kenyalaw.org/8181/exist/kenyalex/actview.xml?actid=Const2010>>.
- 8 Interestingly, the CORD Alliance failed to meet the one-million-signature threshold on a technicality.

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