

**THE IMPACT OF PRESIDENTIAL POWERS UNDER  
THE TRANSITIONAL CONSTITUTION OF SOUTH  
SUDAN 2011 ON THE INSTABILITIES IN SOUTH  
SUDAN A COMPARATIVE ANALYSIS WITH KENYA  
AND BURUNDI**

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## **ABSTRACT**

South Sudan that has been in war for decades gained its independence in 2011 after the citizens voted voluminosly for secession form Sudan. While it was anticipated by many that it would be transcending to democracy, the rule of law and above all nation healing, these hopes were dilution by the 2013 .The crisis has continued to date with no sight of its end and all this blame can be profound in the powers of the president. A number of peace deals signed but there has not been any success of restoring peace. This paper will look into the powers of the president in the Transitional Constitution of South Sudan 2011 that might have contributed to the on-going crisis.

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## Table of contents

THE IMPACT OF PRESIDENTIAL POWERS UNDER THE TRANSITIONAL	1
CONSTITUTION OF SOUTH SUDAN 2011 ON THE	1
INSTABILITIES IN SOUTH SUDAN	1
ACOMPARATIVE ANALYSIS WITH KENYA AND BURUNDI	1
ABSTRACT	i
ACKNOWLEDGEMENTS	ii
Table of contents	iii
INTRODUCTION:	1
Research questions	2
Methodology	5
Chapter 1 Imperial Presidency in Africa: Its Origins, Consequences and the Difficulties of Curbing Them	10
1.1 The Imperial Presidency in Africa: An Overview	11
1.2 The Origins of Imperial Presidents	14
1.3 The Consequences of Excessive Presidential Powers in Africa	17
1.4 Difficulties of addressing powers of the presidency through Constitution making	20
1.5 Conclusion	22
Chapter 2: Presidential Power in the South Sudan Transitional Constitution	24
2.1 What are the Powers of the president under the South Sudan Constitution?	24
2.2 What Specific Powers fueled the crisis?	25
2.3 Appointment and dismissal powers	26
2.4 Emergency powers	27
2.5 Tenure of office of the president and Procedure for constitutional amendment	28
Chapter 3: Presidential Power in Kenya and Burundi	30
3.1 Presidential powers in Kenya;	30
3.2 Emergency powers and Declaration of war	31
3.3 How are constitutional Amendments done?	32

3.4 Presidential powers in Burundi; .....	33
3.5 Appoint and dismissal powers .....	34
3.6 What is the length for tenure of office?.....	35
3.7 How are constitutional amendments done?.....	35
3.8 Emergency powers; .....	35
Chapter 4: Comparative Lessons for South Sudan .....	38
4.1 Lessons from Kenya and Burundi .....	38
4.1.1 Contents of provisions: How different are the powers of the president of South Sudan different from those of the presidents n Kenya and Burundi? .....	38
4.2 Process of constitutional amendments.....	43
4.3 Conclusion and Recommendations: Constitutional and other reforms.....	44
4.4 Term limits .....	45
4.5 Federal system of government. ....	<b>Error! Bookmark not defined.</b>

## INTRODUCTION:

From the Interim Constitution of Southern Sudan 2005, the youngest nation of the world had a task of creating a democratic state that was governed by laws. For this reason, a Technical Committee was formed to draft a Constitution that became the Interim Constitution of Southern Sudan 2005, which established therein the office of the president as the head of state, head of government and commander in chief (Article 103(1)).<sup>1</sup> The Interim Constitution was reviewed by Constitutional commission and after review, the commission drafted the Transitional Constitution of South Sudan 2011 which was adopted as law when the assented to by the president. But like any other African Constitution, key areas of concern evolved around the presidential powers and consolidation of power through the creation of an independent state. A case in point was the December 2013 internal conflict that resulted from the excessive exercise of the executive powers by the president. The 2013 crisis, which started as a political power struggle later took on ethnic lines, pitching against each other the Dinka (the presidents tribe) and the Nuer (the Sudan People's Liberation Movement/ Army (SPLM/A) opposition leader's tribe).<sup>2</sup> The crisis has rapidly spread through the years and is an on-going problem to date.

This resulted in massive deaths and is still the cause of continuing cause of instability in South Sudan. This research seeks to explore whether and how the constitutional regulation of presidential powers has contributed to the 2013 crisis in South Sudan. Using comparative constitutional analysis it will explore if there are possible solutions to the problem.

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<sup>1</sup> The Interim Constitution of South Sudan, 2005

<sup>2</sup> Johan Brosché and Kristine Höglund, 'Crisis of Governance in South Sudan: Electoral Politics and Violence in the World's Newest Nation' (2016) 54 The Journal of Modern African Studies 67, 68.

## Research questions

1. How did the constitutional regulation of presidential powers lead to the crisis?
2. How can the South Sudan crisis be minimized?
3. How do the powers of the president relate to those of the president in Kenya and Burundi?
4. What could be the possible recommendations and lessons for South Sudan from Kenya and Burundi?

The Transitional Constitution was however to be reviewed by the National Constitutional Review Commission (NCRC). The mandate of the NCRC was to consult South Sudan populations on the permanent Constitution that would eventually be the supreme law of the newly created independent state. Whether or not this actually happened is a matter that shall be ascertained hereafter.

During the making of the permanent Constitution before December 2013, the administrative strata of the interim government were maintained and the president had the executive authority vested in him. With the office of the president established under Article 97(2), (Article 97(3)) of The Transitional Constitution provides that “The President of the Republic of South Sudan is the head of State and Government, the Commander-in-Chief of the Sudan People’s Liberation Army and the Supreme Commander of all the other regular forces.” The president of the republic of South Sudan will have to be directly elected by the



voters in general elections,<sup>3</sup> his tenure of office is five years, but during the transitional period, his tenure of office is four years as from July 9, 2011.<sup>4</sup>

Presidential powers under the Transitional Constitution of South Sudan 2011 as entailed under the constitution include but are not limited to presidential assent to bills before becoming into law (Article 85), delegation of legislative powers to the president by the legislature (Article 92). Additional powers are under the Schedules of the constitution. “National powers for example defence and security (schedule A), state powers where by the executive can observe constitutional compliance (schedule C), residual powers that will be handled in accordance to its nature (E). And also powers where national and state governments shall have legislative, economic, and social developments, among others (schedule D).” Functions of the president are under Article 101, presidential immunity under Article 103. Powers to declare state of emergency is Article 189 and consequential powers of the president in a state of emergency under Article 190. Dissenters were not accepted because the government wanted to reserve the Transitional Constitution as the permanent constitution.<sup>5</sup>

Following the independence of South Sudan and the eventual creation of the world’s youngest state, it was highly anticipated that the newly created state would survive the problems of re-birth of the state that suffered by many African states in the post the colonial era. Countries such as Uganda, Kenya and Rwanda to mention but a few that succeeded colonial constitutions with battles to build up their states. South Sudan was highly anticipated to provide a future generational background. A background of a new state that is created without internal political struggles as a result of the executive powers excessively vested in the president and that it would also embark on national healing development and democracy.

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<sup>3</sup> Republic of South Sudan, The Transitional Constitution of South Sudan 2013 Article 97(1).

<sup>4</sup> *ibid* Article 100.

<sup>5</sup> Mark AW Deng, ‘Defining the Nature and Limits of Presidential Powers in the Transitional Constitution of South Sudan: A Politically Contentious Matter for the New Nation’ (2017) 61 *Journal of African Law* 23, 4.

One such hope was the Interim Constitution of southern Sudan 2005 and further belief was when the Transitional Constitution of South Sudan 2011 was passed into law. It was heavily hoped that there would be a peaceful sail through the transitional period to the permanent Constitution that is a representation of the will of the people and, best, that the state be safeguarded from future turmoil. Although it is well documented that the troubles of African countries start with their leaders, a lot was hoped for from this new breed of African leaders that was emerging in South Sudan. The hope died along the journey when the December 2013 internal revolts begun without an end in sight with every defeated effort of peace resolutions between the president and other members of the government as well as the SPLA/M in Opposition. The powers provided to the president under the Constitution have a great bearing on the state of internal fighting in South Sudan upon this background it is of such great rationality that an examination of the presidential powers be made and to assess its impact. A comparative analysis shall be drawn on the other Constitutions of two selected African countries that shall consist of Kenya, and Burundi

The choice of Kenya, is linked to the fact that the president of this countries has fundamentally been part of the concessions and peace talks with the conflicting parties of the South Sudan and have witnessed long periods of peace in their own country despite a rich history of internal wars prior to their coming into office as leaders. Burundi is chosen for having a similar problem as South Sudan considering issues that accelerating the crisis in the country today.

## **Methodology**

The research shall be qualitative, comparative constitutional analysis based on legal materials, secondary sources as well as, Newspapers and internet (websites). The preference for secondary sources is mainly due to inability to access key informants that are required for primary data following extended unrest and terror in South Sudan at the moment with no signs of stoppage any time soon.

Chapter one evidently covers the background to the research, problem statement of the same, objectives, research questions, significance of the research as well as the limitation of the same among other key considerations therein. It will generally discuss the history of imperial presidency in Africa considering the origin, consequences and challenges in limiting the powers of the presidency.

Chapter two will discuss the powers of the president embedded in the South Sudan Transitional constitution of 2011 and how these powers lead to the crisis that has prevailed to date. Chapter three will look at the comparative analysis of presidential powers in Kenya and Burundi to those of the president in South Sudan and draw a line to where the difference may be. And finally chapter four is on comparative lessons drawn from Kenya and Burundi, recommendations for South Sudan and conclusion.

## **Historical background**

During the late 1870's, Egypt wanted to extend its rule over Sudan to create an agro-rich Nile valley and established the province of Equatoria as an out-post. The move was successfully done by the Mahdists and with the interference of the British, the control was put to rest in 1898. This created a predominantly Christian Anglo-Egyptian Sudan that obtained

its independence in 1953. This marked the genesis of the internal crisis between the north and the south of Sudan: the North then the superior side tried to impose control and rule over the south. Sudan obtained its total independence in 1956 from the Egyptian and British forces while the civil war had intensified through the Anyanya guerrilla movement, until 1972.<sup>6</sup>

The civil war was brought to end through the Addis Ababa agreement of 1972 that created an autonomous South Sudan, which lasted until 1983. In 1983 the north withdrew the autonomous power of South Sudan. This resulted into a renewed fighting led by the Sudan People's Liberation Movement (SPLM), a struggle that lasted for 22 years.<sup>7</sup>

A cease-fire was declared in 2002 and a period of negotiation followed for of 2.5 years until January 2005 a Comprehensive Peace Agreement (CPA) was signed.<sup>8</sup> The CPA restored the autonomous power of the Southern Sudan, and created a power sharing agreement between Sudan and Southern Sudan. Among the key successes however was the interim constitution of Southern Sudan that was subject to the national laws of the Sudan Republic. It created interim office of the president that would last until 2015. The citizens would then decide in an election on who their president would be

July 9<sup>th</sup> 2011 marks the birth of South Sudan from Sudan<sup>9</sup> as the world's youngest state created after the referendum when people overwhelmingly voted to secede from Sudan.<sup>10</sup>

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<sup>6</sup> Zacharia Diing Akol, 'A Nation in Transition: South Sudan's Constitutional Review Process' [2013] The Sudd Institute <<https://www.suddinstitute.org/publications/show/a-nation-in-transition-south-sudan-s-constitutional-review-process>> accessed 7 April 2017.

<sup>7</sup> Paul Mertenskoetter and Dong Samuel Luak, 'An Overview of the Legal System and Legal Research in the Republic of South Sudan - GlobaLex' <[http://www.nyulawglobal.org/globalex/South\\_Sudan.html](http://www.nyulawglobal.org/globalex/South_Sudan.html)> accessed 7 April 2017.

<sup>8</sup> Akol (n 6); Christopher Zambakari, 'South Sudan and the Nation-Building Project: Lessons and Challenges' (2013) 8 International Journal of African Renaissance Studies 5, 6.

<sup>9</sup> 'South Sudan Profile - Overview' *BBC News* (27 April 2016) <<http://www.bbc.com/news/world-africa-14019208>> accessed 7 April 2017.

<sup>10</sup> The Carter Centre, 'Observing the 2011 Referendum on the Self-Determination of Southern Sudan' (The Carter Centre 2011)

In 2013, South Sudan engulfed in a civil war that left thousands of people dead and millions displaced.<sup>11</sup> The crisis was the result of a power struggle between the then-vice president of the country, Dr. Riek Machar and the president of the country Salva Kiir ahead of the 2015 elections.<sup>12</sup> On December 16<sup>th</sup> of 2013 the president appeared on the national television of South Sudan, Juba in full combat to address the nation of how he had successfully overcome an attempted coup that was allegedly led by Dr. Riek Machar and ex-ministers of the ruling party.<sup>13</sup>

In 2015, Riek Machar was to stand for presidency President Kiir and his loyalists did not support the idea; Paul Malang (currently chief of staff) trained a military group that would be loyal to the president to rescue him from the situation.<sup>14</sup> After the signing of the peace agreement in 2015, in 2016, Taban Deng Gai was elected as vice president and the president appointed a speaker without giving a chance to SPLM/A, the party in opposition (SPLM/A-IO).<sup>15</sup> As of 2016, the President, Salva Kiir is already talking of standing for elections in 2018.<sup>16</sup> All these escaped according to the analysis of the author is the fact that the current leadership does not want to relinquish power. The opposition wanted change in the governance system and even called for federalism as one of their main objectives.<sup>17</sup> Following a number of peace deals that the warring parties signed but did not implement, February of 2016 marked the signing of the comprehensive peace deal under which Riek

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<[https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/finalreport-sudan-2011-self-determination-referendum.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/finalreport-sudan-2011-self-determination-referendum.pdf)> accessed 7 April 2017.

<sup>11</sup> Brosché and Höglund (n 2) 67.

<sup>12</sup> *ibid* 68. Dr. Riek Machar is now the head of SPLM in opposition.

<sup>13</sup> Douglas H Johnson, 'Briefing: The Crisis in South Sudan' (2014) 113 *African Affairs* 300, 1.

<sup>14</sup> Clémence Pinaud, 'Who's behind South Sudan's Return to Fighting?'

<<http://africanarguments.org/2016/07/11/whos-behind-south-sudans-return-to-fighting/>> accessed 7 April 2017.

<sup>15</sup> Sudan Tribune, 'SPLM-IO says South Sudan's new FVP cut off from controlled areas' (2016) 19/ August, at, <http://www.sudantribune.com/spip.php?article59966>, on 2/march/2017.

<sup>16</sup> 'SPLM-IO Says South Sudan's New FVP Cut off from Controlled Areas - Sudan Tribune: Plural News and Views on Sudan' *Sudan Tribune* (19 August 2016) <<http://www.sudantribune.com/spip.php?article59966>> accessed 7 April 2017.

<sup>17</sup> Deng (n 5) 11.

Machar was to return from Pagak where he had established to,<sup>18</sup> Juba for its implementation.<sup>19</sup> Following the eruption of the December crisis on allegations that the opposition force led by Dr. Riek Machar. As members of the opposition were being arrested and detained, Riek managed to secretly escape from Juba and only to a surprise that he was in Jonglei state.<sup>20</sup> His flight was based on threats to his life and there were on-going targeted killings to his tribal group, the Nuer.<sup>21</sup> In July of 2016, following the return of Riek Machar to Juba for the implementation of the peace agreement, another civil war broke out leaving more people dead and thousands of other displaced.<sup>22</sup>

Right from the adoption of the Transitional Constitution, it has been openly criticized for not involving the public in its process and as such, it fails to meet the current standards of democratic constitutional-making: 23 a few government officials controlled the entire constitutional process. The South Sudan constitution grants so much power to the president that it does not only run and control the politics of the national government but those of the State governments too.<sup>24</sup> This chapter will explore the constitutional provisions of powers of

<sup>18</sup> 'Machar in Pagak for Preparations to Travel to Juba: Spokesperson - Sudan Tribune: Plural News and Views on Sudan' *Sudan Tribune* (14 April 2016) <<http://www.sudantribune.com/spip.php?article58619>> accessed 7 April 2017.

<sup>19</sup> Agence France-Presse, 'Hopes Rise for South Sudan Peace Deal' *The Guardian* (12 February 2016) <<https://www.theguardian.com/world/2016/feb/12/hopes-rise-for-south-sudan-peace-deal>> accessed 7 April 2017.

<sup>20</sup> Dickens H Okello, 'VIDEO: When Machar Escaped from Juba in 2013' <<http://www.chimpreports.com/video-when-machar-escaped-from-juba-in-2013/>> accessed 7 April 2017.

<sup>21</sup> Johnson (n 13) 1.

<sup>22</sup> United Nations, 'Executive Summary of the Independent Special Investigation into the Violence Which Occurred in Juba in 2016 and UNMISS Response' (2016) <[http://www.un.org/News/dh/infocus/sudan/Public\\_Executive\\_Summary\\_on\\_the\\_Special\\_Investigation\\_Report\\_1\\_Nov\\_2016.pdf](http://www.un.org/News/dh/infocus/sudan/Public_Executive_Summary_on_the_Special_Investigation_Report_1_Nov_2016.pdf)> accessed 7 April 2017.

<sup>23</sup> Mark AW Deng, 'Defining the Nature and Limits of the Presidential Powers in the Transitional Constitution of South Sudan: A politically Contentious Matter for the New Nation, *Journal of African Law* (2017), 1, 26

<sup>24</sup> A decentralized form of government governs South Sudan. It is comprised of ten states. South Sudan's Constitution of 2011 with Amendments through 2013, articles, 161, 162, 47 and 1(4). The ten states were expanded to 28 states by a presidential decree in 2015. See Sudan Tribune, 'South Sudan President Expands States to 28 as Opposition Accuses Him of Deal Violation - Sudan Tribune: Plural News and Views on Sudan' *Sudan Tribune* <<http://www.sudantribune.com/spip.php?article56581>> accessed 7 April 2017.

the president in South Sudan and specifically those that led to the crisis. The chapter will also consider the events of tensions that existed before the actual crisis of 2013

## Chapter 1

### Imperial Presidency in Africa: Its Origins, Consequences and the Difficulties of Curbing Them

#### Introduction

Imperial presidency among the African leaders has been a common aspect that has persisted for years. This phenomenon that started with the post-colonial leaders in Africa has existed to date. The love for power by African leaders is so eminent. This can be depicted by the rate at which presidents are amending presidential term limits for example Uganda, South Sudan, and Rwanda among others.

Presidential powers have also lead to a number of crises in the African region. This is because a number have used their massive powers to alter term limits while others have removed those. This chapter will discuss imperial presidency in Africa, the unique concentration of powers in the institution of the presidency. In the words of Prempeh, imperial presidency refers to a leader who has powers, rights and privileges that cannot be questioned or suppressed by any institution in the setting of a constitutional system.<sup>25</sup> Abuse of power is also escalated by the absence of effective mechanisms to limit the powers, and the vast immunities granted to presidents while in office.<sup>26</sup>

In the African context, imperial presidency has been developed gradually under false excuses of emergency situations.<sup>27</sup> Following independence, African constitutions were later

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<sup>25</sup> H Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2007) 35 Hastings Const. LQ 761, 778.

<sup>26</sup> Charles Manga Fombad and Enyinna Nwauche, 'Africa's Imperial Presidents: Immunity, Impunity and Accountability' (2012) 5 African Journal of Legal Studies 91, 94.

<sup>27</sup> Prempeh (n 25) 785.



geared to meet the political desires and regime objectives of post-colonial leaders.<sup>28</sup> First the chapter will introduce the basic features of the imperial presidency, then it will discuss where the imperial presidency originates from (for example whether from the aspirations of colonial masters or from the African culture and traditions). To close, the chapter will also look at the consequences that imperial presidency has posed in African politics and why it is so difficult to manage.

## 1.1 The Imperial Presidency in Africa: An Overview

The phenomenon called today the imperial presidency emerged after independence, in the post-independence constitutional reforms. These constitutions established on one-party rule, while subjecting the civil service to a single party authority, abolished federal system (where it existed), imposed restrictions on judicial independence, and struck down political and civil rights.<sup>29</sup> Under the post-independence constitutions, where power was by one man, the president was empowered to initiate legislation, and in some states, the president could even legislate by formal authorization,<sup>30</sup> such as in Ghana, Senegal among others. In addition, the president also announced policies that were important and were to take legal effect without consulting the legislature.<sup>31</sup> The president also controlled money that was used for illicit purposes that was not to be controlled by parliament, held the power to dismiss judges who tried in any way to challenge powers of the presidency, let alone having to reverse their decisions.<sup>32</sup>

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<sup>28</sup> *ibid.*

<sup>29</sup> H. Kwasi Prempeh, 'Constitutional Autochthony and the Invention and Survival of "Absolute Presidentialism" in Postcolonial Africa' in Gunter Frankenberg (ed), *Order from Transfer Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 209-210.

<sup>30</sup> Prempeh (n 25) 767.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

The democratic and constitutional changes that swept Africa in the third wave of constitutional making process in the 1990s<sup>33</sup> brought some changes to the political and constitutional frameworks. The changes include the introduction of multi-party system that has opened doors for competitive elections also for the presidency as well as the legislature within specific time frames as granted by the constitution.<sup>34</sup> We also see that the courts and the media that were censored curtailed respectively and could not be accessed by the citizens and now opened up and by so doing, complaints about the presidency and their leadership are lodged by citizens to the courts of law and adjudicates, and the civil society is also using the media platform for numerous activism agendas.<sup>35</sup>

Though the African constitutions that emerged in third wave in the 1990s<sup>36</sup> may impose certain limits on presidential powers (e.g. grant censure of ministers by the assembly), such limits are quite impracticable given the fact that the two- third margin as is required for such votes in the legislature by most constitutions. It is a bit unrealistic in situations where the government is dominated by the majority party, high numbers of ministers that are appointed into government and the fact that these party members have to be loyal to the party.<sup>37</sup> Party loyalty had been built in such a way that political parties create and back up their interests through the control of the state and as long as the president can use his powers to promote these interests, then the party's legislation will be enacted in this regard.<sup>38</sup>

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<sup>33</sup> Prempeh (n 29) 209-210.

<sup>34</sup> *ibid* 209-217.

<sup>35</sup> *ibid*.

<sup>36</sup> Fombad and Nwauche (n 26) 92.

<sup>37</sup> Oda van Cranenburgh, 'Restraining Executive Power in Africa: Horizontal Accountability in Africa's Hybrid Regimes' (2009) 16 South African Journal of International Affairs 49, 63.

<sup>38</sup> Prempeh (n 25) 817-8.

The post-independence constitutions did not contain presidential term limits.<sup>39</sup> The presidential tenure of office was unlimited,<sup>40</sup> while the holders of the office held absolute power and did not worry about elections. It took a coup d'état to possibly sweep them out of power, and they avoided this by holding absolute power.<sup>41</sup> However, the 1990 constitutions introduced presidential term limits, requiring that presidents only hold office for a two-year term of presidency through the observance of democratic election. As a result, in a multi-party landscape it became unpredictable whether a president will be able to stay in power or not. This limitation has brought down a reasonable number of autocratic presidents in Africa and created about some set of retired presidents.<sup>42</sup>

Despite the constructional changes that have taken place over the years, the powers of African presidents have remained unlimited.<sup>43</sup> Presidents preserve the powers to appoint officials to key government positions as well as those of independent institutions such as the public finance institution, the corruption investigation institutions among others. Some of these institutions are to serve as checks on government institutions. Yet, this will not be possible as presidents still control these potential institutional checks from the powers to appoint, dismiss as well as overrule their decisions. The rhetoric of presidential powers has not changed little with the constitutional reforms of the 1990's.<sup>44</sup>

In the Kenyan constitution of 2010, the president is empowered to nominate and dismiss government officials subject to subject to approval by National Assembly, holds office for only two terms.<sup>45</sup> Under the same constitution, the president has powers to declare a state of emergency but is parliament to declare war, and power of legislation is by

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<sup>39</sup> Prempeh, 'presidential Power in Comparative Perspective' (n 1), 767

<sup>40</sup> Prempeh (n 29) 209-217.

<sup>41</sup> *ibid* 209-210.

<sup>42</sup> *ibid*, 210-212.

<sup>43</sup> *ibid*, 209-212; Prempeh (n 25) 761 & 772.

<sup>44</sup> *ibid*.

<sup>45</sup> Republic of Kenya, The Constitution of Kenya 2010 article 132(2) & 142(2).

Parliament.<sup>46</sup> In the 2005 Constitution of Burundi, the powers of the president to appoint or dismiss government officials is subject to inquiry of the two presidents, appoints to the superior offices of civil, military and judiciary.<sup>47</sup> The state of emergency is also declared by the presidency by decree but after consulting with the government, National Assembly and Senate, National council of Security and the Constitutional Court.<sup>48</sup>

## 1.2 The Origins of Imperial Presidents

The imperial presidency is a post-colonial legacy inherited from the colonial legal order where by the colonial governor combined powers and functions of the legislature, judiciary and the executive.<sup>49</sup>

Under colonial constitutions, the Governor ruled as an individual, by executive decree powers and was autocratic. His powers would neither be checked, nor questioned by those below him in the constitutional hierarchy. Those who questioned his leadership committed a crime against the Majesty (Governor). The legislative council that may in most cases be dominated by members of the Governor's administration only carried out an advisory role.<sup>50</sup> Though the legislative council was later designed in a way that it would act as a legislature, the Governor still had control over it as he had reserved powers to deprive legislation.<sup>51</sup>

Secondly, colonial constitutions entailed no separation of powers between the executive and the judiciary as the governor headed the judiciary as well and in absence of the governor, the chief justice acted in his place. He had powers to pass and enforce any sort of legislation that he deemed fit for public interest, and the power to deny access to individuals

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<sup>46</sup> *ibid* article 132(4) (d) (e) & 109.

<sup>47</sup> Burundi, The Burundi Constitution 2005 article 108 & 111.

<sup>48</sup> *ibid* article 115.

<sup>49</sup> Fombad and Nwauche (n 26) 209–210.

<sup>50</sup> Prempeh (n 29) 209 & 220–23.

<sup>51</sup> *ibid*, 209 & 227.

to want to challenge him through the court. The courts were captive in a way that they did not have power to question the governor in that regard.<sup>52</sup>

Finally, is the issue of repressive laws that the governor ruled by included restrictions on freedom of speech and access to the courts, imprisonment and criminal charges were placed on those who tried to question the rule of the governor.

The great powers that the governor exercised is what the African leaders later replicated and that was never a matter of coincidence.<sup>53</sup> The first set of post-independence African leaders such as Kwame Nkrumah of Ghana (1957-1966), Mzee Jomo Kenyatta of Kenya (1963-1978), and Kenneth Kaunda of Zambia (1964-1991) were among others who mimicked the powers and rule of the Colonial Governor.

In contrast, the impact of traditional practices on the current iteration of the imperial presidency in Africa is disputed Ghana's Nkrumah—an infamous proponent of the imperial presidency used cultural protocols and symbols of Ghanaian kingship at the beginning of his leadership, the method had both colonial aspects as well African traditions.<sup>54</sup> In addition to that, the constitution that was depicted significant elements of the Westminster style where by laws were enacted by parliament through Order in Council of the Queen and also the roles of the Queen as head of the state as constitutionally provided for.<sup>55</sup> He had the chance to alter the constitution in 1958.<sup>56</sup> This alone mirrors the effect of colonialism.

Not only was the constitutional style borrowed but certain principles, ideologies and structures were also borrowed. Nkrumah who had lived under the leadership of Roosevelt in the U.S. for quite some time borrowed the “New Deal” idea when he became president of

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<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> Prempeh (n 25) 776–7.

<sup>55</sup> Prempeh (n 29) 209 & 215.

<sup>56</sup> Prempeh (n 25) 788-789.

Ghana.<sup>57</sup> He relied on the constitution to lay down his interests.<sup>58</sup> As soon as Ghana attained its independence, Nkrumah changed the twitched the constitution to suit his interest by changing provisions that he thought would affect the acceleration of his ideas of development. By so doing, he centralized power to himself so that he could be in control.<sup>59</sup> He used the idea of political mobilization that was used by leaders such as Nehru, Lenin, Mussolini, and Hitler.<sup>60</sup>

Nkrumah did not only identify himself as the Leader of Ghana, but rather as an African leader, “Kwame Nkrumah of Africa.”<sup>61</sup> He founded the Convention Peoples Party during the colonial time of which he was head. When the nation attained independence, he expanded his powers to include those of the general and Executive secretaries. This gave him a leeway to amend the constitution by a simple majority, changed the central committee membership so as to accelerate his actions and ambitions as he had succeeded in centralizing power. He also abolished regional assemblies, enacted the 1958 Preventive Act that permitted the executive to arrest and detain without one facing trial for five years. The Act targeted those that were anti- government and the members of the opposition whose participation was sidelined while others had to flee the country<sup>62</sup>

In Ghana, the post-colonial reforms of the Constitution dropped the idea of the Monarchy where the Queen was the head of state. This made Nkrumah, the president, with so much power vested in him. His tenure of office would continue to the time until another President would be elected, although he stood the chance of being elected by parliament without limits.<sup>63</sup> In 1964 Nkrumah declared himself president for life. Another amendment

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<sup>57</sup> *ibid*, 785.

<sup>58</sup> *ibid* 785.

<sup>59</sup> *ibid* 789.

<sup>60</sup> *ibid* 804.

<sup>61</sup> *ibid* 786.

<sup>62</sup> *ibid* 790.

<sup>63</sup> *ibid*.

to the constitution was made and did not give a provision for the position of a deputy/vice of Nkrumah remained the top most authority with all powers consolidated in him.

Considering the above factors, Ghana only laid a precedent of leadership that would be followed by the rest of the African leaders by perception and constitutional arrangements. Besides Nkrumah, we also see other leaders like Julius Nyerere of Tanzania not considering the Bill of Rights in the 1965 constitution because of what had transpired in the United States.<sup>64</sup>

Therefore, the claim for so much power without limitations by the post-colonial imperial presidents does not have founding grounds in the African cultural practices and tradition.<sup>65</sup> Some of the African kings ruled at the times of credibility and did not determine their time of office or make decisions of their own that they could imposed on the people. There was room for criticism of kings by their subjects as well as forums for open discussions and deliberations on matters of concern about the kings. Among the Akan, for example, there were ceremonies where the women would sing and dance against autocratic kings.<sup>66</sup> The purpose of this acts was to draw attention to the fact that they disagree with the incumbent king for violating the governance system and that order be restored.<sup>67</sup>

### 1.3 The Consequences of Excessive Presidential Powers in Africa

African constitutions are imbued with hybrid regimes where the president is separately elected and has a fixed term of office, and the president is responsible for the formation of government and holds law-making powers.<sup>68</sup> In this system, the cabinet – selected by the president – is, at least in principle, accountable to parliament. The cabinet

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<sup>64</sup> *ibid* 805.

<sup>65</sup> Prempeh (n 29) 225.

<sup>66</sup> Prempeh (n 25) 782.

<sup>67</sup> *ibid* 783,

<sup>68</sup> van Cranenburgh (n 37) 50.

does not have a separate prime minister.<sup>69</sup> This arrangement of constitutional powers is neither purely presidential, nor purely parliamentary. It does not mean, however, that it is by definition free of checks and balances..

The impeachment of the president is one of those constitutional powers that legislative assembly holds in most African constitutions.<sup>70</sup> The requirement of two- third majority in the assembly too high, however, as explained before. In this regard, it is only Malawi in 2005 that has ever tried to impeach a president but failed.<sup>71</sup> South Africa in 2016 also tried the same with no success.<sup>72</sup>

The effect of imperial presidency in African politics is the lack of separation of powers, or at least checks and balances, between the executive and the other two branches of government. As such, there is no way the other two branches will be able to hold the executive accountable through checks and balances. Countries such as Benin, Malawi, and Sierra Leone among others have separation of powers. And yet the ministers for example in Benin, Malawi among others are appointed by the president of the republic,<sup>73</sup> the cabinet has power to censure ministers and the president cannot dissolve parliament. Much earlier, most African countries the president is empowered to appoint and dismiss cabinet members,<sup>74</sup> but this is not the case for some countries. In Malawi, the cabinet can only be dissolved after five years and that is during its elections.<sup>75</sup>

The hybrid form of government in Africa tends to favour large political parties that normally are based on personalities; the party of the president is usually the largest in parliament. As such, the system of government turns out to be a single party system. Even

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<sup>69</sup> *ibid* 51.

<sup>70</sup> *ibid* 64.

<sup>71</sup> *ibid* 64.

<sup>72</sup> BBC, 'South Africa's Jacob Zuma Survives Nkandla Impeachment Vote' *BBC News* (5 April 2016) <<http://www.bbc.com/news/world-africa-35966916>> accessed 7 April 2017.

<sup>73</sup> The State of Benin, The Constitution of Benin 1990 article 93.

<sup>74</sup> Cranenburgh (n 37) 52 & 54, Fombad and Nwauche (n 26) 93.

<sup>75</sup> The Republic of Malawi, The Constitution of Malawi 2015 article 67(2).



where proportional representation is brought into the picture, like in South Africa or Namibia, the large parties still dominate and the system leans towards the a single party government.<sup>76</sup>

In light of this, there is also fusion of offices in most of the African countries because cabinet ministers can also be members of parliament, which makes an easy foundation for government support in parliament. Countries such as Malawi that show some sort of separation of power still have the executive and legislature fused due to party membership which definitely weakens the legislature.<sup>77</sup>

Many presidents in Africa gravely abuse their powers, knowing well that they cannot be held accountable for their crimes because of the immunities that they have to legal processes while in power.<sup>78</sup> However on a different note, the former Zambian president Rupiah Banda in 2013 was placed on prosecution for crimes committed while in office.<sup>79</sup> The constitutions have not placed proper mechanisms that are effective and efficient to grip the powers these presidents' exercise and abuse.<sup>80</sup> This is why we see that a number of presidents in the African continent are able to even extend presidential term limits and stay in power for longer periods,<sup>81</sup> while abusing office. For instance, president Yoweri Kaguta Museveni of Uganda has been in office since 1986 to date. He has rigged elections for a number of years while suppressing and imprisoning opposition leaders for example Kizza Besigye.<sup>82</sup> Robert Gabriel Mugabe of Zimbabwe is yet another who has been in power since 1987 to date and is a tyrant. In Zimbabwe Mugabe has even overseen a complete constitutional reform, which in

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<sup>76</sup> Cranenburgh (n 37) 56.

<sup>77</sup> *ibid* 55-56.

<sup>78</sup> Fombad and Nwauche N 26) 94 &100.

<sup>79</sup> editor, 'Zambia: Former President Rupiah Banda Comments on His Immunity Restoration' <<https://www.lusakatimes.com/2016/03/21/former-president-rupiah-banda-comments-immunity-restoration/>> accessed 7 April 2017.

<sup>80</sup> Fombad and Nwauche (n 26) 94.

<sup>81</sup> Cranenburgh (n 37) 64.

<sup>82</sup> 'Are More African Leaders Ready to Give up Power?' *BBC News* (27 December 2016) <<http://www.bbc.com/news/world-africa-38403553>> accessed 7 April 2017.

the end did not impose a term limit on the sitting president. In 2018, at the age of 92 he is running for re-election again.

Furthermore most of the constitutions that emerged from the 1990s to date have failed to limit the powers of the presidents. The concentration of these constitutions was much on the introduction of multiparty system and term limits with no consideration on how to limit presidential powers besides these measures. As such, the presidents claim much power even beyond those that are provided for in the constitution<sup>83</sup> This has been the cause of crisis against most of the African leaders, as they have had powers to appoint individuals of their choices to key positions, altered constitutional term limits at will and decided on times of emergency. These powers have been the source of crisis in countries such as Burundi (2015 to date), South Sudan (2013 to date), and Uganda (2016), and many more are showing the red flags of getting into the same crisis.

#### **1.4 Difficulties of addressing powers of the presidency through Constitution making**

Most of the African constitutions indirectly grant so much power to the president, while limiting the legislative powers. Presidents get to initiate budgetary legislations, while the legislature can only amend in reduction of expenditure and nothing more, as it is limited by the constitution.<sup>84</sup> It is also a fact that the president has powerful veto powers over parliamentary legislations; for the veto to be over ruled, it requires the two-third majority.<sup>85</sup> The two-third majority is not easy to meet as the president's party normally dominates the

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<sup>83</sup> Fombad and Nwauche (n 26) 95.

<sup>84</sup> Cranenburgh (n 37), 64

<sup>85</sup> *ibid.*

assembly, the president may use fraudulent means to win the support of parliamentarians not to vote in favour of a given legislation or invoke party discipline.<sup>86</sup>

According to Ghanaian scholar, Kwasi Prempeh, the constitutional reforms that have been ongoing from the 1990s are not about curtailing the powers of the presidency, but promoting the latter: they are often based on significantly limited agendas that are tailored towards the selfish interests of opposition leaders who are likely to get into power and exercise the same.<sup>87</sup> In Zambia for example, the Movement for Multiparty Democracy campaigned against some dictatorial provisions of the constitution during Kaunda's leadership. When they finally took over power from Kaunda, they defended the same provisions, citing presidential democracy and good governmental system.<sup>88</sup> The same defence of dictatorial constitutional provisions also happened in Ghana (2001-2009) by the New Patriotic Part. It is only Kenya in 2010 that has shown an epic attempt to review provisions that aided the existence of imperial presidency.<sup>89</sup> This happened after considerable post-election violence, at the tail of a failed constitutional reform to a similar effect a few years earlier.

This has not really been automatically effective, as many of these leaders have found their own means on either removing the term limits or extending them. The first Namibian president (1999), and Zimbabwe president Mugabe in (2013) successfully removed term limits from their constitutions through Constitutional Amendment. While others, as Museveni of Uganda and Kagame of Rwanda keep extending their terms<sup>90</sup> through constitutional amendments too.

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<sup>86</sup> *ibid.*

<sup>87</sup> Prempeh (n 29) 229-230.

<sup>88</sup> *ibid* 230.

<sup>89</sup> *ibid* 209 & 230.

<sup>90</sup> Cranenburgh (n 37) 64.

At the same time, it is a source of relief and hope that some people and societies are becoming vocal in resisting this act of the presidency.<sup>91</sup> Burkina Faso is a tremendous success story in challenging the extension of the president's term of office. In 2014, Blaise Compaore wanted to repeal the constitutional provisions on term limits. There was a tremendous protest by the citizens across the country, which made Compaore to immediately resign and flee to Ivory Coast.<sup>92</sup>

Just before the 2015 elections, Compaore's allies staged a coup d'état, which was also failed by the citizens, who rampantly went on protest and the restored the Interim government and later elections held.<sup>93</sup>

Burundi has also shown massive resistance against the third term of president Pierre Nkurunziza, by taking to the streets and protesting and has eventually led to the on-going crisis.<sup>94</sup>

## 1.5 Conclusion

In conclusion, the imperial presidency emerged shortly after the time when the African states attained independence. The phenomenon, championed by President Nkrumah of Ghana, has carried on to date, partly due to its appeal to "big men" leaders who dominate African politics, and also because the constitutions have not been able to limit presidential powers effectively. By so doing, African presidents still remain powerful with excessive formal and informal powers that continue to overshadow the other two branches of

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<sup>91</sup> Reginald Ntomba, 'Africa's Presidents: Should They Stay or Go Now? - New African Magazine' <<http://newafricanmagazine.com/africas-presidents-should-they-stay-or-go-now/>> accessed 7 April 2017.

<sup>92</sup> Adrienne LeBas, 'Term Limits and Beyond: Africa's Democratic Hurdles' (2016) 115 *Current History* 169, 169.

<sup>93</sup> *ibid.*

<sup>94</sup> Ntomba (n 91).

government. If constitutional mechanisms and policies are not drawn to limit these powers, then imperial presidencies and their sad consequences may remain a reality.

## **Chapter 2: Presidential Power in the South Sudan Transitional Constitution**

Presidential powers in South Sudan have always been an issue of concern right from the time the Transitional Constitution was adopted in 2011. This is because of the fact that the constitution made inclusions of some sub-sections that not exist in the Interim Constitution and these provisions did that granted more powers to the president. This section will seek to explore the powers of the president and which specific powers led to the crisis.

### **2.1 What are the Powers of the president under the South Sudan Constitution?**

The South Sudan Constitution of 2011 establishes the powers, and composition of the presidency under Chapter 1 part six.<sup>95</sup> Functions of the president include but not limited to protection of the security of the country, supervise the institutions as those of the executive and constitutional wings, appoint official who will hold constitutional and judicial posts.<sup>96</sup> The president also heads the National Council of Ministers (also known as the cabinet) declares a state of emergency, initiates constitutional amendments, appoints presidential advisors.<sup>97</sup> The appointment and removal of the vice president as well as state governors are also presidential powers.<sup>98</sup>

The South Sudan constitution grants so much power to the president that it does not only run and control the politics of the national government but those of the State governments too.<sup>99</sup> This chapter will explore the constitutional provisions of powers of the

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<sup>95</sup> Republic of South Sudan The Transitional Constitution of South Sudan (n 3).

<sup>96</sup> *ibid* Articles 101(a),(b),(c).

<sup>97</sup> *ibid*, Article 101(d), (e), (f) (i).

<sup>98</sup> *ibid*, Articles 101(r)(s) and 104.

<sup>99</sup> A decentralized form of government governs South Sudan. It is comprised of ten states. South Sudan's Constitution of 2011 with Amendments through 2013, articles, 161, 162,47 and 1(4). The ten states were expanded to 28 states by a presidential decree in 2015. 'South Sudan President Expands

president in South Sudan as specifically those that led to the crisis. The chapter will also consider the events of tensions that existed before the actual crisis of 2013

## 2.2 What Specific Powers fuelled the crisis?

The constitution bares two major powers of the presidency that are attributed to the 2013 to date crisis. When the south Sudan Constitution was drafted, the Constitution was managed by a few who did not really have the knowledge in the constitutional-making process.<sup>100</sup> The 2013 conflict to date has pointed towards the powers of the president to appoint and dismiss key government official as well as the power to initiating constitutional amendments and legislation. In 2015, Riek Machar was to stand for presidency President Kiir and his loyalists did not support the idea; Paul Malang (currently chief of staff) trained a military group that would be loyal to the president to rescue him from the situation.<sup>101</sup> After the signing of the peace agreement in 2015, in 2016, Taban Deng Gai was elected as vice president and the president appointed a speaker without giving a chance to SPLM/A, the party in opposition (SPLM/A-IO).<sup>102</sup> As of 2016, the President, Salva Kiir is already talking of standing for elections in 2018.<sup>103</sup> All these escaped according to the analysis of the author is the fact that the current leadership does not want to relinquish power

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States to 28 as Opposition Accuses Him of Deal Violation - Sudan Tribune: Plural News and Views on Sudan' (n 24).

<sup>100</sup> Deng (n 5).

<sup>101</sup> PINAUD (n 14).

<sup>102</sup> 'SPLM-IO Says South Sudan's New FVP Cut off from Controlled Areas - Sudan Tribune: Plural News and Views on Sudan' (n 16).

<sup>103</sup> Sudane Tribune, 'South Sudan President Says Will Run for 2018 Elections - Sudan Tribune: Plural News and Views on Sudan' *Sudan Tribune* (18 April 2016) <<http://www.sudantribune.com/spip.php?article58666>> accessed 7 April 2017.

### 2.3 Appointment and dismissal powers

The Transitional Constitution turned out to have two major and outstanding sub-provisions that did not exist in either the Comprehensive Peace Agreement or the Interim Constitution. These sub provisions are article 101(r) and (s) and stemmed more powers to the presidency and the underlying basis of inclusion is unknown but presumed to be a need that is unclear.<sup>104</sup>

Before the 2013 December crisis, the president exercised these powers of appointment and dismissal under article 101 (r) and (s) of the Transitional Constitution of South Sudan.<sup>105</sup> The President on unjustified grounds dismissed two governors who were rumoured to have declared support to the rebel leader Riek Machar for the 2015 elections from office.<sup>106</sup> After that, the president has continued to exercise this power in situations where the governors were either not loyal to him or members of his party.<sup>107</sup> In March of 2013, Riek Machar, the head of SPLM-IO, who was then the vice president, had declared his intentions to run for presidency in the 2015 elections.<sup>108</sup> Machar had made assurance of his intent to stand for presidency after serious assertions that term limits be included in the constitution. The matter was debated about in public platforms within the party in the general public though it was eventually frustrated by the when the president dissolved cabinet.<sup>109</sup> In addition to this, there were traces that Riek Machar had more support than Salva Kiir.<sup>110</sup> In order for the president to

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<sup>104</sup> Deng (n 5) 5.

<sup>105</sup> Articles 101(r)(s), these provisions allow for the presidency of to remove state governors from their seats in case of any sort of crisis that may affect the security of the country and that these governors are replaced by caretaker governors that the president appoints. However, a governor has to be elected within 60 days following the removal of the latter.

<sup>106</sup> Deng (n 5) 8-10.

<sup>107</sup> Sudan Tribune, 'South Sudan President Sacks Imatong Governor - Sudan Tribune: Plural News and Views on Sudan' *Sudan Tribune* (11 February 2017) <<http://www.sudantribune.com/spip.php?article61618>> accessed 7 April 2017.

<sup>108</sup> Brosché and Höglund (n 2) 76.

<sup>109</sup> Johnson (n 13) 6.

<sup>110</sup> Brosché and Höglund (n 2) 77.



protect his powers, the entire cabinet was dissolved of which Riek Machar was part.<sup>111</sup> Those that were loyal to the president were re-instated. A coalition of those that were not re-instated to office was formed and named SPLM –IO, led by Riek Machar and challenged Salva Kiir’s dictatorial intentions.<sup>112</sup> This became a threat to Salva Kiir. In order to calm down the situation, a National Liberation Council (NLC) meeting was convened on 14 December 2013. It was such a heated meeting that Salva Kiir as well as Machar and his team boycotted follow up meeting scheduled for the following day. Instead, Salva Kiir decided disarm presidential guards loyal to the Machar’s tribe while arresting opposition leaders.<sup>113</sup> He accused the opposition leaders of a coup d’état. Given these justifications, there is no shadow of doubt that the powers of the president under these provisions lead to the crisis.<sup>114</sup> These powers have caused more harm than good as the constitutional regulation has given authority to one party. Accordingly, there should be a reconsideration of how to address it.<sup>115</sup>

How these provisions found their way into the constitution is really unclear

## 2.4 Emergency powers

In South Sudan, the president is empowered to declare the state of emergency as well as war under the constitution.<sup>116</sup> However, how the emergency powers and declaration of war in South Sudan are utilized is perplexing. Now the way the state of emergency and declaration of war starts and ends is what has never been clear in South Sudan. A state of

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<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> Deng (n 5) 5.

<sup>116</sup> South Sudan’s Constitution of 2011 with Amendments through 2013, article 101(e) (n).

emergency can be declared till for notice<sup>117</sup> when it ends is a mysterious fact. Civil war and state of emergency continue to prevail in South Sudan since 2013 no date with no clear sense of when it will ever come to an end. The president declares emergency even without the involvement of the parliament and there is never ever a moment that the president parliament or cabinet has ever stated an end to a state of emergency.

In case of any of any danger such as war, epidemics, natural disaster that may befall the country, the president declares a state of emergency but the declaration of the state of emergency has to be submitted to the National Legislature within a fifteen days time frame for approval.<sup>118</sup> The president may use “orders or laws during a state of emergency but will not use the same measures to dissolve or suspend any institution of the national executive,”<sup>119</sup> among others. This is however not the case in South Sudan as it is evident that the president dissolved the entire cabinet prior to the December 2013 crisis.

## **2.5 Tenure of office of the president and Procedure for constitutional amendment**

The tenure of the president in South Sudan is meant to be five years after the transitional period but four years during the transitional period.<sup>120</sup> As the South Sudan constitution is undergoing review, the National Legislative Assembly (NLA) in an extraordinary sitting in 2013 passed a bill to first bill to amend the constitution. The bill extended the constitutional drafting period of the Constitutional Review Commission for another two years.<sup>121</sup>

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<sup>117</sup> ‘South Sudan President Says Coup Attempt “Foiled”’ *Al Jazeera* (17 December 2013) <<http://www.aljazeera.com/news/africa/2013/12/s-sudan-president-says-coup-attempt-foiled-2013121613417331572.html>> accessed 7 April 2017.

<sup>118</sup> The Transitional Constitution of South Sudan 2013, article 189.

<sup>119</sup> *ibid* article 190.

<sup>120</sup> *ibid* article 100.

<sup>121</sup> Dong Samuel Luak, ‘South Sudan: The Fiasco of Constitutional Amendments’ <<http://nyamile.com/2015/11/19/south-sudan-the-fiasco-of-constitutional-amendments/>> accessed 7 April 2017.

In 2015, the presidential term was extended by another three years through a constitutional amendment after the call off of the 2015 elections citing the need for political instability.<sup>122</sup> The Sudan Constitution had seen that test of elections not being held in June of 2015. The spokesperson of the SPLM in Government (here is SPLM-IG) was quoted saying that if Machar had not invoked war then the election would have taken place and the voters would have been given a chance to elect their leaders.<sup>123</sup> Thus extensions of tenure of office of the presidency and curtailing elections greatly have a connection to the violence that prevails to date.

The extension of tenure of office is not only an intimidation to democracy but also in most cases pushes presidents to edge killing their political opponents or squandering public funds to bribe their stay in office.<sup>124</sup>

## **2.6 Conclusion.**

After the analysis of the powers of the president under the Transitional constitution, it is evident that the powers definitely have a direct link to the 2013 to date crisis. The president having to interfere in the affairs of the state for example the president dismissing and appointing the governors of the state that are directly elected by the people infers with the underlying will of the people who elected their leaders.

On the second note, the extension of tenure of office of the president was in itself problematic as it was an evident signal that the 2015 elections would not take place and that the need for change was not to happen anytime soon.

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<sup>122</sup> ‘S. Sudan Presidential Mandate Extension - Constitutional?’ VOA <<http://www.voanews.com/a/south-sudan-presidential-mandate-extension-constitutional-/2857593.html>> accessed 7 April 2017.

<sup>123</sup> Ibid.

<sup>124</sup> Charles Manga Fombad, ‘CONSTITUTIONAL REFORMS AND CONSTITUTIONALISM IN AFRICA: REFLECTIONS ON SOME CURRENT CHALLENGES AND FUTURE PROSPECTS’ (2011) <<http://www.repository.up.ac.za/bitstream/handle/2263/16941/Fombad-paper-2011.pdf?sequence=1>> accessed 7 April 2017.

## **Chapter 3: Presidential Power in Kenya and Burundi**

### **Introduction**

In this chapter, the powers of the presidency both in Burundi and Kenya is to make a comparison with the powers of the presidency in South Sudan. Knowing the difference will help on gaging where the problem lies and how this can be limited based on the practice that Kenya and Burundi may shade light on.

### **3.1 Presidential powers in Kenya;**

The powers of the president under the constitution of Kenya are enshrined under chapter 9 of the constitution of 2010. The president is head of state, commander in chief, head of national Security Council, empowered to protect human rights, the constitution, and sovereignty of the constitution.<sup>125</sup> The constitution also goes on to provide that the presidency also has powers to control the state of emergency, and power of mercy.<sup>126</sup>

The president, has power to appoint cabinet secretaries, attorney general, cabinet secretary, principle secretaries, high commissioners, and ambassadors, among others the constitution may permit the presidency to do so.<sup>127</sup> The president also, appoints the chief justice and the deputy chief justice as recommended by the Judicial Service Commission and approval is by the National Assembly.<sup>128</sup> The Public Service Commission which consists of seven members, the chairperson, and the vice chairperson are all appointed by the president

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<sup>125</sup> The Constitution of Kenya, article 131.

<sup>126</sup> *ibid* articles 133 & 134.

<sup>127</sup> *ibid* 2010, article 132(2).

<sup>128</sup> *ibid* article 166(1) (a).

based on the approval by National Assembly.<sup>129</sup> Members of commissions are also appointed by the presidency and approved by the national assembly.<sup>130</sup>

Tenure of office of the presidency in Kenya is limited to two terms,<sup>131</sup> of which the leaders have abided by. Former presidents Moi (2002) and Kibaki (2012) respected term limits.<sup>132</sup> In East Africa Kenya is the most outstanding country when it comes to term limits and party change and this has stood the test since 2002 that presidential term limits are observed.<sup>133</sup> By this limitation and practice, Kenya has shown a legacy of apolitically democratic culture of politics because presidents willingly leave office no matter what the circumstance may be to keep them ruling.<sup>134</sup>

Even in the 2015 Ugandan elections, Dr. Kiiza Besigye, the Forum for Democratic Change opposition leader called on the Uganda to pick on lessons from Kenya and Tanzania when it comes to term limits.<sup>135</sup>

### 3.2 Emergency powers and Declaration of war

The power of emergency and declaration of war in the Kenyan constitution is not by the president but rather by the National Assembly.<sup>136</sup> The constitution has limited the powers

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<sup>129</sup> *ibid* article 233(2)

<sup>130</sup> *ibid* article 150 (2)(a)(b)(c)

<sup>131</sup> *ibid* article 142 (2)

<sup>132</sup> Catherine S Namakula, 'THE EFFICACY OF PRESIDENTIAL TERM LIMITS IN AFRICA' (Mandela Institute for Development Studies Youth Dialogue 2016) <[http://minds-africa.org/Downloads/2016%202/2a.%20MINDS%202016%20Youth%20Dialogue%20Discussion%20Paper\\_Term%20Limits\\_Catherine%20Namakula.pdf](http://minds-africa.org/Downloads/2016%202/2a.%20MINDS%202016%20Youth%20Dialogue%20Discussion%20Paper_Term%20Limits_Catherine%20Namakula.pdf)> accessed 7 April 2017.

<sup>133</sup> CHARLES ONYANGO-OBBO, 'Why Term Limits Are No Longer a Big Deal in Kenya' *The East African* (28 March 2015) <<http://www.theeastafrican.co.ke/OpEd/comment/Why-term-limits-are-no-longer-a-big-deal-in-Kenya-/434750-2668314-axxfeu/index.html>> accessed 7 April 2017.

<sup>134</sup> *Ibid*.

<sup>135</sup> 'Emulate Kenya, Tanzania on Term Limits, Urges Besigye in' *Daily Nation* (20 January 2016) <<http://www.nation.co.ke/news/africa/Emulate-neighbours-on-term-limits-urges-Besigye-in-campaign/1066-3040372-format-xhtml-dwjix2z/index.html>> accessed 7 April 2017.

<sup>136</sup> The Constitution of Kenya, 2010, article 95 (6)

of the president as a way of promoting peace<sup>137</sup> If powers of the president are restrained then there will be no interference by the president on matters of the state, and the appointment and dismissal of governors. The problem is that the president dismisses governors who are directly elected by the people and this as such, his acts frustrate the will of the people which leads to violence. Peace can also be profound if the presidential powers are restrained in a way that there will be no frictions and divisions within the SPLM/A party as it is now. The powers of the president have a hand in the disunity and divisions within the party and the restraint can help bridge this gap... and many have described the constitution a document that can possibly facilitate and transform the Kenyan political culture.<sup>138</sup>

### **3.3 How are constitutional Amendments done?**

The Kenyan constitution allows for amendment in three different ways. First of all, any proposed amendment to the constitution has to be done in accordance with Article 256 or 257 of which the approval is by a referendum.<sup>139</sup> The referendum approval is required if the matter of amendment is related to supremacy of the “supremacy of the constitution, the Kenyan territory sovereignty of the people, bill of rights, term of office of the president, independence of the judiciary...”<sup>140</sup> among others.

Secondly way of amendment is by the two houses of parliament initiating a bill that will amend the constitution. The bill will pass through three readings but a time frame is needed between the second and third reading of the bill and once the readings are done, then it will be put to the public for open discussion. Then finally, the presidents of the two houses of

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<sup>137</sup> Mai Hassan, ‘Continuity despite Change: Kenya’s New Constitution and Executive Power’ (2015) 22 *Democratization* 587, 588.

<sup>138</sup> *ibid.*

<sup>139</sup> The Constitution of Kenya, 2010, article 255(1) and (2).

<sup>140</sup> *ibid* article 255(1).

parliament shall present the amendment bill to the president for signature accompanied by a certificate that indicates that the bill was actually passed by parliament. The president's response in this regard has to be availed within thirty days and law to be published.<sup>141</sup>

The third way that a constitutional amendment can be done is by the general public making suggestions or coming up with a bill that has to be supported by a minimum of a million signatures of registered voters.<sup>142</sup> The formulated bill from the suggestions plus the signatures will have to be delivered to the independent electoral and boundaries commission for verification of the list of voters before it is passed to the county assemblies for consideration.<sup>143</sup> If a county assembly happens to approve the bill in the three months' time frame, the speaker of the county assembly then hands it over the speakers of the two houses of parliament plus the certificate that shows that the county assemblies have approved the bill.<sup>144</sup> If parliament happens to pass the bill then it will be extended to the president for signature and if the parliament does not pass then it is submitted to the public for a referendum.<sup>145</sup>

### **3.4 Presidential powers in Burundi;**

The powers of the presidency under the constitution of Burundi are stipulated under Tittle five. The president is entitled to execute laws through decrees that are counter signed by the vice president and the concerned minister but the issue of countersignature is only for exceptional cases as stipulated by some of the provisions.<sup>146</sup> The president is also the head of government, commander-in-chief, declares war, issues pardons after consultations with the

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<sup>141</sup> *ibid* article 256

<sup>142</sup> *ibid* article 257 (1) (2)

<sup>143</sup> *ibid* article 257 (3) (4) (5)

<sup>144</sup> *ibid* article 257(6)

<sup>145</sup> *ibid* articles 257 (9) (10) (11)

<sup>146</sup> Burundi's Constitution of 2005, article 107.

two vice presidents after the superior council of the magistrates has issued their opinion.<sup>147</sup>

The president is also empowered to declare the state of emergency by decree measures be taken after consultation has been done by the government, bureaus national assembly, senate, constitutional court and the national council of security.<sup>148</sup>

### **3.5 Appoint and dismissal powers**

The president of Burundi appoints key positions in the military or civil service and the judiciary. Domestic law that lays down the categories that the presidency can appoint and the appointment is only effective after approval by senate.<sup>149</sup>

A governor of a province is appointed by the president after consultation is done with the two vice presidents and confirmed by Senate.<sup>150</sup> All appointments by the president under article 187(9) with the exception of those of the constitutional court are based on proposals by minister of justice under its jurisdiction and confirmed by the Senate after opinion of superior council of magistrate.<sup>151</sup> Considering appointment powers in Burundi, the president is not in absolute control of the appointment powers because checks have to be done by Senate and other bodies. The presidency also appoints specific positions as prescribed by law. Finally, the president appoints governor of the province, consultation have to be done as noted in the outset of the text.

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<sup>147</sup> *ibid* articles 109,110,113.

<sup>148</sup> *ibid* article 115.

<sup>149</sup> *ibid* article 111.

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid* article 215.



### 3.6 What is the length for tenure of office?

The tenure of office of the president is five years that can be renewed for another one term.<sup>152</sup> However there is an exception to his provision which states that “exceptionally, the president of the republic of the post-transitional period is elected by the national assembly...with a majority third...members of parliament”<sup>153</sup> This exception that seems to be unclear gives room for the constitution to be interpreted in a different way which is giving an exception which is different from the provision of article 96.<sup>154</sup>

### 3.7 How are constitutional amendments done?

In the constitution of Burundi, president has the power of constitutional amendment but this is done in a way that the president has to consult government, the national assembly or senate and decision has to be taken with an absolute majority of all the members of the mentioned sections.<sup>155</sup> The president can submit a bill to a referendum for a constitutional amendment of the proposed constitutional amendment has to be passed by two-third of senate and four-fifths of the national assembly.<sup>156</sup> If the revision affects national unity, state security, democracy among others, then there is no way the procedure can stand its grounds.<sup>157</sup>

### 3.8 Emergency powers;

In an event of state of emergency and declaration of war, it is the responsibility of the presidency to observe the situation and may declare by decree to carry out consultations with the government, bureau of national assembly. Consultations also have to be done with the

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<sup>152</sup> *ibid* article 96

<sup>153</sup> *ibid* article 302

<sup>154</sup> Stef Vandeginste, ‘Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi’ (2016) 51 *Africa Spectrum* 39, 40.

<sup>155</sup> Burundi’s Constitution of 2005, article 297.

<sup>156</sup> *ibid* articles 298 & 300.

<sup>157</sup> *ibid* article 299.

national council of security and the constitutional court on the subject matter.<sup>158</sup> The presidency will then have to inform the nation of the subject matter through a message, and dissolution of parliament may not be done in the case of emergency.<sup>159</sup> At the end of Burundi's in (2000) civil war, which lasted almost a decade, a new constitution was adopted in 2005. The 2005 Constitution of Burundi limits tenure of the president to two terms.<sup>160</sup> Burundi experienced a horrible crisis in 2015, which was triggered by President Pierre Nkurunziza announcing his intentions to seek third term<sup>161</sup>. In 2014, president Nkurunziza announced his intention to run for the 2014 elections arguing that, he had not been elected by the voters in (2005), but appointed by the National Assembly and the Senate. Given that ground, that he was eligible to stand for another term in office.<sup>162</sup> The president's intention led to the split of the party, National Council of the Defence of Democracy (CNDD), massive street protests in Bujumbura, and an unsuccessful coup d'état.<sup>163</sup> The coup d'état happened while Nkurunziza was in Tanzania for a meeting, but his loyalist (Nkurunziza) allowed him to return to the country.<sup>164</sup> The crisis has left hundreds dead, thousands displaced to neighbouring countries. With all these happening, and the controversies that surround Nkurunziza's 2015 elections, plus the crisis, he has hinted that he may run for fourth term.<sup>165</sup> He has not only mentioned his likelihood to run for fourth term in office but also named the possibility of changing of changing the text of the constitution on term limits.<sup>166</sup>

### 3.9 Conclusion.

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<sup>158</sup> *ibid* article 115.

<sup>159</sup> *ibid*.

<sup>160</sup> 'AD30: African Publics Strongly Support Term Limits, Resist Leaders' Efforts to Extend Their Tenure | Afrobarometer' (2015) <<http://afrobarometer.org/publications/ad30-african-publics-strongly-support-term-limits-resist-leaders-efforts-extend-their>> accessed 7 April 2017.

<sup>161</sup> Vandeginste (n 154) 40.

<sup>162</sup> *Ibid* 39.

<sup>163</sup> *ibid* 40.

<sup>164</sup> 'AD30: African Publics Strongly Support Term Limits, Resist Leaders' Efforts to Extend Their Tenure | Afrobarometer' (n 160).

<sup>165</sup> 'Burundi President Hints He Might Seek Fourth Term' (30 December 2016) <<http://www.enca.com/africa/burundi-president-hints-he-might-seek-fourth-term>> accessed 7 April 2017.

<sup>166</sup> *Ibid*.

The powers of the presidents in the three countries are similar in such a way that they are all heads of state 'commanders in chief among others. The only difference is that the president in Kenya does not hold emergency powers, in Burundi the office of the president is shared by the president and the vice president, which is a shared arrangement. It can be noted that the presidency in South Sudan has more powers compared to presidents in Burundi and Kenya. As the president of South Sudan holds more powers which is a sign of autocracy and tyranny. This is evident as the president of South Sudan controls even the affairs of the state and this is not a good sign to democracy at all

## **Chapter 4: Comparative Lessons for South Sudan**

### **4.1 Lessons from Kenya and Burundi**

After all the analysis of the power of the president of the President in Kenya and Burundi with the comparison to south Sudan, this chapter will look and lessons that south Sudan can learn from each of them in regard to the constitutional provisions. Not only the constitutional provisions but also the find some recommendation for South Sudan.

#### **4.1.1 Contents of provisions: How different are the powers of the president of South Sudan different from those of the presidents' in Kenya and Burundi?**

Considering the powers of the president in South Sudan, Burundi and Kenya, South Sudan is outstanding for the fact that the president has so much power invested him. In Kenya, the president does not have the powers to declare war or a state of emergency as the presidency in South Sudan. These powers in Kenya are left for the National Assembly to safeguard.

On a different note, the president does not have powers to dismiss governors or ministers all by it as the case is in South Sudan. There is a procedure by which dismissal may be done for example dismissal of a cabinet secretary. Where by any member from the national assembly who has to be supported by a quarter at least of members of the national assembly may move a motion to the president to remove a cabinet secretary.<sup>167</sup> The removal of the cabinet ministers has to be on matters of gross misconduct which can be investigated

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<sup>167</sup> The Constitution of Kenya, 2010, article 152(6)

and there is also chance that the cabinet secretary is given a chance to be heard.<sup>168</sup> The procedure is clear and well stipulated unlike in South Sudan.

In Burundi, the president of the republic and the two vice presidents exercise the presidency,<sup>169</sup> the president of the republic exercises his powers that through decrees that are countersigned by the vice president in matters arising from the vice president and the minister concerned,<sup>170</sup> and the two vice presidents of the very republic. In this way, it somewhat minimizes on the levels of powers that the president could manipulate as it is not easy to keep three heads to speak the same language, unlike in South Sudan where there president exercises all powers as he wishes. Burundi has got a power sharing mechanism that is profound in its history, picked up in its constitution and is a mechanism of promoting peace and unity among the people of Burundi. Burundi has been referred to as a centre of peaceful transitional governance that is anchored in power sharing.<sup>171</sup> Power sharing in Burundi started as an aspect by which parties would be shared among different political parties that had earlier been neglected based on ethnicity or region among others.<sup>172</sup>

In regard to the issue of appointments in Burundi, the president's appointments are specific positions and approval has to be done by Senate.<sup>173</sup> There has never been a situation in South Sudan where by appointments by the president of members to specific positions such as deputy ministers have ever been frustrated by parliament or the national legislative assembly. Even when the issue of Tilar Ring (the then minister of Justice and later became a presidential advisor and now an Ambassador to Russia) was the first of its kind, the presidency still managed to find a way out. The reason for this is that the appointed ministers

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<sup>168</sup> *ibid* article, 152(6) (c)-(10)

<sup>169</sup> Burundi's Constitution of 2005, article 92

<sup>170</sup> The Constitution of Kenya, 2010, article, 107

<sup>171</sup> D. Curtis, 'The International Peacebuilding Paradox: Power Sharing and Post-Conflict Governance in Burundi' (2013) 112 *African Affairs* 72, 72.

<sup>172</sup> Vandeginste (n 154) 67.

<sup>173</sup> Burundi's Constitution of 2005, article 111,112

or deputy ministers are not approved as individuals but rather as collective group and singling out an individual is not easy.<sup>174</sup> The president in South Sudan appoints and dismisses deputy ministers and their approval is by a simple majority of the present members.<sup>175</sup>

There is actually a difference between the content of constitutional provisions in the three countries of South Sudan, Kenya, and Burundi. The provisions especially in South Sudan are in such a way that they are not explicit or they give room for the president to have more power.

In Kenya, there are provisions well laid out for the different levels of government. Chapter 11 discusses the devolution and its objectives as “to promote democracy and accountable exercise of power, fostering national unity through the recognition of diversity, give powers of self-governance to the people while encouraging their participation in decision making.”<sup>176</sup> The Article goes on to state that “communities need to manage their own affairs and development, protect and promote rights of minorities, equitable sharing of national and local resources, facilitate decentralization of state organs and above all to promote checks and balances and separation of powers.”<sup>177</sup> The Kenyan constitution lays down the principles of devolution and the other levels of government in a devolved government constituting of county governments.<sup>178</sup> The Transitional Constitution of South Sudan does not provide for the other levels of government that it has to learn from and make provisions for as the case of Kenya. Because article 48 simply states devolution but does not

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<sup>174</sup> James Okuk, ‘The Constitution and Presidential Appointments in South Sudan’ <<http://www.southsudannation.com/the-constitution-and-presidential-appointments-in-south-sudan/>> accessed 7 April 2017.

<sup>175</sup> South Sudan’s Constitution of 2011 with Amendments through 2013, articles 115&117.

<sup>176</sup> The Constitution of Kenya, 2010, article 174 (a) (b) (c)

<sup>177</sup> *ibid* article 174(d)-(i)

<sup>178</sup> *ibid* article 175&176

provide for the other levels of government but simply mentions of how the powers will be shared with the other levels of government.<sup>179</sup>

On the issue of appointment of governors, as was stated in the outset of this document that in South Sudan the appointment and dismissal of governors is by the president as per article 101(r) and (s), the Kenyan provisions are more clear and distinct. County governors in Kenya are appointed by the general public in elections as the parliamentarians and are limited to a two term of office.<sup>180</sup> The removal of these governors is only on grounds of “great violation of the constitution or any other law, abuse of office and gross misconduct, physical or mental health” of which the legislature shall have to enact a law that will stipulate the procedure by which the governors shall be removed. As for South Sudan, the two first governors who were victim to the powers of the president of dismissal and appointments was only on grounds of ethnic conflict which is not a state problem or caused by the governors but rather a national problem.<sup>181</sup> Surprisingly, the caretaker governors continue to serve in office despite the fact that the problem has never been solved and that the constitution provides for election of a governor within ninety days.<sup>182</sup> The removal of governors is a usual and normal issue as removal may not have reasoning as to why it happens or if there is a need from some individuals for a governor to be removed.<sup>183</sup> And the spoke person of the president Ateny Wek even goes on to assert that it is normal and easy process.<sup>184</sup> The appointment and removal of governors in South Sudan can be stated as abuse of power or autocratic rule as the presidency has all the powers to use them as it wishes.

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<sup>179</sup> Deng (n 5) 10.

<sup>180</sup> The Constitution of Kenya, 2010, article, 180(1)(7).

<sup>181</sup> Deng, (n 5) 7.

<sup>182</sup> Ibid.

<sup>183</sup> Garang Abraham Malak, ‘President Kiir Removes Two Governor in His Latest Presidential Decree’ <<https://paanluelwel.com/2017/01/04/president-kiir-removes-two-governor-in-his-latest-presidential-decree/>> accessed 7 April 2017.

<sup>184</sup> Ibid.

The Kenya constitution provides for powers of both the national and county governments under the forth schedule<sup>185</sup> and the process by which the two governments can be able to exchange their duties is also provided. The different levels of government can transfer powers to one another under by an agreement if they find that the other does it in a better way than the one that is positioned to, and the resources for the specific delivery of the power too is transferred.<sup>186</sup> The Transitional constitution of South Sudan does not have any provisions containing functions of the governors or powers can be shared but only provides for the three levels of government.<sup>187</sup> And as such the powers are left to the president to control the states too as much earlier discussed in this document. There then has to be provisions in the South Sudan constitution that will clearly layout the functions of the governors as well as the limitations and intuitional arrangements in which they can corporate. Like in Kenya, corporation between the national and county governments is clearly provided for in the constitution so that there are boundaries and integrity in the functions of either government.<sup>188</sup>

From Burundi, despite the fact that the president is responsible for appointments and dismissal of government officials, it is done by the three figures in the presidency, which are the president of the republic, and the two vice.<sup>189</sup> This still shows a difference with the presidency in South Sudan whereby decisions are by one single individual the president as earlier discussed. There should be a rethink of the provisions of the presidency.

Secondly, in Burundi, the president appoints governor of the province but the president of the republic has to consult with the two vice presidents and the senate finally confirms the appointment. This is different form South Sudan and if there be appointments by

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<sup>185</sup> The Constitution of Kenya, 2010, article 186

<sup>186</sup> *ibid* article 187

<sup>187</sup> South Sudan's Constitution of 2011 with Amendments through 2013, article 47.

<sup>188</sup> *ibid* article 189.

<sup>189</sup> Burundi's Constitution of 2005, article 108.



the president, there has to be mechanisms by which the president appointments be approved and not the presidency to do it wholly. The national government also delegates some powers to the province where the governor is in control and charge of administrative work and service delivery.<sup>190</sup> In South Sudan, the presidency does not permit for any kind of decentralization as the presidency controls all powers to the state levels and as such, there has not been any room for the Rule of Law and good governance to flourish in the country.<sup>191</sup>

Thirdly, the state of emergency in Burundi is exercised by the presidency but other institutions are involved. The government, Bureau of National Assembly and of Senate, National Council of Security and the constitutional court,<sup>192</sup> but for the case of South Sudan, the president decides as an individual with no limitations or consultations.<sup>193</sup>

Though the law provides for that declaration of war shall be submitted to the National Legislature within 72 hours, and that the declaration shall require a two-third majority approval of the members of the National Legislature,<sup>194</sup> it has never happened for the case of South Sudan. South Sudan should be able to emulate what the Burundi and Kenya are doing. Stricter procedures have to be formulated for there to be stability and peace and the general development of the country because of the observation that will be given to the utilization of these powers.

## 4.2 Process of constitutional amendments

Considering both Kenya and Burundi, they have a much a better strict procedure for amending their constitutions. In Burundi, constitutional amendment requires absolute

<sup>190</sup> Burundi's Constitution of 2005, article 138

<sup>191</sup> Deng (n 5)10.

<sup>192</sup> Burundi's Constitution of 2005, article 115.

<sup>193</sup> South Sudan's Constitution of 2011 with Amendments through 2013, article 101 (e) &(n), article 190-192 provide for the state of emergency and declaration of war b the presidency.

<sup>194</sup> ibid article, 192(1)-(3).

majority of members of the government and national assembly.<sup>195</sup> Its adoption has to be by four-fifths of members of the national assembly and two-thirds of senate.<sup>196</sup> Meeting this requirement may not be easy and so is a good means of keeping the constitution safe from unnecessary interference and amendments.

In Kenya, there are three different categories of constitutional amendment as earlier discussed that have to be observed for a constitutional amendment to succeed. Looking at what Kenya and Burundi has in place, will guarantee or safeguard the constitution from unwanted amendments.

#### **4.3 Conclusion and Recommendations: Constitutional and other reforms.**

South Sudan needs to now get into constructing a democratic constitution for the country. Some scholars have stated that a democratic constitution is one that is made through a process that is democratic and not one that stipulates governance that is democratic.<sup>197</sup> As we very well know, the constitutions of South Sudan to date have not been built on participatory process. This is one of the reasons as to why it has failed to gain legitimacy and acceptance.<sup>198</sup> The constitution process is lightly mentioned under chapter II that permits for the establishment of a Constitutional Review Commission (CRC) that will be responsible to the development of a permanent constitution.<sup>199</sup> The members of the commission should not be however appointed by the presidency as the case for South Sudan.<sup>200</sup> The president

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<sup>195</sup> Burundi's Constitution of 2005, article, 297

<sup>196</sup> Ibid article 300

<sup>197</sup> Deng, (n 5) 16.

<sup>198</sup> Ibid 1.

<sup>199</sup> South Sudan's Constitution of 2011 with Amendments through 2013, articles 202.

<sup>200</sup> Deng, (n 5) 14.

should not elect members of the CRC because this will make him influential in the drafting process.<sup>201</sup>

The constitutional process should involve public participation. The modern democratic constitutional building processes require that there be public participation. It is regarded as a fundamental right of the people to participate, express their desires, determine and decide on matters that affect them.<sup>202</sup> International Instruments such as the Universal Declaration of Human Rights 1948, The International Convention on Civil and Political Rights among others also stipulate the need of the public to participate in a constitutional making.<sup>203</sup> To understand public participation, Saati divides public participation into four categories.

According to Kirky and Murray, the public participation has to be seen through the four stages of constitutional building process. That is to say, in the drawing of the agenda, writing of the constitution, providing inputs and in the ratification.<sup>204</sup> The goodness of public participation is not only in making it legitimate and acceptable but is also away of nation healing, keeping the public informed among others.

#### **4.4 Term limits**

Another important aspect to consider is term limits of the presidency to be clearly and properly established in the constitution. According to Prempeh, the introduction of presidential term limits in the Africa constitutions that emerged from the third wave (1990s)

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<sup>201</sup> Ibid 14-15.

<sup>202</sup> Christina Murray, 'Constitution-Making in Anglophone Africa: We the People? From Imposition to Participation in Constitution-Making' <[https://www.academia.edu/6026889/Constitution-Making\\_in\\_Anglophone\\_Africa\\_We\\_the\\_People\\_From\\_Imposition\\_to\\_Participation\\_in\\_Constitution-Making](https://www.academia.edu/6026889/Constitution-Making_in_Anglophone_Africa_We_the_People_From_Imposition_to_Participation_in_Constitution-Making)> accessed 7 April 2017.

<sup>203</sup> Deng, (n 5) 15.

<sup>204</sup> Murray and Kirkby (n 202).

of constitutional building has helped introduce orderly political successions.<sup>205</sup> Term limits brought down some strong leaders that had served for long like Daniel Arap Moi of Kenya and Jerry Rawlings of Ghana among others.<sup>206</sup> Having term limits in place allow for other individuals to also become presidents as leadership is able to rotate among different individuals duly through election.<sup>207</sup>

While introducing term limits of the presidency, there is need to consider the manner by which they will be effective and also not easy to amend while providing for the protection of the leaders in power after they leave office.<sup>208</sup> Some of the fears of the African leaders is having to be persecuted and humiliations after their term of office and therefore, term limits should provide for measure for such fears.<sup>209</sup> In order to encourage presidents to retire without having fear of persecutions and humiliations, the term limits should protect presidents from actions that are politically motivated but not from crimes committed while in office, and incentives should also be considered.<sup>210</sup> The incentives are guard against the presidency corrupting public funds and this is an initiative that is already being encouraged or practiced by the Ibrahim foundation and given to leaders who have shown excellence while in office.<sup>211</sup> It should be noted that if term limits are introduced, there is likelihood in minimize dictatorship among other advantages.<sup>212</sup>

The idea of term limits is highly agreed upon by many of the African voters. According to opinions of the public collected by Afrobarometer in 2011 and 2013 from 24

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<sup>205</sup> H Kwasi Prempeh, 'Africa's "constitutionalism Revival": False Start or New Dawn?' (2007) 5 International Journal of Constitutional Law 469, 471.

<sup>206</sup> Fombad (n 124).

<sup>207</sup> Boniface Madalitso Dulani, 'PERSONAL RULE AND PRESIDENTIAL TERM LIMITS IN AFRICA' (Michigan state University 2011) <<https://etd.lib.msu.edu/islandora/object/etd%3A1526/datastream/OBJ/view>> accessed 7 April 2017.

<sup>208</sup> Fombad (n 124) 1052.

<sup>209</sup> Ibid 1052-1053.

<sup>210</sup> Ibid 1054.

<sup>211</sup> Ibid 1055

<sup>212</sup> Dulani (n 207) 81.

countries, eighty percent agreed to term limits.<sup>213</sup> This percentage has been portrayed in countries that have discerned to the presidency extending their term of office such as Senegal (2012), Burkina Faso (2014) among others. When Wade of Senegal attempted to amend his two term of office in 2012, the citizens protested and failed his act and he was later voted out during the elections.<sup>214</sup> This act of the citizens helped rescue the collapsing democracy of Senegal.<sup>215</sup> The same happened in Malawi and Zambia where presidents Chiluba and Bakili respectively, wanted to amend term limits but were failed by the citizens who went on the streets and protested.<sup>216</sup>

This aspect of ambiguity within the law gave the room for the presidency in Burundi to maintain aground legality for the extension of term of office by president Nkurunziza when there were forces against it.<sup>217</sup> Besides the ambiguity of the law the bodies that are responsible for electoral matters are not independent of the presidency and their powers to ensure term limits are so limited.<sup>218</sup> These bodies only have administrative functions, that is to say, they only make verifications of the candidates if they meet the requirements set in article 101 which is inline with article 94 of the code. In addition, electoral code itself does not specify term limits for presidency.<sup>219</sup>

At the pick of the crisis against term limits for the presidency, the constitutional court was asked to provide an interpretation of articles 96 and 302 of the constitution. The constitutional ruled that the article 305 was wrongly imported into the constitution and the Arusha Peace and Reconciliation Agreement did not permit third term.<sup>220</sup> Despite the constitutional court ruling in the favour of the presidency, it was not meant to be so because

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<sup>213</sup> LeBas (n 92) 177.

<sup>214</sup> *ibid*

<sup>215</sup> *ibid*

<sup>216</sup> *ibid*

<sup>217</sup> Vandeginste (n 154) 43.

<sup>218</sup> *Ibid* 44.

<sup>219</sup> *Ibid*.

<sup>220</sup> *ibid* 52.

there was force from the presidency for the ruling to be in his favor and this only came to pass after the vice president of the constitutional court flee the country.<sup>221</sup> Civil society filed an application before the East African Community (EAC) requiring for invalidation of the constitutional court decision and an interim order for elections to be postponed.<sup>222</sup> The matter is still pending before the EAC though a number of president Nkurunziza and some of his government officials have asserted that the EAC validated the ruling of the constitutional court.<sup>223</sup> When confronted with the realities of term limits, the government simply stated that it was not yet time for term limits of the presidency to be considered as was revealed by the Afrobarometer response from government.<sup>224</sup>

Nkurunziza's declaration for his third term elections led to an outrage of protests that led to an attempted coup d'état while he was in Tanzania for talks over the on-going crisis but the attempt failed because of the division within the forces.<sup>225</sup> Amidst the crisis, and protests, president Nkurunziza conducted legislative elections and the results showed that the party of the president out of the 100 seats in the national assembly won 77 of them despite boycotts by international observers and the African union.<sup>226</sup>

The crisis is however on going to date. The protests in Burundi show how important the rule of law is when it comes to matters of governance and the power that the people can have to stop an incumbent presidency from unlawful acts.<sup>227</sup> When thousands took on the streets to protest, they were in defence of the law on which the state is based when there was no alternative left to save the situation.<sup>228</sup> South Sudan should clearly be able to learn from

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<sup>221</sup> Ken Opalo, 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi' (*ConstitutionNet*) <<http://www.constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi>> accessed 7 April 2017.

<sup>222</sup> Vandeginste (n 154) 56.

<sup>223</sup> Ibid 57.

<sup>224</sup> Ibid 45.

<sup>225</sup> Opalo (n 221).

<sup>226</sup> Ibid.

<sup>227</sup> Ntomba (n 91).

<sup>228</sup> Ibid.

this kind of hidden provisions to draw on a very clear and explicit constitution that is not ambiguous so that future constitutional challenges are minimized.

## Conclusion

Presidential powers are exercised through the techniques of how a constitution is built or constructed. The procedure by which the constitution is made has so much impact on the put come of the content of the constitution too. The Transitional Constitution of South Sudan was only drafted by a few individuals, no public or opposition involved and as a result, the out come was some unclear additional provisions on the power of the president were included and these turned out to be problematic.

Burundi had an ambiguous provision that found its way into the constitution provision on the tenure of office of the president found its way into the constitution and has affected the stability of the country because of the president seeking a third and possibly fourth term. The provision that was included was not even in the Comprehensive Agreement of Burundi that was signed in Arusha (2005).

In south Sudan, the Transitional Constitution included some provisions that that increased on the powers of the president The president could appoint and dismiss state governors and as such, it affected the stability of the country to the as it triggered instability.

In Kenya, the constitution that was designed in 2010 has managed to limit the powers of the president and as such, Kenya has set a leading president for a democratic kind of governance and a culture that is politically stable. This fosters the rule of law and good governance. All in all, it should be noted that the powers of the president all in all have to do with how the constitution is constructed. Just as was discussed in the outset of the document that on how the post colonial African leaders used the constitution to pave way for their

interests and agendas, the same still happens today in some parts of the African continent. There fore, constitutions have to be drawn in such a way that they are not ambiguous but rather very clear, involve people who are knowledgeable in the subject matter and also that proper mechanisms are put in place within the constitution to limit the powers of the president. Failure to limit the powers of the president for example in South Sudan and Kenya is that the Constitution did not place proper mechanisms to constrain the powers of the president as is the case in Kenya.



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