THE EFFECT OF UNAMENDABLE PRESIDENTIAL TERM LIMITS IN FRANCOPHONE AFRICA

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LLM/MA Capstone Thesis

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07.06.2020

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INTRODUCTION

The rise of authoritarian tendencies and faltering of democracy in most of the world provides a challenge for the principles of constitutionalism. Term limits, provisions ensuring that an officeholder cannot remain in power indefinitely, have been one of the concepts which have faced such assaults. Powerful presidents seek ways of extending their stay in office through various constitutional strategies, while various means of entrenchment seek to curtail their ambition.

This thesis will speak on the function and effectiveness of unamendable provisions in safeguarding against presidential overstay in Francophone Africa. Following the third wave of democratization, many countries on the African continent endeavored to create new constitutions which would provide a basis for democratic development. These documents attempted to solve the issue of presidents remaining in power for life by including term limits. In the Francophone states, many states went further, and attempted to provide safeguards against a president who would seek an amendment to override these temporal checks on his power. The strategy constitutional drafters utilized was making term limit provisions unamendable, thus making any attempt at changing them unconstitutional.

Despite their increased protection, these provisions were not left unchallenged. Presidents of Francophone African states have employed varied strategies attempting to overcome this barrier. Unamendable clauses provide the most advanced level of constitutional entrenchment, and yet many of these attempts were successful. This poses a research question, which has implication on understanding the legal and political realities of the region. Has the unamendable nature of term limits in Francophone African states made them more resilient to presidential overstay attempts? If not, they provide a false sense of security which might increase international legitimacy of the state but does not provide protection against powerful presidents seeking indefinite reelection.

The thesis will provide an overview of the concept of term limits and place it into an African setting by describing the imperial presidency and the usefulness of term limits in curtailing it. Furthermore, the thesis will consider the theoretical framework of unamendable provisions, as well as their use in Francophone African states to entrench term limits.

This will be followed by an elaboration on the case selection, which will provide an overview of the pertinent socio-political and constitutional similarities and differences of three comparator states: Niger, The Republic of the Congo and the Democratic Republic of the Congo. The thesis will proceed to provide an analysis of the 2009 constitutional crisis in Niger and the 2015 constitutional replacement process of the Republic of the Congo, in light of constitutional court rulings. The differences of reasoning between the two courts will be considered, keeping in mind the already established theoretical framework. Finally, the thesis will present an alternative overstay strategy, exemplified by president Kabila's overstay attempt.

1) THEORETICAL FRAMEWORK OF UNAMENDABLE TERM LIMITS

Lord Acton's claim that "power tends to corrupt, and absolute power corrupts absolutely" has long become proverb, and thus a cliché. From this belief, originates the commonsensical view on term limits. The figure that best represents absolute power and thus corruption is a president,

clad in a well-tailored suit and dark sunglasses, entering his third decade of rule. The fight against an entrenched dictator is a powerful cultural image, and it has served as backdrop for many constitutional arrangements designed to thwart it happening again. The founding story of the Roman Republic found its normative core in the opposition to the last king of Rome, Tarquinius Superbus[1] and an aspiration for such rulers not to emerge again, exemplified by the short one-year term of the consuls. From these origins emerged the principle of temporally limited executive positions. While not present in many early constitutions[2], a restriction of the number of terms for elected heads of states has become a main stay of contemporary democratic countries. However, the idea of limiting a powerful president from seeking reelection is being challenged. Primarily by the presidents themselves. In order to understand these challenges, we will consider a definition of term limits, and the arguments in favor and against such restrictions. This will allow us to have a clearer view of the principle when placed in relation to the specific Francophone African setting, and the principle of unconstitutional constitutional amendments.

1.1) Defining term limits

Term limits are a beguilingly simple idea. Its core is the principle that law, and often the constitution, enshrines a temporal limit on a person holding an office. Merriam-Webster defines the phrase simply as "a specified number of terms that a person is allowed to serve"[3]. However, there is a wide variation in the type of term limits which can be implemented by a state. Term limits can vary through the length of a single term. The consuls of the Roman Republic were limited to a year, while contemporary terms tend to be considerably longer. Members of the House of Representatives of the US Congress are elected for two-year terms[4], while the Senators are elected to a six-year term[5]. The first issue with viewing term limits as only indicating the maximum number of terms is seen in these differences, since if terms are extended the purpose of the limit is degraded. Term limits do not exist to limit the number of times a person can run for office, but to limit the length of time a person stays in office. Thus, outside of enshrining the number of terms a person can serve, term limit articles can include the maximum number of years. An example of this can be seen in the Constitution of Botswana, which limits its indirectly elected president to "hold office for an aggregate period not exceeding 10 years"[6].

Another distinction is that term limits can serve to restrict only the number of consecutive terms. This prevents the same person always having an incumbency advantage. The Constitution of Lithuania states that "the same person may not be elected President of the Republic for more than two consecutive terms"[7]. Such provisions have the benefit of allowing a popular politician to remain in contention for the presidency but are susceptible to manipulation. An infamous example is that of Russian president Vladimir Putin, who served

[1] Edward Bispham, 'Literary Sources' in Nathan Rosenstein and Robert Morstein-Marx (eds), *A Companion to the Roman Republic* (Blackwell 2020) 35
[2] Famously being only a constitutional tradition in the USA, until its incorporation in the constitution in 1951 through the 22nd Amendment.
[3] 'Term limit.' (*Merriam-Webster.com Dictionary*, Merriam-Webster), https://www.merriam-webster.com/dictionary/term%20limit Accessed 3 June 2020
[4] U.S. Constitution, Article I, Section 2
[5] U.S. Constitution, Article I, Section 3
[6] Constitution of Botswana 1966, Article 34, Section 1
[7] Constitution of Lithuania 1992, Article 78, Section 3

two terms as president, remained the most powerful political figure as prime minister, and subsequently returned to the office[8].

1.2) The merits and function of term limits

In Books Six of his Politics, Aristotle presents his view on the institutional requirements for democracy. He asserts that one "factor of liberty is to govern and be governed in turn"[9]. Furthermore, while listing the characteristics of a democracy, Aristotle includes "government of each by all, and of all by each in turn" and that "no office to be held twice, or more than a few times"[10]. This principle, and primary function of term limits, can be termed "rotation"[11]. Peter Stone argues that selection through sortition as appeared in the Greek polis, is what makes "rotation" a democratic principle[12]. Nevertheless, even this limited version of "rotation" through modern term limits serves the function of proving a check against an emergent tyrant.

Even without an immediate threat of tyranny, there are arguments for preventing indefinite reelections. One is to function as a counter to incumbency advantage. Those who hold office tend to retain it. In the United States House of Representative "many state legislators are nearly invulnerable to electoral defeat"[13], and in US presidential elections incumbents are much more likely to win[14]. This challenges the democratic principle of competitive elections. Term limits can provide a hard counter by forcing incumbents to retire or seek another office, allowing others to contest the election in a more competitive manner.

There are advantages of term limits which are of importance in authoritarian and hybrid states. Gideon Maltz notes that: "The stepping-down of an incumbent often leaves an electoral authoritarian regime less able to deploy such typical methods of preventing party alternation as repression, intimidation, registration fraud, and intentional miscounting of votes"[15]. Term limits negate much of the "uneven playing field"[16] which competitive authoritarian regimes utilize to achieve electoral success.

Nevertheless, there are downsides to term limits. Politicians who know that they are not facing reelection could be less responsive to the interests of their constituency. While such effects have been recorded, the effect of term limits on accountability is not conclusive. Smart and Sturm have found that in interaction with "other distortion of the political system" term limits "can be welfare enhancing - even when the direct effect of term limits is unambiguously

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[8] Mila Versteeg and others, 'The Law and Politics of Presidential Term Limit Evasion' [2019] Virginia Public Law and Legal Theory Research Paper 2019-14. Available at SSRN: https://ssrn.com/abstract=3359960 Accessed 27 April 2020

[9] Aristotle, *Politics* (Hackett Publishing 1998) 176

[10] Aristotle, *Politics* (Hackett Publishing 1998) 177

[11] Peter Stone, 'Theorizing Term Limits Politics of Term Limits', in Alexander Baturo and Robert Elgie (eds), *The Politics of Term Limits* (Oxford University Press 2019) 21

[12] Ibid. 23

[13] Gary King, 'Constituency Service and Incumbency Advantage' [1991] 21 British Journal of Political Science 119

[14] David R. Mayhew, 'Incumbency Advantage in U.S. Presidential Elections: The Historical Record' [2008] 123 Political Science Quarterly 201

[15] Gideon Maltz, 'The Case for Presidential Term Limits' [2007] 18 Journal of Democracy 128, 132-133

[16] Steven Levitsky and Lucan A. Way, 'The Rise of Competitive Authoritarianism' [2002] 13 Journal of Democracy 51, 53

negative"[17]. Term limits are also undemocratic. While term limits might aid in the removal of a president who have lost popular support but clings to power by unjust means, they also end the presidencies of many beloved and popular political figures. A term limit can be considered neutral in the sense that it does not take the popularity of the incumbent into account. In reality, it disfavors powerful and popular figures. A term limit is not needed to stop a powerless and unpopular incumbent from winning the presidency. This results in a situation where the only time a term limit serves its purpose is when it removes the preferred choice of the voters.

1.3) The African imperial presidency and term limits

All merits and functions of term limits become enhanced when considered in the context of the "imperial presidency", a form of executive present in many African states. Described by H.W.O. Okoth-Ogendo, the imperial presidency is distinguished by four features[18]. First is a "supremacy of the office of the President over all organs of government"[19], which makes any notion of separation of powers irrelevant. The second is the "immunity of the President" who faces no accountability for his actions in office[20]. The third is a paranoid state of African executive which causes uncertainty for those under the president and reaffirms him as the "final redress even for the simplest problems"[21]. The fourth feature is a lack of term limits, understood by Okoth-Ogendo to be a consequence of path-dependence created by the powerful "founding presidents"[22] that held great personal authority following their nations liberation. The style of leadership of these presidents stressed the importance for continuity at the top for political and economic stability. The imperial presidency lacks many of the constitutional limitations of classic presidential systems, and the accountability of parliamentary system. It brings personalized rule to an extreme. While Okoth-Ogendo coined the term in 1993, it remains relevant in many contemporary African countries. Even after an increase in the level of democracy on the continent "power in the African state, and with it control of resources and patronage, continues to rest with the president, making the capture and control of the presidency the singular ambition of Africa's politicians"[23].

The advantages of presidential term limits are enhanced by the legacy of the imperial presidency. The ability of opposition to face off against a candidate other than the powerful incumbent may be the only way that ruling parties can be dislodged from power. In developing countries, the problem of systemic corruption and patronage systems get entrenched under the protection of a long serving president. The threat of "wannabe Caesars" which term limits are intended to ward against is greater when imperial power is part of the office itself. In such circumstances, the distinguishing line between a president and a tyrant becomes blurry, and with time and the entrenchment of personalized rule, democratic government becomes ever

[17] Michael Smart and Daniel M. Sturm, 'Term Limits and Electoral Accountability' [2013] Journal of Public Economics 93, 100

[18] H. W. O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Greenberg and others (eds) *Constitutionalism & Democracy: Transitions in the Contemporary World* (Oxford University Press 1993), 65

[19] Ibid. 74

[20] Ibid. 74

[21] Ibid. 75

[22] Ibid. 75

[23] Denis M. Tull and Claudia Simons, 'The Institutionalisation of Power Revisited: Presidential Term Limits in Africa' [2017] 52 Africa Spectrum 79

more threatened. The fact that term limits are "flat prohibitions and bright-line rules"[24] provides them an advantage over less clear restriction. Greater electoral spending, allies in the media, patrons in the electoral commission, might all circumvent any legislative attempts to a level electoral playing field. A provision stating that a president can serve only two four-year terms leaves little ambiguity.

1.4) Presidential overstay

While they might be a powerful break on an aspiring tyrant, term limits are not an immovable object. Influential presidents seeking to retain power have devised various means of escaping the constraints. A situation in which the intended maximum of time in office is breached by a president can be considered overstay. Ginsburg, Melton and Elkins have suggested four possible outcomes of a presidential overstay attempt[25]. The president may leave office. This would signify that the term limit was successful. On the other hand, the president may decide to attempt amending the constitution or replacing it outright. The final option is for the president to simply ignore the constitution[26].

While these are the potential outcomes, there are multiple strategies a president can take. Versteeg et al. conceptualized these into five categories: "constitutional amendment", "writing a new constitution and proclaiming that the time served under the old constitution does not count", " using courts to re-interpret term limits out of the constitution", "finding a placeholder president that can be controlled by the exiting Leader" and "delaying elections"[27]. Two of these strategies will be discussed through the examples of Niger, Republic of the Congo and the Democratic Republic of the Congo. The imperial presidency creates political leaders possessing the powerbase and lack of constraints needed to carry out an overstay strategy. Facing these challenges, constitutional drafters of many Francophone African countries sought to entrench term limits. One of the means of achieving this is through eternity clauses.

1.5) Unamendable provisions

The power to amend the constitution is a logical extension of the power to create it. It provides flexibility to a legal instrument that should be marked by longevity. Furthermore, it provides a democratic way of overriding judicial decisions and enforces the powerful idea that the legal order originates from the citizenry. It is an anti-anti-majoritarian action, which allows, after a heightened threshold has been met, for citizens to truly be final arbiters of under which constitutional order they live. It allows for the constitution to be responsive to changes in society, for unforeseen flaws to be corrected, and for its democratic legitimacy to be reinforced[28]. Despite this, a doctrine of unconstitutional amendments has developed across legal jurisdictions.

The doctrine relies on a clear principle, that some parts of the constitutional order should be beyond the reach of even constitutional amendments. It reflects the belief that heightened

[24] Henry Kwasi Prempeh, 'Progress and Retreat in Africa: Presidents Untamed' [2008] 19 Journal of Democracy 109, 120
[25] Tom Ginsburg, James Melton and Zachary Elkins, 'On the Evasion of Executive Term Limits' [2011] 52 Wm & Mary L Rev 1807
[26] Ibid. 1844
[27] Mila Versteeg and others, 'The Law and Politics of Presidential Term Limit Evasion' [2019] Virginia Public Law and Legal Theory Research Paper 2019-14. Available at SSRN: https://ssrn.com/abstract=3359960 Accessed 27 April 2020
[28] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017) 4

procedural protections are not enough to guarantee the safeguarding of the constitution. This results in an increased power of constitutional adjudication bodies which now become the final arbiter of whether a constitutional amendment is unconstitutional. It allows the judiciary "to substitute—not once, but twice—their own view of the constitution for that of a legislative and/or popular majority" creating "super-strong judicial review"[29].

The distinction between the constituent and the constituted power provides the framework for an amendment being unconstitutional. The first is an extraordinary power which relies on revolutionary strength needed to create a constitution, while the latter is created by the first and thus limited in its ability and scope by the legal order which created them[30]. The constituent power, having created the constitution, exist above it. It is not a constant force, instead it is the constitution which "regulates the ordinary constituted powers, such as the executive, legislative, and judiciary, and governs everyday political life"[31]. An apparent paradox is created when we consider that a procedure of constitutional amendment is present in constitutions. Does every amendment entail a revolutionary strength manifested to alter its own creation? If so, limiting it would prove difficult. To solve this, Yaniv Roznai utilizes the distinction between the primary and secondary constituent power, which this thesis will adhere to[32]. The primary constituent power is "is neither exhausted nor is it bound by the constitutional limitations, including explicit or implicit unamendable"[33]. The secondary constituent power is derived from the first, granting the possibility of altering the constitution through amendments. However, the secondary constituent power, having been created by the primary and not existing outside of the constitutional order it is in, can be limited[34]. These limitations can come in the form of unamendable provisions, which place certain elements of the constitution outside the reach of this secondary constituent power.

Despite its legal coherence, the question of justifying the use of such a vigorous anti-majoritarian measure remains. The fact that a doctrine of unconstitutional constitutional amendments is possible within a legal order does not mean its use is desirable in a democratic society. Dixon and Landau find the concept useful in combating "abusive constitutionalism" which they define as "cases where would-be authoritarian leaders use the tools of constitutional change to undermine the democratic order"[35]. The changes proposed in these situations have the goals of making "it harder to dislodge the incumbent leader or party" and weakening "checks on their exercise of power"[36]. A president attempting to remove term limit provisions certainly seeks the first goal. Removing term limits also weakens the "checks on their exercise of power", since it weakens downstream restraints and increases their political influence over other organs of government which now know that they could be forced to deal with the incumbent in perpetuity. In light of a legacy of imperial presidency, the threat that such changes would amount to undermining the democratic order increases.

[29] Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' [2015] 13 International Journal of Constitutional Law 606, 610
[30] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017) 106
[31] Ibid. 110
[32] Ibid. 122
[33] Ibid. 125
[34] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017) 125
[35] Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' [2015] 13 International Journal of Constitutional Law 606, 612
[36] Ibid. 613

1.6) Francophone Africa, term limits and the third wave

While unamendable provisions existed since the eighteenth century, they became a popular feature in the constitutions of the third wave of constitutionalism. Of the constitutions drafted from 1989 to 2015, 54% have unamendable provisions included[37]. This trend had not circumvented Francophone African states, many of which drafted new constitution during this period and initiated a process of transition to democracy. Some of these new governing documents contained unamendable term limits, showing a commitment towards ending the tradition of life-long presidents.

The core of these provisions remains similar across Francophone African jurisdictions. The 1991 Constitution of Burkina Faso states that "no bill or proposal of revision of the Constitution is receivable when it affects", among others, "the limitative clause of the number of presidential mandates" or "the duration of the presidential mandate"[38]. Mauritania's 1991 constitutional drafters opted to include the specific length and number of presidential terms in the unamendable provision itself. Article 99 states that "no procedure of revision of the Constitution can be engaged if it jeopardizes…the principle according to which the mandate of the President of the Republic is of five years, renewable one sole time"[39]. More recent constitutions which included these entrenchments followed similar logics, with the 2010 Constitution of Guinea stating that "the number and the duration of the mandates of the President of the Republic, may not be made the object of a revision"[40].

These provisions seeking to entrench presidential term limits in Francophone Africa are transformative in their purpose. Albert identified transformational unamendable provisions as those which endeavor to "repudiate something about the past" allowing states to create and maintain new constitutional order[41]. In the case of Francophone Africa, the provisions assist in distancing from a constitutional reality marked by personalized rule spanning decades, which has long been the hallmark of the region.

1.7) Unamendable term limits

Imbuing term limits with an unamendable property has the effect of enhancing both the merits and the disadvantages of the principle. Term limits have the consequence, and the primary purpose, of preventing popular presidents remaining in office. Its final effect is that a majority in an election is not enough for the preferred candidate to retain his office. Making these provisions unamendable increases the anti-majoritarian effect. The consequence shifts to a situation where not even with an amendment, however strenuous the procedure is, the preferred candidate may not remain in office. Such an anti-majoritarian constitutional tool must be justified with considerable advantages. The unamendable term limit offers as justification a security that a powerful figure cannot establish himself as a life-long president. Thus, these provisions create a solution to a plight which has caused much suffering in Francophone Africa. However, this trade-off relies on the unamendable nature of these provisions being effective in stopping presidents who wish to engage in overstay. While an absolute effectiveness cannot be

[37] Yaniv Roznai, Unconstitutional Constitutional Amendments (Oxford University Press 2017) 21
[38] Constitution of Burkina Faso 1991, Article 165
[39] Constitution of Mauritania 1991, Article 99, Section 4
[40] Constitution of Guinea 2010, Article 154
[41] Richard Albert and Bertil Emrah Oder 'The Forms of Unamendability' in Richard Albert and Bertil Emrah Oder (eds) *An Unamendable Constitution?* (Springer International Publishing 2018) 8

expected from any legal instrument, evidence that a tool is serving its purpose is needed to justify its expense.

2) CASE SELECTION

When considering presidential overstay attempts for analysis we are, worryingly, faced with a litany of choices. Between "between 20 and 30 per cent of presidents extend the term in one way or the other"[42], and many more make unsuccessful attempts. This broad selection is primarily restricted by the thesis considering only those states whose term limits are entrenched through unamendable provisions. The choice is further constrained by focusing on Francophone African states, similar on socio-political and constitutional grounds, and yet differing on overstay strategies and outcomes. While the regional restriction has been elaborated upon through a discussion of the unique position of African executives and Francophone unamendable term limits, the later categories require further explanation. We have considered socio-political similarities to entail shared historical experiences of autocratic rule, especially in a post-colonial setting, which is a powerful enough distinguishing feature to exclude those states who lack it from "same with same" comparisons.

Secondly, a similar constitutional order is required for a coherent comparison of presidential overstay attempts, and court reasonings surrounding them. Comparing an overstay attempt by a largely ceremonial president to that of an "imperial" president would be a fruitless endeavor. They face different checks and balances and different powers push back against them. A textual similarity in relation to unamendable term limits is also considered, since the consequences of those provisions are the basis of comparison.

Finally, the case selection was influenced by the outcomes and strategies of presidential overstay attempts. This thesis has attempted to provide diversity on those grounds. In observing the effectiveness of the unamendable nature of term limits, choosing cases with the same outcomes would provide a challenge to drawing any meaningful conclusions. The utilization, or its lack, of the unamendable nature of term limits could not be separated from being contingent on the attempt's outcome. We also sought to display different overstay strategies employed by the executives. If all three attempts utilized the same strategy, the unamendable nature of term limits could have been exceptionally useful against that specific approach. And yet, without considering alternative strategies, we could not conclude it is generally effective. We will comment on the first two parameters for case selection, while outcomes and strategies will be discussed when considering the events of the overstay attempts and the court cases related to them.

2.1) Socio-political similarities

This thesis will focus its analysis on three countries: The Republic of Niger, The Republic of the Congo and the Democratic Republic of the Congo. They share both historical experiences and socio-economic indicators. We will give only a brief overview of those factors most relevant for the issue of executive overstay and constitutionalism. In light of the strong effect

[42] Alexander Baturo and Robert Elgie, 'Presidential Term Limits', in Alexander Baturo and Robert Elgie (eds), The Politics of Term Limits (Oxford University Press 2019) 11

they have on creating path dependence, these will be colonial subjugation[43] and post-independence authoritarian rule[44].

All three states were subject to European powers, suffering the consequences of colonial rule. Colonization attempts towards Niger started in the late nineteenth century, and it came under full control of France in 1922[45]. The territory of the Republic of the Congo became a colony of the French Empire in 1891, with its capital Brazzaville later serving as the capital of the whole of French Equatorial Africa[46]. Emerging from Belgian King Leopold II's colonial ambition, the Congo Free State, colonial precursor to today's Democratic Republic of the Congo, came into being in 1885, the administration of which was taken over by the Belgian government in the twentieth century[47]. During colonial times the peoples of these states faced repression from paternalistic and cruel colonial administrations. All three states gained independence in 1960, bringing a formal separation from colonial masters but not an end to autocratic rule over the citizenry.

A history of long-term authoritarian rule is also shared between the three states. Economic, Geopolitical, demographical, constitutional and many other factors influence the failure of most former French and Belgian African colonies to establish long lasting democracies. We would only be doing a disservice by summarizing the reasons which led to the emergence of autocratic rule in the region. What we can establish is that all three states had long-term undemocratic governments, exemplified by long ruling dictators or military rule. In the Democratic Republic of Congo, following a period of civil war and upheaval, Mobutu Sese Seko become the led a coup which installed him as the president of the country. From there on he ran an oppressive and kleptocratic regime for thirty-two years. His successor Laurent-Désiré Kabila, a para-military leader, emerged as the apparent victor of the devastating First Congo War[48]. He served as president for only four years, until he was assassinated in 2001, and succeeded by his son, Joseph Kabila, whose rule has been marked with oppression and brutality[49].

The career of the current president of the Republic of the Congo spans a period even longer than the rule of Mobutu Sese Seko of the neighboring state. Becoming the president of the then socialist one-party state, the People's Republic of the Congo, in 1979 following a takeover within the regime, Denis Sassou Nguesso served in the office until 1992. Following a shift towards democracy, Pascal Lissouba, the first democratically elected president of the state

[43] Gita Subrahmanyam, 'Ruling continuities: Colonial rule, social forces and path dependence in British India and Africa' [2006] 44 Commonwealth and Comparative Politics 84
[44] Steven Levitsky and Lucan A. Way, 'Durable Authoritarianism' in Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (eds) Oxford Handbook of Historical Institutionalism (Oxford University Press 2016)
[45] Finn Fuglestad and Diouldé Laya, 'Niger' (Encyclopædia Britannica 8 November 2019) https://www.britannica.com/place/Niger Accessed 3 June 2020
[46] Dennis D. Cordell, 'Republic of the Congo' (Encyclopædia Britannica 24 October 2019) https://www.britannica.com/place/Republic-of-the-Congo Accessed 3 June 2020
[47] René Lemarchand and others, 'Democratic Republic of the Congo' (Encyclopædia Britannica 28 February 2020) https://www.britannica.com/place/Democratic-Republic-of-the-Congo Accessed 3 June 2020
[48] Ibid.
[49] Jason Burke, 'Congo steps up deadly crackdown as church joins anti-Kabila protests' (The Guardian 23 January 2018) https://www.theguardian.com/world/2018/jan/23/congo-steps-up-deadly-crackdown-after-more-protests-against-kabila Accessed 1 June 2020

came into office. However, through victory in a short civil war, Sassou Nguesso recaptured the presidency in 1997, and has maintained his position since then[50].

As opposed to these two examples, the experience with undemocratic rule in Niger has not been marked by a few individuals, but by protected periods of military rule. Governed as a one-party state by president Hamani Diori from 1960 to 1974, and a military regime from 1974 to 1991, Niger's first democratic government was elected in 1991. Following years of political unrest and internal security issues, a coup in 1996 ended the period of democratic governance. In 1999 a new constitution was enacted, and Tandja Mamadou was elected as president[51].

2.2) Constitutional similarities

While all three constitutions analyzed have emerged within the framework of the third wave of constitutionalism, they also share substantive similarities which make them useful for comparison. Some provisions, exhibiting similarities to the 1958 Constitution of France, are functionally identical between the states. Primarily, all three documents envision a directly elected president as head of state. The 1999 constitution of the Republic of the Fifth Republic of Niger states that the "President of the Republic is the head of state" and that he "incarnates national unity"[52]. The president is further seen as a "guardian of national independence, national unity, territorial integrity, respect for the Constitution, treaties and international agreements"[53]. Similar language is present in the 2005 Constitution of the Democratic Republic of the Congo, which states that aside from being the head of state, the president "represents the nation and is the symbol of national unity"[54] and that he "is the guarantor of national independence, territorial integrity, national sovereignty and the observance of international treaties and agreements"[55]. Functionally identical constitutional language enshrines the position of the president in the Republic of the Congo constitution of 2001 which states that he "incarnates the national unity"[56] and is "is the guarantor of the continuity of the State, of the national independence, of the integrity of the territory and of the respect for the international treaties and agreements"[57].

However, to see the position of the president as identical in the three constitutions would be an oversimplification. The 2001 constitution of the Republic of the Congo foresees a more presidential system, in which besides the for mentioned prominent constitutional position, the president is also "the Head of the Executive", "the Head of the Government", he "determines and conducts the policy of the Nation" and "disposes of the regulatory power and assures the execution of the laws"[58]. This is quite a difference from the more semi-presidential constellation of powers in the 2005 constitution of the Democratic Republic of Congo. There it is the Prime Minister who is "the head of the Government"[59], and it is the government that "conducts the policy of the Nation" and "defines, in coordination with the President of the

[50] Dennis D. Cordell, 'Republic of the Congo' (Encyclopædia Britannica 24 October 2019) https://www.britannica.com/place/Republic-of-the-Congo Accessed 3 June 2020
[51] Finn Fuglestad and Diouldé Laya, 'Niger' (Encyclopædia Britannica 8 November 2019) https://www.britannica.com/place/Niger Accessed 3 June 2020
[52] Constitution of the Fifth Republic of Niger 1999, Article 35
[53] Constitution of the Fifth Republic of Niger 1999, Article 35
[54] Constitution of the Democratic Republic of the Congo 2005, Article 69, Section 1
[55] Constitution of the Democratic Republic of the Congo 2005, Article 69, Section 3
[56] Constitution of the Republic of the Congo 2001, Article 56, Section 1
[57] Constitution of the Republic of the Congo 2001, Article 56, Section 3
[58] Constitution of the Republic of the Congo 2001, Article 56, Section 2
[59] Constitution of the Democratic Republic of the Congo 2005, Article 90

Republic, the policy of the Nation and assumes responsibility for it"[60]. Similarly, the 1999 Niger constitution states in Article that "The Prime Minister is the Head of Government. He directs, animates and coordinates government action", and is the one who insures the execution of the laws[61]. Despite this substantial difference, it should not be inferred that the presidents of Niger and the Democratic Republic of the Congo are not in a constitutionally powerful position. All three presidents possess extensive emergency powers, appointment powers and influence through chairing the council of ministers and national security councils. Pertinently for authoritarian and post-authoritarian settings, all three presidents are the commanders and chiefs of their respective armed forces. Crucially, for the vast majority of their post-colonial history and during the time the constitutions in questions were in force, the president was the most powerful political figure in all three countries.

While the appointment powers of all three presidents are vast, the role of the constitutional adjudication bodies in interpreting unamendable clauses makes the relation of their appointment to the president crucial. If one constitutional court is appointed fully by the president, and the other fully by members of the judiciary such a fact would have to be included when analyzing cases which relate to enforcement of checks on presidential power. Such stark distinctions are not present. All three constitutional adjudication bodies have different actors involved in their selection, primarily the three branches of government[62] and in the case of Niger, civil society[63]. Crucially, the presidents have sole selection powers over no more than one third of the constitutional court judges in all three states.

Finally, the unamendable term limit provisions of the three constrictions share many similarities. The 1999 Niger constitution enshrines the presidential term limits and their unamendable nature in two separate articles. Article 36 states that the president "shall be elected for five years" adding that he "shall be eligible for re-election only once"[64]. This restriction of two five-year terms is entrenched by Article 136 which states a list of unamendable portions of the constitution, including "the clauses of articles 36" which "shall not be subject to any revision"[65]. The 2005 Constitution of the Democratic Republic of the Congo utilizes the same two article entrenchment. Article 70 states that "The President of the Republic is elected by direct universal suffrage for a term of five years which is renewable only once"[66]. Article 220 lists aspects of the constitutional order which may "not form the object of a Constitutional amendment", including "the number and length of the terms of office of the President of the Republic"[67]. The 2001 Constitution of the Republic of the Congo differs in the length of term of the president and what its unamendable clause entrenches. Article 57 states that "The President of the Republic is elected for seven years" and "is re-eligible one time"[68]. Article 185, which lists what "may not be made the object of revision", mentions the "the number of mandates of the President of the Republic", but not the length of the term[69]. This

[60] Constitution of the Democratic Republic of the Congo 2005, Article 91
[61] Constitution of the Fifth Republic of Niger 1999, Article 59
[62] Constitution of the Fifth Republic of Niger 1999, Article 104, Section 2; Constitution of the Democratic Republic of the Congo 2005, Article 158; Constitution of the Republic of the Congo 2001, Article 144
[63] Constitution of the Fifth Republic of Niger 1999, Article 104, Section 2
[64] Constitution of the Fifth Republic of Niger 1999, Article 36
[65] Constitution of the Fifth Republic of Niger 1999, Article 136
[66] Constitution of the Democratic Republic of the Congo 2005, Article 70
[67] Constitution of the Democratic Republic of the Congo 2005, Article 220
[68] Constitution of the Republic of the Congo 2001, Article 57
[69] Constitution of the Republic of the Congo 2001, Article 185

would make an extension of the second term to a period of 50 years a more negotiable position than an addition of a third term. However, the overstay attempt in the Republic of the Congo did not utilize this strategy and we can say that all three overstay attempts faced similar levels of constitutional entrenchment of term limits.

3) JUDICIAL UTILIZATION OF UNAMENDABLE TERM LIMITS

3.1) Utilization of unamendable term limits – the role of the judiciary

Unamendable term limits might serve a series of roles, such as relying opposition around a core issue or providing a symbolically powerful expression of constitutional values. However, if they seek to influence the legal reality in a consistent manner, it falls on the judiciary to utilize them. Yaniv Roznai states that the "effectiveness of unamendability is related to its judicial enforcement"[70]. This stems from the goal of the unamendability. In any amendment process, a broad support base among the political branches is needed for a revision to succeed. The unamendable provision, seeking to curtail the ambition of the political force, must be activated elsewhere. This duty falls on the judiciary, which in stating "what the law is" can utilize these provisions to make clear what the constitution does not allow itself to become.

The judiciary is not absent in the overstay attempts in Francophone Africa. Constitutional adjudication bodies can interpret the constitution in a way which legitimizes an attempt, or in way which hinders it. In this work we will discuss three overstay attempts from the region, in all of which the highest courts of the land played a role. While not all utilized the unamendable nature of the term limits in their reasoning, they had it at their disposal. Through these three attempts, differing in outcomes and strategy, we will see both the potential for the use of unamendable provisions in the region and ways in which they are disregarded or circumvented.

3.2) The 2009 Constitutional Crisis in Niger

Following period of democratic governments at the beginning of the nineteen nineties, Niger reverted to military rule. A coup in 1996 resulted with Major Baré becoming president following a fraudulent election. Baré's rule was also ended by military intervention, led by the presidential guards, during which he was killed[71]. The new junta acted upon their promise to revert to civilian rule and hold elections[72]. It is following these events that the 1999 constitution was adopted and Mamadou Tandja won the presidency. While Tandja was a military officer, he formed a political party and governed a civilian administration. He won successful reelection in 2004, while maintaining encouraging relations with opposition parties[73].

However, President Tandja began shifting his conciliatory approach after his victory. He asserted control over opposition leaders, and centralized decision-making power in his office. Three years into his second term the "gradual personalization of power had already become visible"[74]. After Prime Minister Hama Amadou, a potential successor to Tandja, was voted out of office by the president's party in 2007, it was taken as further sign that the two-term limit for holding the presidency was in peril[75]. The suspicion was justified in April 2009 when the

[70] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017) 186
[71] Virginie Baudais and Grégory Chauzal, 'The 2010 coup d'etat in Niger: A praetorian regulation of politics?' [2011] 110 African Affairs 295, 296
[72] Ibid. 296
[73] Ibid. 296
[74] Ibid. 297
[75] Ibid 297

president indicated that a referendum which could result in a potential for a third term in office was being considered.

3.2.1) The 25th of May decision of the Constitutional Court of Niger

On the 11th of May deputies of the National Assembly sought the interpretation of the Constitutional Court of Niger on the constitutional articles relevant for the referendum plan initiated by president Tandja. The court passed a ruling on the 25th of May, in which it found that the president had no right to "initiate or pursue the change of the Constitution without violating his oath"[76]. In reaching this decision the court faced two challenges, both related to the distinction between the primary and secondary constituent power; and between constituted and constituent power, as understood by Roznai. Firstly, the court needed to prove that the presidents attempt at a constitution revising referendum was not granted through the constituted power of his office. Secondly, the court needed to respond to the challenge of the constituent power being invoked through the direct democratic nature of a referendum.

In seeking to ascertain whether the president, as a constituted power, could initiate a referendum which revises the constitution the court had to inquire into the provision which regulated referenda and those which enshrined the procedure for amending the constitution. The 1999 constitution of Niger does place the power to call a referendum in the hands of the president, although it places considerable limitations on it. Article 49, which regulates this, states: "The President of the Republic may, after the opinion of the National Assembly and the President of the Constitutional Court, submit to a referendum any text that he considers should require the direct constitutional consultation with the people, except for any revision of this Constitution, which shall continue to be governed by the procedure laid down in Title XII"[77]. While the influence of the president in the process is beyond doubt, there are two separate check on this power. Firstly, the president requires an opinion of the National Assembly and the President of the Constitutional Court. The Court did not stress this opinion, choosing instead to focus on the clearer and firmer restriction in the second portion of the Article, stating that "Issues of a constitutional nature, such as the term of office of the President of the Republic, cannot therefore be directly submitted to a referendum and Article 49 cannot thus serve as a basis for a revision of the Constitution, which remains in all cases governed by Title XII"[78]. Through this, it was established that a president-initiated referendum is not a legal way of revising the constitution.

The second step of the court's reasoning was to interpret the procedure for revising the constitution, present in Title XII which Article 49 invoked. The procedure to amend the constitution is enshrined in Article 134 and Article 135 of the 1999 constitution of Niger. The initiative to revise the constitution "belong to the President of the Republic and the Members of the National Assembly"[79]. Furthermore, for an initiated project of constitutional revision to be considered it needs to be approved by a three fourths majority in the National Assembly. Finally, if it to be accepted it needs to secure a four fifths majority in the National Assembly. Only if this high majority needed for accepting the amendment is not achieved, may a referendum on the matter be called.

[76] Avis n° 002/2009/CC du 25 mai 2009
[77] Constitution of the Fifth Republic of Niger 1999, Article 49
[78] Avis n° 002/2009/CC du 25 mai 2009
[79] Constitution of the Fifth Republic of Niger 1999, Article 134

The second task of the Court was to confront the possibility of invoking the constituent power to legitimize a change of the constitution through referendum. Here the court employs a twin strategy in its reasoning, seeking to define the constituent power and to assert the limitations placed on the secondary constituent power.

The invocation of "the People", as a representation of the ultimate constituent power, presents a threat to any attempt to limit constitutional revisions. When faced with this challenge, the logical step in reasoning is to ask what is "the People". The Constitutional Court of Niger in its reasoning heads on this path, relying on Article 5 of the 1999 constitution. The Article states that : "National sovereignty shall belong to the people. National sovereignty shall not be exercised by any fraction of the people nor by any individual. In the exercise of national sovereignty, all efforts which foster personal power, regionalism, ethnocentricity, clannishness, nepotism, feudalism, illegal aggrandizement, favoritism, corruption and the trading of influence shall be forbidden and punishable by law"[80]. The Court finds that this Article enshrines that "the People" cannot be "subdivided" and that " no individual or group of people, whether or not they are supervised by political parties, trade unions, etc. or other associations could not identify with the people in the exercise of the national sovereignty"[81].

This reasoning of the Court places a large burden on any who seek to invoke a constituent power represented as "the People", though it is not clear in itself. It can be understood in one of two ways. Firstly, the ban on subdivisions of the people can be seen in a more absolute sense, requiring the participation of the entire society in order for "the People" to be considered present. In this case, if a referendum is boycotted by only a small minority, it still cannot be said that it represents the symbolical "People". The second Interpretation would leave more room for "the People" to appear, with the Courts reasoning being understood as a safeguard from a one-party state excluding any others from decision making through the claim they solely represent and embody "the People". An obstacle for accepting the first way of interpreting the reasoning of the Court is present in Article 6, which the Court quotes but does not comment on directly. The Article states that: "The people shall exercise their sovereignty through elected representatives and through referendum"[82]. With this in mind, an interpretation which seeks to deny any possibility of a referendum representing popular sovereignty becomes more difficult to sustain.

However, even if the possibility of "the People" being present through referenda remains, the Courts further reasoning clarifies that this does not mean the primary constituent power reemerges at such times. The Court does so by addressing the "issue of a new Constitution". The Court states that there are only two possibilities to come to a new Constitution. Firstly, that the "the State is not governed by any Constitution because it is new, because it has never had one or that the Constitution has been suspended or abrogated as a result of an extra-constitutional de facto situation"[83]. In this possibility, the Court acknowledges the existence of a true primary constituent power. The reasoning invokes an image of a new state, or one newly independent, which asserts its constitutional identity and brings forth a fundamental law which governs it. The mentioned "extra-constitutional de facto situation" is at the same time an acknowledgment of the revolutionary nature of the primary constituent power, and the

[80] Constitution of the Fifth Republic of Niger 1999, Article 5
[81] Avis n° 002/2009/CC du 25 mai 2009
[82] Constitution of the Fifth Republic of Niger 1999, Article 6
[83] Avis n° 002/2009/CC du 25 mai 2009

historical reality that the 1999 constitution itself was created following a series of military coups. However, the Court leaves a second possibility of creating and enacting a new constitution. This second path is a "full revision authorized by the current Constitution"[84]. Here the Courts reasoning foresees the existence of a secondary constituent power, exercised by the amendment powers of the 1999 constitution, and subject to limitations placed by the document.

These limitations on this second path to a new constitution, one where the primary constituent power is absent, can be procedural. Those the Court addressed by outlining the correct procedure for amending the constitution present in Article 134 and 135. However, the court acknowledges a set of substantive limitations. These are enshrined in Article 136, which holds the unamendable clauses of the 1999 constitution of Niger. In its entirety, the Article states: "No procedure for revising the Constitution shall be activated or evoked if it incorporates a threat to the nation's territorial integrity. The republican form of state, the principle of separation of church and state, and the recognition of the possibility for a multitude of parties, and the clauses of articles 36 and 141 of the present Constitution shall not be subject to any revision"[85]. Article 141 provides amnesty for the perpetrators of the coups of 1996 and 1999[86]. Article 36 enshrines that the president is to be "elected for five years by free, direct, equal and secret universal suffrage" and that he is "eligible for re-election only once"[87]. The Court establishes that a complete revision of the constitution, in effect creating a completely new document through the secondary constituent power granted by the old, is impossible "because of the restrictions imposed by Article 136 of the Constitution"[88].

Finally, the Court utilized another mean of entrenching the current constitution, and by extension the unamendable presidential term limits. They interpreted the presidential oath which appears in Article 39 and includes an obligation for the President "to respect and to uphold the Constitution which the people have freely given themselves"[89]. The Court concludes by asserting the fact that a president who seeks to replace the constitution would be violating his oath.

With this ruling the court places a multiple of insurmountable obstacles for a President seeking to continue his rule past two five-year terms through referendum. Furthermore, by creating a distinction of the two different ways a new constitution may be brought, it effectively removes any constitutional means for this to be achieved.

3.2.2) Constitutional Crisis following the Ruling

On the 26th of May, president Tandja responded to the decision of the Constitutional Court. Seeking to retain power despite the ruling, he dissolved the National Assembly, and appointed a body charged with drafting the text of the new constitution which would allow him to run for a third term[90]. The new constitution is approved through a strained and boycotted process in a referendum, with a 92.5% majority[91]. Opposition parties refused to recognize the new

[84] Avis n° 002/2009/CC du 25 mai 2009
[85] Constitution of the Fifth Republic of Niger 1999, Article 136
[86] Constitution of the Fifth Republic of Niger 1999, Article 141
[87] Constitution of the Fifth Republic of Niger 1999, Article 36
[88] Avis n° 002/2009/CC du 25 mai 2009
[89] Constitution of the Fifth Republic of Niger 1999, Article 39
[90] Virginie Baudais and Grégory Chauzal, 'The 2010 coup d'etat in Niger: A praetorian regulation of politics?' [2011] 110 African Affairs 295, 298
[91] Ibid. 298

constitution and participate in the elections held after its enactment, leaving the president's party in absolute control of Niger's government.

This situation of total control was short lived, as on February the 18th 2010 the military staged a coup which overthrew Tandja and installed a military-civilian junta to lead a transition back to democracy[92]. While led by the military, the coup had support from internal opposition actors and some international actors. A new constitution was passed in November 2010. This document reinstates presidential term limits, through provisions of very precise wording, Article 47(1) stating "The President of the Republic is elected by universal, free, direct, equal and secret suffrage for a mandate of five (5) years, renewable one (1) sole time"[93] and Article 47(2) stating "In any case, no one may exercise more than two (2) presidential mandates or extend the mandate for any reason whatsoever"[94]. Both are made unamendable by Article 175 which states that they, among others, "may not be made the object of any revision"[95].

3.3) 2015 Constitution of the Republic of the Congo

An overstay attempt with a dissimilar epilogue unfolded in the Republic of the Congo. Denis Sassou Nguesso, has ruled over the African state from 1979-1992 and returned to the presidency in 1997. By 2015 the long reining president was nearing the term limitations enshrined in the 2001 Constitution of the Republic of the Congo. Article 57 of the document states that the " President of the Republic is elected for seven years by universal direct suffrage" and is "re-eligible one time"[96]. Furthermore, Article 58, which lists the requirements for being a candidate for the presidency, establishes a maximum age limit for running for the office. The limit serves as an additional safeguard against lifelong president and is set at seventy years of age. President Sassou Nguesso's second term was set to expire in 2016. At the time of the election, he would have been 72, and thus above the age limit as well.

The President sought to preempt this barrier by seeking constitutional change. In July 2015 he held a "national forum" during which the possibility of extending his right to run for office was discussed. In September 2015 these discussions transformed into a proposal for adopting a new constitution, initiated by the president. The proposed document would remove both the term limit restriction, and the maximum age limit for holding the presidency. Invoking the democratic legitimacy of a referendum, the President stated that he has "decided to directly give a voice to the people in order for them to decide on the draft law formulating the fundamental principles of the Republic". The initiative did not proceed without opposition, with large protests occurring in Brazzaville. The government responded harshly, and the period leading up to the referendum was marred with violence and police oppression[97]. Despite fierce resistance the referendum proceeded and was successful with a 92% majority voting in favor of the new constitution[98]. The new constitution allowed the President to seek two further

[92] Virginie Baudais and Grégory Chauzal, 'The 2010 coup d'etat in Niger: A praetorian regulation of politics?' [2011] 110 African Affairs 295, 299
[93] Constitution of Niger 2010, Article 47, Section 1
[94] Constitution of Niger 2010, Article 47, Section 1
[95] Constitution of Niger 2010, Article 175
[96] Constitution of the Republic of the Congo 2001, Article 57
[97] 'Deadly clashes in Congo Brazzaville as protesters defy crackdown' (France 24 21 October 2015) https://www.france24.com/en/20151021-dead-unrest-congo-brazzaville-protesters-defy-crackdown-sassou-nguesso Accessed 28 April 2020
[98] 'Congo backs Sassou Nguesso third-term bid by landslide' (BBC 27 October 2015) https://www.bbc.com/news/world-africa-34646310 Accessed on 1 June 2020

presidential terms, and completely removed the maximum age limit. Furthermore, the eternity clause still entrenches the "integrity of the territory", "republican form, and secular character of the State", but makes no mention of presidential term limits[99]. President Sassou Nguesso proceeded to win reelection in 2016, securing another five-year term in office.

3.3.1) The response of the Constitutional Court of the Republic of the Congo

During this time of upheaval, the Constitutional Court of the Republic of the Congo passed a number of decisions pertaining to the constitutional change. The most pertinent decision came on the 17th of September 2015 when the Court examined the legal basis for the referendum, on the request of the President of the Republic[100]. Unlike the court in Niger, the Congolese court found that such a referendum was in the power of the president, and in complete constitutional conformity. It did so through employing a twofold strategy, which runs counter to the reasoning which was employed by the court in Niger.

Firstly, the Court accepted the Presidents use of a legislative referendum as a means to create constitutional change, as opposed to the constitutional amendment process. The President utilized his power of initiative for referendums found in Article 110 of the 2001 constitution. The Articles states that parliament "has the initiative of the referendums, concurrently with the President of the Republic"[101]. The is part of Title VI of the constitution, which regulates the legislative power, containing the structure and function of parliament. However, constitutional change is not regulated by Article 110, nor by any provision of Title VI. On the contrary, the 2001 constitution possesses a distinct part, Title XVIII which regulates the revision of the constitution. It is within this Title that Article 186 is, which possesses the eternity clause which entrenches the presidential term limits. The third provision of the Article states that the "republican form, the secular character of the State, the number of mandates of the President of the Republic, as well as the rights enunciated at Titles I and II may"[102]. The Court here is faced with an explicit prohibition to constitutionally revise sections of a constitution, and a president who is attempting to do so without even invoking the right article for the procedure.

However, the Court utilizes a creative interpretation of what the President is attempting to do to escape this apparent constitutional dead end. The Constitutional Court of Niger established that unless a new state is being formed, or similarly revolutionary occurrence is undoubtable, a new constitution must be seen as emanating from the revision procedures present in the old. In effect, a new constitution should be seen as the simultaneous revision of most or all of the provisions of the old one. The reasoning of the Congolese court heads in the opposite direction, foregoing any mention of constitutional revision. Article 185 which regulates the procedure is not mentioned in the decision, neither is Title XVIII. The word "revision" does not appear in the ruling. Instead, the phrase that was used to refer to the constitutional change which was sought was "the evolution of the institutions of the Republic"[103]. After this Orwellian but ingenious distinction is made, the court proceeds to argue, invoking Article 110, for the constitutionality of the initiative. The president possesses "the privilege to use this constitutional prerogative" which allows him to "initiate proceedings with the aim of submit to

[99] Constitution of the Republic of the Congo 2015, Article 240, Section 3
[100] CC, Avis N° 002-ACC-SVC/15 du 17 septembre 2015
[101] Constitution of the Republic of the Congo 2001, Article 110
[102] Constitution of the Republic of the Congo 2001, Article 186, Section 3
[103] CC, Avis N° 002-ACC-SVC/15 du 17 septembre 2015

the general public, for approval or rejection, a text or any other matter of national interest"[104]. With this the reasoning of the court accepts that the proposed constitutional draft is a text of "national interest"[105], and thus the President's initiative is constitutionally sound.

3.4) Alternative strategies of presidential overstay attempts

Constitutional change, whether through revision of term limitations, or through adoption of a new constitution, has been the most dominant strategy for presidential overstay. Ginsburg, Melton and Elkins carried out a study of executive over-stay attempts since 1875 and determined that 11% of leaders had successfully extended their rule beyond what the term-limits envisioned. Of those, a large majority opted for either an amendment or replacement of the constitution (40.8% and 38.0% of successful overstays, respectively)[106]. However, while these are the most common, they are not the only strategies available to a president. Other options include relying on courts to reinterpret constitutional provisions or proclaim term-limits unconstitutional in their entirety[107]. This strategy is not foreign to the Francophone African context, with president Nkurunziza of Burundi utilizing the constitutional court to legitimize and constitutionalize his extended stay in power.

Another of these alternative strategies is a practice which has been termed "Glissement", translated as slippage or sliding. The practice entails a sabotage or stalling of the electoral process, with the goal of extending an office holder's stay in power[108]. Faced with the constitutional barrier of seeking another, a president proceeds to extend his current term in an attempt to remain in power or engineer a political situation favorable for his exit from office. An example of this strategy has appeared in Francophone Africa, with the electoral crisis in the Democratic Republic of the Congo.

3.4.1) The Electoral Crisis in the Democratic Republic of the Congo

By 2015 Joseph Kabila had served as the President of the Democratic Republic of the Congo for 14 years. Under the 2005 constitution he had ran and been elected for two five-year terms, the second of which was set to expire in 2016[109]. However, already in 2015 president Kabila showed that stepping down from power after his final term was finished would not proceed smoothly. He called for "national political dialogue"[110] during which he wished for electoral issues to be discussed, which was met by intense protests and were boycotted by opposition parties. Kabila's party proceeded to propose a census law, which contained a requirement for a national census to be conducted before the next election could happen. Estimates appeared

[104] CC, Avis N° 002-ACC-SVC/15 du 17 septembre 2015
[105] Constitution of the Republic of the Congo 2001, 110
[106] Tom Ginsburg and James Melton and Zachary Elkins, 'On the Evasion of Executive Term Limits' [2011] 52 Wm & Mary L Rev 1807, 1847
[107] Mila Versteeg and others, 'The Law and Politics of Presidential Term Limit Evasion' [2019] Virginia Public Law and Legal Theory Research Paper 2019-14. Available at SSRN: https://ssrn.com/abstract=3359960 Accessed 27 April 2020
[108] William Clowes, 'DR Congo's Joseph Kabila is taking a slippery path to a third term' (Quartz Africa 9 December 2015) https://qz.com/africa/569612/dr-congos-joseph-kabila-is-taking-a-slippery-path-to-a-third-term/ Accessed on 1 June 2020
[109] Martina Schwikowski, 'DRC President Joseph Kabila: Reformer or corrupt authoritarian', (Deutsche Welle 29 December 2016) https://www.dw.com/en/drc-president-joseph-kabila-reformer-or-corrupt-authoritarian/a-36935441 Accessed 1 June 2020
[110] William Clowes, 'DR Congo's Joseph Kabila is taking a slippery path to a third term' (Quartz Africa 9 December 2015) https://qz.com/africa/569612/dr-congos-joseph-kabila-is-taking-a-slippery-path-to-a-third-term/ Accessed on 1 June 2020

that this process could take more than three years[111]. Intense protests erupted following the decision and the Senate responded by adopting the bill but excluding the controversial provisions which would allow Kabila to remain in power[112].

However, the Independent National Electoral Commission found that elections could not be held, stating that without the census the number of voters could not be determined, and thus voting lists would not be serviceable[113]. It is at this point that the Constitutional Court of the Democratic Republic of the Congo became involved in the looming crisis. In a decision of the 11th of Mai 2016 the Court sought to answer, at the request of deputies of the National Assembly, would the current president retain the presidency beyond the planned election date, if the elections failed to be organized[114]. The 2005 constitution presented three relevant Articles. Those opposed to the continuation of the Kabila presidency hoped that the Court would invoke Article 75 and 76, which regulated the question of a vacant presidency and regulates time limits for organizing a new presidential election. Article 76 states that the "vacancy of the Presidency of the Republic is declared by the Constitutional Court referred to [the matter] by the Government"[115]. Once vacancy is proclaimed, even in "the case of force majeure", the time period between vacancy and the next election "may be prolonged to one hundred and twenty days at the most by the Constitutional Court on request by the Independent National Electoral Commission". A period much shorter than the 3 years mentioned by the electoral commission. However, the Court had not utilized this path in its reasoning, opting to resolve the issue through Article 70. Although the court has been criticized heavily by opposition forces, the wording of the Article left it a legal basis for its, ultimately, pro-Kabila ruling. The Article regulates presidential terms in its first provision, but in its second provision it states that at "the end of his mandate, the President of the Republic remains in [his] functions until the effective installation of the newly elected President"[116]. The Court found that while Article's 75 and 76 invocation of "vacancy" refers to a situation where there is effectively no person holding the office, Article 70 regulates situations such as the failure of an election to take place. Through it, it is the incumbent who by staying in power assures "the principle of the continuity of the State" until the "until the installation of the new elected president"[117].

Through this ruling, the slippage strategy of overstay found constitutional ground. Article 70 being worded in a way which places no time limit for the "effective installation of the newly elected President", allowed Kabila to maintain constitutional legitimacy for this tactic. Limitations for the period between a new election is regulated only if the presidency is deemed vacant, which the Constitutional Court refused to do. Article 220, which contains the unamendable entrenchment of the term limits did not come into consideration. While it states that, among others, the " the duration of the mandates of the President of the Republic… cannot

[111] Martin Rupiya, 'What Explains President Joseph Kabila's Quest for a Third Term until Pressured to Reluctantly Relinquish Power, late in 2018?' [2018] 13 International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity 42, 43
[112] 'DR Congo senate amends census law to allow 2016 election' (BBC 23 January 2015) https://www.bbc.com/news/world-africa-30947880 Accessed on 1 June 2020
[113] 'RDC : la Cour constitutionnelle reporte la présidentielle' (BBC 28 October 2016) https://www.bbc.com/afrique/region-37692091 Accessed on 1 June 2020
[114] CC, 11 mai 2016, R. Const.262
[115] Constitution of the Democratic Republic of the Congo 2005, Article 76
[116] Constitution of the Democratic Republic of the Congo 2005, Article 70
[117] CC, 11 mai 2016, R. Const.262

be made the object of any constitutional revision"[118], there was no constitutional revision needed for Kabila to maintain his office. The unamendable nature of the term limits failed to come into consideration. The crisis in the Democratic Republic of the Congo continued, until a 2017 agreement between Kabila and opposition parties led to the presidential election of 2018, in which the incumbent did not participate. Kabila left office in 2019, serving almost three years beyond his five-year term, and remaining a looming influence on the politics of the Democratic Republic of the Congo[119].

3.5) Unamendable nature of term limits and overstay attempts in Francophone Africa

The utilization of the unamendable provisions during presidential overstay attempts in the Francophone African states discussed has been warried. The idea of an immovable object, a granite wall on which an aspiring tyrant would dull his sword is certainly a fantasy. While all three provisions are unamendable, they are not impervious to creative interpretations. In the Republic of the Congo, a Court willing to reinterpret what a constitutional revision or replacement is, managed to legitimize a blatant overstay attempt. The fundamental law of the state was changed through referendum, following a procedure which would not be appropriate for even an amendment. The primary constituent power of creating a whole new constitution was invoked with only paying minimal reference to the logic of the old. The Court made no reference to unamendable clauses, and what their role could be in curtailing this exercise of power. In the Democratic Republic of the Congo, Kabila managed to prolong his term, utilizing an unfortunate provision, interpreted in a way which pays no respect to the unamendable clauses and their intended purpose.

However, in the role of the Constitutional Court of Niger, we see the logic of unconstitutional constitutional amendments coming into light. From the reasoning of the Court we could see what the role of unamendable term limits could play in Francophone Africa. The Court did not rely on the unamendable provisions in their isolation. President Tandja's attempt was lined with procedural violations and disregards for constitutional norms. On these points, easier to prove and to argue than concepts such as unamendable clauses, the court made their stand. However, they employed the unamendable nature of the term limits to entrench their arguments against the invocation of the primary constituent power. It is in this, that we can find the value of unamendable term limits for curbing the ambitions of the imperial presidents which are a constant threat to democracy and constitutionalism in the region.

Both in the Democratic Republic of the Congo and the Republic of the Congo, strategies were used which invalidated the core goal of making term limits unamendable. However, the unamendable nature of term limits cannot assure that court will enforce them. Nor can they guard against the strategy of slippage, unless the unamendable nature is coupled with precise language which prevents the tactic. On the other hand, if these gaps are all remedied and there exists a constitutional court willing to enforce term limits, their unamendable nature provides them with a tool with which to combat a particular assault. The utilization of this tool can be seen in the reasoning of the Constitutional Court of Niger. The unamendable provisions are used as a basis for developing a distinction between a primary and a secondary constituent power. From there one can equate any attempt to change the whole constitution as a broad use

[118] Constitution of the Democratic Republic of the Congo 2005, Article 220, Section 1

[119] Kimiko de Freytas-Tamura, 'Congo President Didn't Run for Re-election, but He's Still in Control' (The New York Times 14 January 2019) https://www.nytimes.com/2019/01/14/world/africa/congo-kabila-tshisekedi-election.html Accessed on 2 June 2020

of the secondary constituent power. Without unamendable provisions, even after this distinction a president's term limits would be susceptible to revision. However, with them, they remain an unamendable core of the constitution, which the court can seek to protect from even the heavy handed overstay strategy of constitutional replacement. The Constitutional Court of Niger further enhanced their symbolic and legal potency by utilizing them in conjunction with the presidential oath which is present in the 1999 constitution of Niger. A president which replaces the unamendable core of a constitution can not be said to have protected it, and thus has violated his oath. A potent symbol to enhance a courts rulings political effectiveness.

Thus, the effectiveness of unamendable presidential term limits in Francophone Africa must be discussed with these two caveats in mind. Firstly, it is dependent on a constitutional adjudication body which is willing to employ them. Secondly, there primary effectiveness in the region lies in protecting against overstay strategies which involve constitutional replacement. Alternative strategies, such as reinterpretation by the courts and slippage are more viable in circumventing the entrenchment. However, in cases when these are satisfied, the unamendable nature of presidential term limits provides a potent foundation for the reasoning of Francophone African courts which seek to curtail the imperial executive.

4) CONCLUSION

This paper sought to understand if the unamendable nature of term limits served to safeguard against presidential overstay attempts in Francophone African states. To do so it presented a theoretical justification for executive term limits and related it to Roznai's theory of unconstitutional constitutional amendment. The features of the African imperial presidencies present a unique challenge to both principles. The power and longevity of such executives increase the usefulness of the clear constitutional constraints to their stay in office. However, that very same power allowed them to employ overstay strategies which challenged even unamendable term limit provisions.

In Niger, the Republic of the Congo, and the Democratic Republic of the Congo, presidents attempted to overstay beyond their term limits. All three states shared a history of authoritarian rule, and similar constitutional design. Through these attempts the executives challenged the entrenchment provided by unamendable provisions. In utilizing the principle of unconstitutional constitutional amendments, the brunt of the work fell on constitutional adjudication bodies. President Tandja, employed an overstay strategy of constitutional replacement, but was ultimately not successful. The Constitutional Court of Niger played a role in preventing this overstay attempt, by finding the Presidents referendum unconstitutional. While the Court employed procedural reasoning to reach its conclusion, it was enhanced by the invocation of the unamendable nature of the term limits. In effect, utilizing the distinction between primary and secondary constituent power, the Court argued against the possibility of a presidential term limits being removed, even through complete constitutional replacement. In contrast, the Constitutional Court of the Republic of the Congo found the Presidents overstay attempt constitutional. In its reasoning it did not consider the unamendable clauses, instead accepting the redefining of constitutional change as an "evolution of the institutions of the Republic". Furthermore, President Kabila's overstay attempt in the Democratic Republic of the Congo showcased another gap in the armor of unconstitutional constitutional amendment. Through employing the strategy of slippage, Kabila managed to extend his final term far beyond the constitution's intent. In doing this, he was not checked by the Constitutional Court,

which saw executive continuity as paramount, and found justifications for such a finding in the constitution.

The unamendable term limits of Francophone Africa have not proven to be an impregnable shield against the lifelong president. However, through the example of Niger, we established that they do provide protection in a specific set of circumstances. If a constitutional adjudication body is ready to utilize them, they provide a foundation for reasoning against an executive who wishes to stay in power through enacting a new constitution. While these caveats make them far from universally useful, we have seen that they are have been employed for this very purpose. If these limitations are kept in mind, we may take a more realistic view of the principle, and thus view and employ it accordingly. Not as a silver bullet against the imperial presidency, but as a very specialized tool which can enhance the power of an independent constitutional court and provide it with a textual basis to combat a pernicious strategy of replacing a constitution in order to remain in power.

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