SELECT ESSAYS ON GOVERNANCE AND ACCOUNTABILITY ISSUES IN PUBLIC LAW

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LAW, DEVELOPMENT AND RESPONSIBLE GOVERNANCE IN AFRICA

A Case Study of the Presidential Term Limits in Post-Conflict Burundi*

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Summary

The limitation of presidential term is amongst the issues that have raised concerns in Africa where incumbents of a number of African countries have shown their desires to remain in power or retain their tenure through political manipulations or changing the constitutions. Although there is a theoretical assurance in the democratic states that seek to embrace the universal constitutional principles of justice, democracy, freedom, equality, respect for rule of law and human rights, in practice the desired constitutional values in Africa are often being ignored.

The purpose of the 2005 Constitution in Burundi, for example, as clearly specified in the Preamble is to reaffirm, *inter alia*, put an end to the ongoing ethnic and political violence, human insecurity and instability. Yet, the interpretation of Articles 96 and 302 of the Constitution in light of the Constitutional Court of Burundi and East African Court of Justice's decisions have raised an important legal question, which ought be answered, contextualised and construed within the constitutional meaning. Owing to the historical accounts of militarisation and armed conflicts in Burundi, it is not clear whether or not the resort to *coup d'état* and armed violence as a response to the perceived "impugned decision" referred to in the case of *EACSO v Attorney General of Burundi and Other* advanced the cause and the spirit of constitutionalism. In order to determine the extent of the law, development and responsible governance in Africa by using the post-conflict Burundi, this chapter attempts to critically analyse the fundamental provisions of the Post-conflict Constitution of 2005 relating to the presidential term limit as proposed in the Arusha Peace and Reconciliation Agreement of 2000.

* This chapter is an updated version of the paper presented to the Nelson Mandela University and University of Johannesburg Faculties of Law Book Project Symposium, Port Elizabeth, 23-24 August 2018.

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4.1 INTRODUCTION

Since the turn of the millennium, there is a remarkable number of incumbent presidents who have managed to remain in office beyond their constitutionally mandated terms.¹ The current trend shows that there is a desire amongst incumbents to extend their presidential term limits through amending their constitutions. Such examples include the Chinese President Xi Jinping, Paul Kagame of Rwanda, Alvaro Uribe of Columbia and Algeria's Abdelaziz Bouteflika who have successfully taken the pathway of amending their constitutions. Furthermore, presidents like Vladimir Putin of Russia, Kagame and Uribe exemplify a study of Heads of State who were initially elected through democratic processes, but later chose to remain in power for a longer period, contrary to their original constitutional mandates.² This chapter confines itself to the efforts made to remain in office for longer than mandated in Africa by using examples of selected countries.

There have been attempts to deepen democracy by limiting presidential terms in Africa. Since the 1990s, there was a call to move away from one-party authoritarian states in order to embrace constitutionalism and good governance. The constitutions of the emerging democracies in Africa start with their affirmation of the universal values of justice, democracy, freedom, equality and respect for human rights. However, the construction of these emerging democracies in the continent remains a big challenge.³ Incumbent presidents often come to power through legitimate democratic processes. However, later on, other dynamics come into play such as having a dominant political party, holding free but unfair elections and opting for a weaker rule of law that prevents their countries from being fully democratic states. Therefore, there has been a decline in respect of political and civil rights in countries like Algeria, Angola, Cameroon, Chad, Congo Republic, Democratic Republic of Congo (DRC), Egypt, Equatorial Guinea, Eritrea, Rwanda, Somalia, South Sudan, Sudan and Swaziland.⁴ Similarly, other countries have been classified as "partly

1 Versteeg, Horley, Meng, Guim and Guirguis "The Law and Politics of Presidential Term Limit Evasion" 2020 120 *Columbia Law Review* 175.

2 Versteeg et al (n 1) 173.

3 See generally Akpojivi *Media Reforms and Democratization in Emerging Democracies of Sub-Saharan Africa* (2018). While evaluating the media reform processes and re-democratisation in Ghana and Nigeria's emerging democracies, Akpojivi argues that dependency approaches resulting from the transplanting of policy framework from the West into emerging democracies in Africa, the objectives of these reforms have not been achieved. In most cases Africa's democratic principles are based on the strategic choices that combine contextual and contingent variables. That means that the current trends show that Heads of State make calculations about their prospects of winning or losing in future competitive elections and these are considered as the primary source of electoral systems choice in Africa's emerging democracies. But contextual frameworks relating to the political legacies of varied authoritarian regimes tend to inform the political executives' institutional preferences that shape their choice of alternative electoral systems. See Mozaffar "Africa: Electoral Systems in Emerging Democracies" in Colomer (eds) *The Handbook of Electoral System Choice* (2004).

4 Fombad "An Overview of the Crisis of the Rule of Law in Africa" 2018 18 *African Human Rights Law Journal* 220-223.

free” which include Burkina Faso, Comoros, Kenya, Liberia, Madagascar, Malawi, Morocco, Mozambique, Niger, Nigeria, Seychelles, Tanzania, Togo and Zambia.⁵

In most African countries, the independence from colonial powers have been perceived as a failed project.⁶ Many countries in Africa continue to struggle to consolidate democracy, constitutionalism and respect for the rule of law and human rights.⁷ Noticeable examples include, but are not limited to, Burundi, Rwanda, DRC, Uganda, Cameroon and Zimbabwe (the late President Robert Mugabe was ousted from power in 2017 through military takeover), where incumbent presidents have indicated their intention to hang onto power through the violation of the Constitution or political manipulation of the Constitution in order to legalise their stay in power. In some instances, countries such as Somalia, Libya, Central African Republic and South Sudan are still entangled in the protracted armed conflicts and collapse of their constitutional orders. Others, like Zambia,⁸ Tanzania⁹ and South Africa,¹⁰ although they are relatively peaceful and politically stable, yet, they have recently encountered the political upheavals and are in the process of reviewing their constitutions.¹¹ This suggests that there is a paradigm shift towards constitutional reforms in Africa. Although such constitutions may not share the same values, the tenets of constitutional values are shared across national legal systems.

In Burundi, for example, after three decades of Tutsi military regimes from 1966 to 1993 and 1996, internal and external factors of political instability and economic sanctions against Burundi pushed the country to consider democracy and

5 Fombad (4).

6 Prempeh “Africa’s Constitutionalism Revival: False Start or New Dawn?” 2005 *International Journal of Constitutional Law* 469.

7 Kibert and Fombad “Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa” 2017 17 *African Human Rights Law Journal* 365.

8 The Mainza Chona Constitutional Review Commission of 1972 on institutionalisation of the One Party State. The Mvunga Commission which led to the promulgation of the 1991 Constitution which also reintroduced multi-party system and the limitation of the presidential term to five years renewable once. See also the Mwanakatwe Constitutional Review Commission of 1996, Mung’omba Constitutional Review Commission of 2003 and the Constitutional Amendment Bill of 2015.

9 Under President Jakaya Kikwete, Tanzania embarked on constitutional review processes. The Constitutional Review Act was enacted. This Act underwent three amendments in order to improve and broaden public participation. The first amendment was approved by the Parliament on 10 February 2012 and urged the Tanzanian Mainland and Island (Zanzibar) to engage and agree on fundamental matters pertaining to the constitutional review process that included having representatives from both sides of the Tanzanian Union. The second amendment of September 2013 dealt with the composition and operations of the Constituent Assembly and dissolution of the Constitutional Review Commission. The third Amendment of November 2013 dealt with, amongst others, the increase of members of the Constituent Assembly from 166 to 201. Also, the Referendum Act of 2014 was promulgated to enable a referendum to be held on 30 April 2015, but was prevented by the 2015 elections. See also the Nyalali Commission Report of 1991 on the adoption of a multi-party system and the Warioba National Constitutional Review Commission Report of 2012 on constitutional review in Tanzania since 1990s.

10 The Joint Constitutional Review Committee was established to review section 25 of the Constitution in South Africa on possible expropriation of land without compensation. See D Spies “Parliament Receives Over 700,000 Written Submissions on Land Expropriation” <https://www.news24.com/SouthAfrica/News/parliament-receives-over-700-000-written-submissions-on-land-expropriation-20180624> (2018-06-24).

11 Kibert and Fombad (n 7) 365.

constitutionalism. The common doctrines of the separation of powers, rule of law, good governance and an independent judiciary were presumed to be respected. For the first time in the early 1990s, diverse political parties and government of Pierre Buyoya, a military official, started political dialogue that brought compromised peace and reconciliation agreements since 2000, specifically, the Arusha Peace and Reconciliation Agreement (the Arusha Peace Agreement).¹²

Contrary to the expectations of the flourishing rule of law, democracy and good governance, the postcolonial governments, like the case of Burundi, have been experiencing political instability, military *coups* and attempted *coups*,¹³ authoritarianism, armed violence, corruption and gross violations of human rights.¹⁴ For example, between 1960 and 2010, more than 200 successful and failed *coups* have been witnessed¹⁵ across Africa – 104 in West Africa, 35 in Central Africa, 48 in Eastern Africa and 16 in Southern Africa.¹⁶ Although in every *coup d'état* or an attempted *coup d'état* there seem to be justified reasons, repercussions are nonetheless evident, if Burundi can be cited amongst examples.¹⁷

The judicial interpretation of constitutional provisions generally are somehow inconsistent and tend to create judicial uncertainties. Reference is made to a few examples from other jurisdictions with respect to judicial interpretations of failure to abide by the constitutional principles. For example, in Kenya, the case of *Trusted Society of Human Rights Alliance v Attorney-General & Others*¹⁸ dealt with invalidating various decisions of the president and Parliament for failing to comply with the Constitution. This decision was later overturned on appeal, but the appointments made by the president and approved by the National Assembly were considered ineffectual for months while the appeal was still pending. In the *Institute of Social Accountability & Another v National Assembly & 4 Others*¹⁹ also, the court invalidated a popular law passed by the National Assembly and directed the government to remedy its faults. Similarly, in *The Very Right Rev Dr Jesse Kamau & Others v The Hon Attorney-General & Another*, it was observed that a timorous

12 The Arusha Peace Agreement was concluded on 28 August 2000 between Buyoya government, Tutsi-led military, seven Hutu parties and 10 Tutsi political parties, thus making a total of 19 parties to the agreement with diverse interests.

13 A small group's struggle to depose the established government fails which generally takes less than a week like what happened in Burundi in 2015.

14 Kibert and Fombad (n 7) 341.

15 Barka and Ncube "Political Fragility in Africa: Are Military Coups D'état a Never-Ending Phenomenon?" *African Development Bank Report of 2012* <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Economic%20Brief%20-%20Political%20Fragility%20in%20Africa%20Are%20Military%20Coups%20d%E2%80%99Etat%20a%20Never%20Ending%20Phenomenon.pdf> (2018-08-21).

16 See generally Japhet "Military Coups and Military Regimes in Africa" 1978 *South African Journal of Military Studies*; see also Giles C. "Sudan coup: Are military takeovers on the rise in Africa?" <https://www.bbc.com/news/world-africa-46783600> (2019-04-11).

17 Barka and Ncube (n 15).

18 [2012] eKLR (HCK).

19 [2015] eKLR (HCK).

and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document.²⁰ On interpretation of rights in particular, the court went on to note:

The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.²¹

The reasoning behind the above cited Kenyan cases imply that the rights and duties established by substantive post-liberal alterations based on the constitutional designs in post-conflict societies like Burundi must be constrained by the past intellectual instincts and liberal judicial mind-set. Therefore, an approach that transcends legal formalism and positivism is necessary.²²

Likewise, the Constitutional Court of South Africa in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*²³ for example, held that, legislation should be interpreted textually, contextually and purposefully. Consequently, under a transformative constitution, judges must, as a matter of necessity, justify their decisions not only by making reference to precedents and other legal authorities, but also by referring to certain overarching principles and values. Similarly, any attempts by the legislature to restrict the fundamental rights and freedoms must be strictly examined and justified. Therefore, the power to assess any measures restricting presidential term limits provided for in the Constitution must be vested in the judiciary.

The Constitutional Court of Burundi (CCB) and East African Court of Justice (EACJ) also had to deal with the issue of interpretation of the presidential limits provided for in the Constitution of Burundi in 2005 which proved to be uneasy task. Unlike most other cases of executive term limit evasion, it has been contended that Burundi's Constitution has never been amended, replaced, or ignored.²⁴

While there were unsuccessful attempts to replace and, alternatively, amend the Constitution in March 2014, the case of Burundi is notably different from the common constitutional amendment processes that remove or soften term limits in

20 Nairobi HCMCA 890 of 2004 (unreported).

21 Above.

22 Klare "Legal Culture and Transformative Constitutionalism" 1998 *South African Journal on Human Rights* 146.

23 [2018] ZACC.

24 Ginsburg et al on the evasion of executive term limits in 2011 *William and Mary Law Review* 1807-1831.

other countries such as Uganda in 2005,²⁵ Congo-Brazzaville in 2015,²⁶ and Rwanda in 2015 so as to allow the incumbents to renew their presidential terms without arguably violating their respective constitutions.²⁷

This chapter investigates the extent to which the principles of democracy and limitation to presidential terms in Africa are adhered to. It uses an example of Burundi where Burundian politics have developed from military rules to constitutional and democratic processes. The case of *East African Civil Society Organisations Forum (EACSOFF) v Attorney General of Burundi and Others*²⁸ is considered in order to demonstrate how deteriorating political and social cohesion has been associated with maladministration in post-conflict Burundi. Articles 96 and 302 of the Constitution are used to explain the controversies surrounding the “third term presidential mandate” in Burundi. The chapter compares what is happening in the neighbouring countries with respect to the constitutionally entrenched presidential terms and succession. It concludes that one of the repercussions of ongoing human rights violations in post-conflict societies in Africa, Burundi in particular, is to engender the culture of impunity and the hindrance of national reconciliation, reconstruction and development. In addition, the concepts of democracy, promotion of human rights, and respect for the rule of law are analysed holistically. For that reason, this chapter refers to the constitutional interpretation by the CCB which was considered by the EACJ as discussed below under sections 4.3 and 4.4 of this chapter.

4.2 TWO FIVE-YEAR PRESIDENTIAL TERMS AND AGE LIMITS IN THE GREAT LAKES REGION OF AFRICA

The presidential term limit issue as raised in the *EACSOFF* case has been demonstrated to be a contentious one in Africa. For example, both the CCB and EACJ in the Burundi case revealed the ambiguities that can be associated with the constitutional design of the presidential term limit. This chapter uses the examples

25 President Yoweri Museveni assumed executive powers from 1986 to date. After the protracted armed conflicts, the National Resistance Movement overthrew the previous repressive regimes, Museveni declared a transitional one-party government from 1986-1989 which was extended to 1996. For this period Museveni ruled Uganda without a Constitution, but rather through the NRM's Legal Notice 1 of 1986. In 1995, the Constitution of 1995 was adopted which provided for two five-year presidential and 75-year age limits respectively and elections were held. Museveni won and his mandatory presidential terms were supposed to end in 2005. However, a referendum on the presidential limit and restoration of multi-party democracy was approved. As a result Museveni was nominated as a presidential candidate for the 2006, 2011 and 2016 elections. Based on age Museveni would be disqualified as a president in 2019 and ineligible to run for the upcoming 2021 elections. Interestingly, the Constitution Amendment Bill No.2 of 2017 was brought before the Parliament on 20 December 2017, seeking the removal of the 75-year presidential age limits and became a law on 27 December 2017. This can allow Museveni to run for presidential candidacy in 2021.

26 *All Africa News* “Congo-Brazzaville: Referendum Passes Allowing President to Extend Rule” <https://allafrica.com/stories/201510270558.html> (2018-07-04).

27 Vandeginste “Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi” 2016 *Africa Spectrum* 43.

28 Case Number RCCB 303 decided on 5 May 2015.

from the neighbouring countries of Burundi to demonstrate inconsistencies in the application of the presidential term limits in Africa. For that reason, the countries of Tanzania, Uganda, DRC, Rwanda and Burundi are referred to in terms of two five-year presidential terms and age limits as well as the presidential alternance and the popular will.

4.2.1 Two five-year terms and age limits

Tanzania has complied with the two five-year presidential terms limit as stated in the Constitution²⁹ since the adoption of multi-party system in 1992.³⁰ In Uganda, when the National Resistance Movement (NRM) came to power, the two five-year presidential term limit was included in the Constitution of 1995 but was never implemented. The original Constitution stated that: a president is supposed to serve for two terms. But, this was scrapped through a referendum in 2005. Article 102 of the Constitution of Uganda states that the age limits for President should be between 35 to 75 years. This was removed by the Parliament after passing the Age Limit Bill.³¹ The implication of the age limit law can now allow the 75-year-old President Yoweri Museveni to seek re-election for a sixth term in 2021, because the presidential term limit has recently been abolished together with the age limit. Rwanda, since the time the Rwandan Patriotic Front (RPF) assumed power in 1994, has now extended the presidential term limit from five to seven years.³² In the DRC, after the expiry of the two five-year term limits, the President, Joseph Kabila, never changed the Constitution but still desired to stay in power and was unwilling to step down.³³ Although Kabila had a constitutional presidential mandate until 20 December 2016, this mandate was initially extended until the end of 2017. Then Kabila continued to remain in power until the presidential election was held in December 2018 when Felix Tshisekedi was elected and took over to become president of the DRC on 24 January 2019. In Burundi, through the referendum of May 2018, the Constitution has been changed like Rwanda's and has extended the term limit from five to seven years.

29 Article 42 of the Constitution of the United Republic of Tanzania of 1977 which is read together with section 9 of the Time of Assumption and Term of Office of President Act 15 of 1984.

30 See article 3 of the Tanzanian Constitution and Act No 4 of 1992 on the declaration of Tanzania as a multi-party state. See also the Nyalali Commission's Report of 1992, Ngasongwa "Tanzania Introduces a Multi-Party System" 1992 *Review of African Political Economy* 112-116.

31 BBC News "Uganda MPs Vote to Scrap Presidential Age Limit" 20 December 2017 <https://www.bbc.com/news/world-africa-42434809> (2018-07-29).

32 Homolkova "Transnationalisation Potential of Electoral Violence in Burundi" 2017 *Journal of African Elections* 133. President Kagame's ability to contest elections for a further three terms suggests that future protests should not be discounted. His move has the potential of giving him an additional 15 years in office and disadvantages democracy, constitutionalism and responsible governance in Rwanda.

33 Kestler-D'Amours "DRC Violence Shows Kabila Determined to Stay in Power" January 2018 <https://www.aljazeera.com/news/2018/01/drc-violence-shows-kabila-determined-stay-power-180101102949537.html> (2018-09-29).

4.2.2 Five vs. seven years

Rwanda has changed its Constitution through referendum and this has been endorsed by the Parliament in 2017. The Rwandan constitutional referendum which was held on 18 December 2015 and included Rwandese citizens living abroad, voted on 17 December, and 98% of voters approved the seven-year term limit.³⁴

Likewise, Burundi's change to the Constitution is one of the significant features. There are several arguments which have been put forward in that regard to the effect that the five-year term is not long enough or adequate for the government to implement the aspirations expressed in the election manifestos. Burundi being one of the poorest countries it cannot afford the election costs every five years as proven in 2015 when the government shouldered the costs of the 2015 elections, because the external donors like Burundi's former colonial power Belgium and the European Union (EU) boycotted the drive to fund elections.³⁵ Also, the government funding of the 2018 constitutional referendum's related costs has proven to be expensive. Like Rwanda, the Constitution of Burundi has been changed through referendum and the Parliament.³⁶

The Independent National Electoral Commission, on 17 May 2018, confirmed that a majority number of Burundians voted in favour of a new Constitution. Overall, the referendum took place in a calm environment despite some alleged irregularities as reported by opposition and civil society representatives.³⁷ Given the approval of the new Constitution of Burundi, the United Nations has raised socio-economic and humanitarian concerns as many Burundians continue to live in refugee camps, especially in Tanzania, Rwanda, Uganda and the DRC.³⁸ But, what has been acknowledged, is the fact that the referendum to change the Constitution should reflect the will of the Burundians and should not have the negative impact of taking the country back to the political instability, human insecurity and the outrages of the 2015 elections. A call has been made on all political parties to engage in meaningful dialogues, which should include negotiations which aim towards peaceful, free, fair, transparent and inclusive participation in the 2020 elections.³⁹

34 See *The Guardian* "Rwandan President Paul Kagame to Run for Third Term in 2017" 1 January 2016. <https://www.theguardian.com/world/2016/jan/01/rwanda-paul-kagame-third-term-office-constitutional-changes> (2018-07-29).

35 *BBC News* "Burundi's Nkurunziza Asks Public for Money for Election" 26 May 2015 <https://www.bbc.com/news/world-africa-32886071>

36 Institute for Security Studies "The AU Should Take a Stand on Burundi's Constitutional Review" 19 March 2018 <https://issafrica.org/iss-today/the-au-should-take-a-stand-on-burundis-constitutional-review> (2020-04-02); see also Reuters "Burundi Approves New Constitution Extending Presidential Term Limit" <https://www.reuters.com/article/us-burundi-politics/burundi-approves-new-constitution-extending-presidential-term-limit-idUSKCN1IM1QG> (2018-05-21).

37 The UN Security Council Report on the situation in Burundi S/PV.8268 of 24 May 2018 https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8268.pdf (2018-07-15).

38 Above.

39 Above.

4.2.3 Reflection of third termism in the African Great Lakes

The two five-year presidential term limit has proven to be an issue in both Rwanda and Burundi which are part of the African Great Lakes Region. Both countries, which have a long history of armed conflicts and had agreed on two five-year term limits, have now extended this to a two seven-year presidential term limit. They both used the Parliament to achieve their objectives. But, the question that remains is whether or not changes in the Constitution imply change of the presidential candidacy as raised in the *EACSO* case.

4.2.4 Presidential alternancy and the popular will

The alternance of the presidents in line with the constitutional framework in Tanzania has been complied with. Tanzania managed to keep two five-year presidential terms as provided for in the Constitution and ultimately alternate the presidents since the independence from the British colonial rule. The only concerns that have been raised relate to the ruling party. Although it changed its name from Tanganyika African National Union (TANU) to Chama Cha Mapinduzi (CCM), it has remained in power since the independence to date. But, there are positive aspects because Tanzania remains economically and politically stable in comparison with its neighbouring countries of Rwanda, Burundi, DRC, Uganda and Kenya.

It must be noted that the presidencies in Burundi, Rwanda, Uganda and DRC are results of the armed struggle. President Kagame, for example, maintains that as long as the people of Rwanda want him to rule he will always be available.⁴⁰ But the EU and United States of America have argued that Kagame should step down in order to empower the younger generation. Thus, by implication, the people of Rwanda are keeping President Kagame in power as a form of gratitude for his military victory and apparent economic achievements. President Nkurunziza, on the other hand, after his second term, announced that he will not be available for the upcoming elections of 2020,⁴¹ although during the 2018 referendum the opposition parties alleged that the incumbent wanted to entrench himself in power. But the ruling party's Secretary-General, Evariste Ndayishimiye, was elected as a presidential candidate in the May 2020 elections, he was sworn as a new President of Burundi in June 2020 after the sudden death of President Nkurunziza.⁴²

40 *The Guardian* "Rwanda Votes to Give President Paul Kagame Right to Rule until 2034" <https://www.theguardian.com/world/2015/dec/20/rwanda-vote-gives-president-paul-kagame-extended-powers> (2018-02-08).

41 *News24* "Burundi President Surprises with Vow to Step Down in 2020" <https://www.news24.com/Africa/News/burundi-president-surprises-with-vow-to-step-down-in-2020-20180609> (2018-08-17). See also Mwakideu "Is Nkurunziza Ready to Relinquish Power?" <https://mg.co.za/article/2020-01-28-is-burundi-president-pierre-nkurunziza-ready-to-relinquish-power/> (2020-01-28), the ruling party CNDD-FDD has elected an army general Evariste Ndayishimiye as its presidential candidate.

42 *News24* "Burundi's Evariste Ndayishimiye Sworn in as New President" <https://www.news24.com/news24/africa/news/burundis-evariste-ndayishimiye-sworn-in-as-new-president-20200618-2> (2020-07-11).

The Ugandan elections have been held many times, however, it seems that the incumbent is not ready to relinquish his presidential powers and has changed the presidential age and term limits for him to stay in power as supported by the Constitution. In the DRC, despite the expiry of the presidential term limit in 2016, President Kabila still remained in power, supported by the military although he eventually stepped down in 2018. The presidential term limits with specific reference to Burundi are discussed hereunder.

4.3 A CASE STUDY OF THE POST-CONFLICT BURUNDI

4.3.1 A history of the post-conflict Burundi

Before discussing various interpretations attributable to the above stated constitutional provisions, it is worth referring to a brief history of Burundi. After three decades of Tutsi military regimes from 1966 to 1993 and 1996, the United Nations (UN) adopted resolutions to intervene in the issue of Burundi.⁴³ Despite the international and regional initiatives which aimed at ending the armed conflicts, the fighting between the warring parties never stopped. Peace and reconciliation negotiations led to the conclusion of peace agreements like the Arusha Peace Agreement in 2000, but some of the Tutsi parties signed the Arusha Agreement with diverse reservations⁴⁴ while the Hutu parties like the *Conseil National pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie* CNDD-FDD (the current ruling party) and the *Forces National de Libération* (FNL) did not sign the Agreement at all.⁴⁵ Hence, there was a need to engage in further peace negotiations which eventually benefited the CNDD-FDD and FNL by signing their own peace accords, such as the Pretoria Protocol on Political, Defence, Security and Power-Sharing of 2003 (the Pretoria Protocol) and the Dar es-Salaam Comprehensive

43 See the UN Security Council Resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009) and 1960 (2010) on women, peace and security, Resolutions 1674 (2006) and 1894 (2009) on the protection of civilians in armed conflicts, Resolutions 1612 (2005), 1882 (2009), 1998 (2011) and 2068 (2012) on children and armed conflicts and Resolution 2090 (2013) on extension of mandate of the UN Office in Burundi until 15 February 2014, Resolution 2248 (2015) on the UN Security Council's intention to consider additional measures against all Burundians who contribute to the perpetuation of violence and requested the Secretary-General to update the Council on the situation in Burundi within 15 days, Resolution 12174 (2015) a press statement noting the African Union decision to deploy an African Prevention and Protection Mission and calling on Burundian stakeholders to comply with it, Resolution 2303 (2016) on establishment of a UN police component in Burundi of 228 officers for a period of one year, Resolution S/2016/799 (2016) on the report of the Secretary-General to enable the UN to facilitate the deployment of AU human rights observers and military experts, and Resolution A/HRC/RES/36/2 (2017) on the Council resolution requesting the United Nations Office of the High Commissioner for Human Rights (OHCHR) to urgently dispatch a team of three experts to Burundi to collect information concerning human rights violations in cooperation with the government of Burundi and forward such information to the judicial authorities of Burundi.

44 Six out of 10 Tutsi political parties signed the Arusha Peace Agreement with reservations. See International Crisis Group (ICG) "Burundi's Peace Process: The Road Map from Arusha" 20 July 1998 <https://www.refworld.org/docid/3ae6a6d10.html> (2020-04-22).

45 Above.

Ceasefire and Peace Agreement of 2006.⁴⁶ As a result, the CNDD-FDD gained from the subsequent agreements and it assumed political power from 2005 to date.

4.3.2 Constitutional framework

After the conclusion of the Arusha Peace Agreement in 2000, the 2001 Constitution was adopted allowing the governance of the post-conflict Burundi. However, the Interim Constitution of 2004 repealed the 2001 Constitution and remained in force until the post-transition or Final Constitution of 2005 was adopted. The final Constitution was based on the French Model with some modifications to acknowledge ethnicity that plays a major role in Burundian politics.⁴⁷ It is through the constitutional framework that the salient constitutional-related issues attributable to the current constitutional crisis in Burundi ought to be addressed.

4.3.3 The flaws in the Arusha Peace Agreement and the Constitution

Upon examination of the peace and reconciliation initiatives as reiterated in the constitutional framework, it must be pointed out that some loopholes were evident in the above stated Arusha Peace Agreement, as well as in the 2005 Constitution. For example, ethnic quotas, i.e., Hutus, Tutsis and Twas, that is, 60% Hutu to 40% Tutsi in the executive, legislature and the judiciary and co-option of Batwa⁴⁸ which were provided for, while the ethnic composition in Burundi is 85% Hutus, 14% Tutsis and 1% Twas, raised concerns and have attracted legitimate criticisms. Furthermore, the ethnic quota which allowed 50/50 for Hutus and Tutsis, respectively, in the military have proven to be altogether impractical in the Burundian constitutional design.⁴⁹

It is equally important to note that the rationale of ethnic quota requirements as mentioned above has far-reaching implications in the Burundian constitutional dispensation and their failure to provide comprehensive answers to the current constitutional crisis has exacerbated the situation. Accordingly, the proposed ethnic quotas have been removed under the constitutional referendum of May 2018 so that they can be determined under presidential directives.⁵⁰

46 The Pretoria Protocol on Political, Defence, Security and Power-Sharing in Burundi 2003 (the Pretoria Protocol) and the Dar es-Salaam Comprehensive Ceasefire and Peace Agreement 2006. The Global Cease-Fire Agreement between the Transitional Government of Burundi and the CNDD-FDD 16 November 2003, and the Comprehensive Cease-Fire Agreement between the Government of Burundi and the Party for the Liberation of Hutu People-National Liberation Forces (PALIPEHUTU-FNL) 7 September 2006 were concluded and the subsequent agreements such as the Magaliesburg Agreement 2008 and Bujumbura Agreement 2009.

47 See the Preamble to the Burundian Post-transition Constitution of 2005.

48 Article 164 of the Post-transition Constitution of 2005.

49 Nantulya "After Burundi's Referendum, a Drive to Dismantle the Arusha Accords" 20 July 2018 <https://africacenter.org/spotlight/after-burundis-referendum-a-drive-to-dismantle-the-arusha-accords/> (2018-11-17).

50 Nantulya (n 49).

Given the flaws which were evident in the peace agreements – to be precise, the Arusha Peace Agreement – the inadvertent consequences came to the light in the 2015 elections. The case of *EACSO v Attorney General of Burundi and Others*⁵¹ is a controversial one which instigated armed violence and highlighted, *inter alia*, the weaknesses of the Arusha Agreement as re-iterated in the Post-transition Constitution of 2005. The *EACSO* case, which dealt with the interpretation of constitutional provisions concerning the presidential term limits,⁵² whereby fourteen Senators in Burundi filed a motion before the court *a quo*, i.e., the CCB on 28 April 2015 wherein they were seeking an interpretation of Articles 96 and 302 of the Constitution.

The CCB for the first time was tasked to give clarity on the issues pertaining to the presidential term limit envisaged under the Arusha Peace Agreement⁵³ and the Constitution.⁵⁴ Amongst the issues raised before the CCB were: the lawfulness of the motion in terms of Article 230 (1) of the CCB's Constitution which provides that “[t]he Constitutional Court is referred to a matter by one-quarter of the members of the Senate”, and most importantly, the interpretation of Articles 96 and 302 of the Constitution and the modalities of the referral of the matter relating to the interpretation of the Constitution.⁵⁵ A day before the handing down of the judgment, the Vice President of the CCB, a part of the minority judgment, fled Burundi alleging intimidation.⁵⁶ On 5 May 2015, the CCB in what is referred to as the “impugned decision”⁵⁷ held that Nkurunziza was eligible to run for the presidency of the country. Clearly, the “impugned decision” elicited political and security instability in Burundi in 2015.

4.3.4 Response to the Constitutional Court's decision

The “impugned decision” became the central thrust of the case whose consequences led to demonstrations, an attempted *coup d'état*,⁵⁸ internal displacement and a refugee crisis. A number of Burundian citizens fled the country again similarly to

51 An appeal to the East African Court of Justice, Appeal No 4 of 2016, whose judgment was handed down on 24 May 2018.

52 *EACSO v Attorney General of Burundi and Other* [par 2].

53 After prolonged peace and ceasefire negotiations which were held in Tanzania under the mediation of former Tanzanian President Mwalimu Julius Nyerere. After his death, the former South African President Nelson Mandela took over. On 28 August 2000, in Arusha all the parties signed the Agreement with some reservations, especially Tutsi political parties, while Hutu parties like CNDD-FDD and FNL were not signatories. Law n°1/017 of 1 December 2000 on the adoption of the Arusha Peace Agreement was enacted.

54 Constitution of the Republic of Burundi of 2005.

55 As provided for under Article 228 (3) of Law No 1/010 of 18 March 2005 on promulgating the Constitution of Burundi.

56 *EACSO v Attorney General of Burundi and Other* [par 5].

57 *EACSO v Attorney General of Burundi and Other* [par 5].

58 Ndimurwimo and Mbao “Rethinking Violence, Reconciliation and Reconstruction in Burundi” 2015 *Potchefstroom Electronic Law Journal* 849-850.

what happened before in 1972 and the 1990s, and sought refuge in the neighbouring countries of Rwanda, DRC, Tanzania and Uganda.⁵⁹

In spite of the CCB's careful consideration in arriving at its decision, it is important to note that the approval of President Pierre Nkurunziza's third term mandate in 2015 was criticised by opposition parties as well as the international community as unconstitutional and contrary to the spirit of the Arusha Agreement.⁶⁰ A fundamental issue attributable to the legality of Nkurunziza's third-term presidential candidacy lied on uncertainties found in the constitutional design in relation to the modalities on how the president should be elected.

Considering Article 302 of the Constitution *vis-à-vis* the "provisions relating to the first post transition period" and the vagueness of the use of the word "exceptionally" which appears to be independent of Article 96 were the key issues that had to be clarified. Articles 302 and 96 which intended to create an exceptional and special mandate for the presidential candidacy exposed the uncertainties which the CCB ought to expound. For example, it has been contended that, rather than objecting to the form of election provided for under Article 96 as the Arusha Agreement intended to be, the application of Article 302 was viewed as a delay in limiting the number of presidential terms by universal direct suffrage stated in Article 96. The CCB, in applying the broader interpretation, ruled out that the Arusha Agreement did not allow a third presidential term, but the drafters of the Constitution in 2005 wrongly interpreted the Arusha Agreement.⁶¹

Moreover, Article 302 of the Constitution is in conformity with Article 190 of the Electoral Code of April 2005. This Code, which was promulgated one month after the adoption of the Constitution in 2005, is seen as an exception to the principles enshrined in its Article 186 of the Code, which is also similar to the provisions of Article 96 of the Constitution envisioned by the Arusha Peace Agreement in 2000. It has been argued that the presidential term limit in Burundi occurred in a context of sustained militarism.⁶² However, it must also be noted that the underlining historical factors of political and social injustices cannot be undermined either. In fact, the presidential "third term mandate" or "*troisième mandat*" vividly demonstrated a troubling governance trend in Burundi, notably, since the contested 2010 elections that paved the way for a return to probably a *de facto* one-party regime.⁶³

59 UNHCR Briefing Notes "Burundi Refugee Numbers in Neighbouring Countries Reach 50,000 as Violence Continues" <https://data2.unhcr.org/en/news/12771> (2015-05-08). The violence that accompanied the third-term crisis of Burundi resulted in at least 1,200 deaths and over 400,000 refugees between April 2015 and May 2017 according to estimates by the International Criminal Court (ICC) which has opened an investigation.

60 Homolkova (n 32).

61 Vandeginste (n 27) 54.

62 Vandeginste (n 27) 39-63.

63 Daley and Popplewell "The Appeal of Third Termism and Militarism in Burundi" 2016 *Review of African Political Economy*.

Based on the above, the following section seeks to analyse whether or not President Pierre Nkurunziza, who had served the post-transitional as a president in 2005 and 2010, was eligible for presidential candidacy in 2015. Another fundamental legal issue is whether the CCB's "impugned decision" in *EACSO v Attorney General of Burundi and Others* advanced the development of legal norms and responsible governance in the post-conflict Burundi.

4.4 AN ANALYSIS OF THE EAST AFRICAN COURT OF JUSTICE'S DECISION

Given the unresolved issue before the CCB, the East African Civil Society Organisations Forum (EACSO), which is a platform for Civil Society Organisations in East Africa brought an urgent application against President Pierre Nkurunziza's third term presidential campaign before the East African Court of Justice (the EACJ).⁶⁴ The EACJ had to determine whether or not the EACSO had *locus standi*. The EACSO based their *locus standi* on their pursuit to build a critical, knowledgeable and empowered civil society in the East African Community (EAC). For that reason, the EACSO approached the EACJ in order to foster their confidence in articulating the grassroots, needs and interests to the EAC and its various organs, institutions and agencies. Thus, their *locus standi* lay within the objectives of the Treaty for the Establishment of the East African Community (the Treaty).⁶⁵

As indicated above, the EACJ was established in terms of the Treaty. Initially, Kenya, Uganda and Tanzania were the first State Parties to ratify the Treaty. Thereafter, Burundi and Rwanda acceded to the Treaty on 18 June 2007 and became Members States of the EAC from 1 July 2007⁶⁶ and South Sudan joined the EAC in 2016. It is worth emphasising that the EAC's mandate in terms of the Treaty plays a major role in promoting democracy, rule of law and respect for human rights. The EACJ serves as a judicial body of the EAC. The Treaty's objectives confer powers on the EACJ to deal with a wide range of legal issues, including to develop policies and programmes that aim to widen and deepen cooperation amongst the Member States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, and other issues to their mutual benefit.⁶⁷ One of its explicit jurisdictions is the power to hear and determine disputes on the interpretation and application of the Treaty.⁶⁸

On 6 July 2015, the applicants, EACSO, sought orders for the stay Decree No. 100/177 of 9 June 2015 to postpone Burundi's presidential and senatorial elections

64 *EACSO v Attorney General of Burundi and Other* Appeal No 4 of 2016. This was an appeal of the First Instance Division of The East African Court of Justice dated 29 September 2016.

65 Article 9 (e) of the EAC Treaty.

66 EAC "History of the EAC" https://www.eac.int/health/index.php?option=com_content&view=article&id=57&Itemid= (2018-10-22).

67 Chapter 8 of EAC Treaty.

68 Article 27 of the EAC Treaty.

of 15 and 24 June 2015 respectively, as well as the stay of the second respondent's decision, the Independent National Electoral Commission or *Commission électorale nationale indépendante* (CENI) dated 12 June 2015 which approved the nomination of Pierre Nkurunziza as a candidate in the presidential election. The urgent application further sought an order directing CENI and the government of the Republic of Burundi to postpone the presidential and senatorial elections.

The respondents were the Attorney-General of Burundi, CENI and the Secretary-General of the EAC. The EACSOFF contended that the situation in Burundi required urgent attention and if no action was taken, President Nkurunziza would run for an unconstitutional third term of office. The applicants argued that the procedure used by the second respondent, CENI, in arriving at the decision to submit and accept the candidacy of President Nkurunziza, violated the Constitution and the Arusha Peace Agreement, both of which limit presidential tenure in Burundi to two terms.

It is imperative to state that the applicants' opinion in the interim orders raised serious and fair concerns in terms of the notions of democracy, the rule of law, transparency and constitutionalism.⁶⁹ On 14 July 2015, the urgent application was heard *ex parte*, but the EACJ declined to grant the orders sought. It transpired that Burundi's presidential election had been postponed to 21 July 2015, therefore the court ordered the application to be heard inter-parties.⁷⁰

The presidential third term mandate issue was already decided in Burundi by the CCB. The question posed before the EACJ was whether the CCB had the final say on the matter, since Burundi is a Member State to the Treaty. Thus, the EACJ had to determine if it had the jurisdiction to review a constitutional matter that was already decided at the national level and dismiss the CCB's decision. At the same time, the EACJ had to determine whether or not the presidential nomination of Nkurunziza contravened Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c), and 8(5) of the Treaty.⁷¹ The respondents in their counter argument stated that the EACJ did not have jurisdiction to entertain the matter due to the fact that Article 30(3) of the Treaty, which states that "the Court shall have no jurisdiction under this Article where an act, regulation, directive, decision or action has been reserved under the Treaty to an institution of a State Party".⁷²

It was stated that in Article 30(3) legal provision negates the jurisdiction of the court over matters that have been reserved under the Treaty to an institution of a State Party to the Treaty. The court referred to Article 9(4) and Article 27(1) of the Treaty and concluded that the Treaty does not expressly reserve the business of national

69 *EACSOFF v Attorney General of Burundi and Others* 2-3.

70 Above par 3-4.

71 Above par 12.

72 Above par 13.

courts as one of those matters over which the EACJ has no jurisdiction.⁷³ However, the court used a purposive interpretation to determine whether it had jurisdiction. The court held that in matters relating to constitutional interpretation, it is excluded to entertain such matters as its jurisdiction is restricted to Treaty-related matters. Furthermore, that the EACJ had no jurisdiction to interpret the provisions of the Burundi Constitution or Arusha Peace Agreement for purposes of determining the correctness of the CCB's decision.

However, the EACJ, in elaborating more, stated that it is entirely different from the court reviewing the provisions of State Party's national law with a view to determining its compliance with the Treaty. The EACJ explicitly stated that it has jurisdiction to entertain the matter while referring to the latter scenario.⁷⁴ The EACJ observed further that, in the same vein, the court is not clothed with an appellate jurisdiction over the decisions of national courts. Article 23(3) of the Treaty specifically designates a court *a quo* in matters of Treaty interpretation. As such, the EACJ concluded that it was not persuaded that the EACSO's application raised matters of the Treaty's interpretation.

Since the EACJ could not find jurisdiction over the CCB's "impugned decision", it was clear that the application was destined to fail. The respondents questioned the injury the applicants specifically stood to suffer in the event that the application was dismissed. The EACJ confirmed that even if it had to use the principle of convenience to determine whether the applicants' rights were worthy of protection, the court concluded that the applicants' rights did not outweigh the constitutional rights of the Burundians to vote. Reason being, the Constitution of Burundi prescribed the holding of the presidential election not later than one month before the expiration of the term of the incumbent president. Therefore, President Nkurunziza's term was set to expire on 26 August 2015, meaning that the presidential election had to be conducted at least before 26 July 2015. In essence, if the EACJ would have decided in favour of the applicants, it would have caused more harm to the Burundian citizens and the Constitution by denying them their democratic and constitutional right to vote in a timely manner for their president.

4.5 CRITICISM OF THE CCB AND THE EACJ DECISIONS

While reflecting on the law, development and responsible governance in the post-conflict Burundi, it is imperative to consider the political and social injustice of the past while upholding the fundamental rights of Burundian citizens which transcend civil and political rights. For example, the constitutionality of the Arusha Peace Agreement as echoed in Constitution provisions was tested in the courts of law for the first time by the CCB and the EACJ, ten years after the adoption of the

⁷³ Above par 9.

⁷⁴ Above par 16.

Constitution in 2005. Perhaps, if the dilemma of the presidential third term limits had been clarified before in the 2005 and 2010 elections, it would have prevented the undesirable consequences of the “*troisième mandat*” in the 2015 elections which took back the country to the history of bloodshed and armed violence. In other words, it would have resolved the issue of whether or not President Nkurunziza was eligible for re-election in 2015.

The EACJ acknowledged that although it may not be difficult to interpret Article 96 of the Constitution, the same cannot be said of Article 302. The court elaborated that the word “exceptionally” cast doubt on the real intentions of the drafters of the Constitution. The court went on and stated the following:

[A]rticle 302 of the Constitution, given where it appears in the Constitution under provisions for the first post-transition period and the vagueness of the word “exceptionally” appears to be independent of Article 96 thereby creating a completely exceptional and special mandate which is unrelated to Article 96. Considering that the application of Article 302 can also delay the limiting number of presidential terms by universal direct suffrage provided for under Article 96. Moreover, the idea is in conformity with Article 190 of the Electoral Code of April 2005 which was approved one month after the promulgation of the Constitution which is similar to Article 302 of the Constitution as it states that it is the exception to the principles enshrined in Article 186 of the Electoral Code which is also similar to Article 96 of the Constitution. Though the Arusha Peace Agreement recommended that no President can serve more than two terms, the vague nature of Article 302 of the Constitution made a third term possible for a president who headed the first post-transition period. Considering that the applicants requested the Court to interpret Articles 96 and 302 of the Constitution and state if a renewal once of the term of the current president is in conformity with the Constitution. Considering that Article 302, for its part, came up with a special universal indirect suffrage mandate and had nothing to do with the mandate provided for in Article 96.⁷⁵

The court’s logical reasoning was flawless up to the point of interpreting Article 302 of the Constitution. The question posed was whether or not Article 7 of Protocol II of the Arusha Peace Agreement had a different meaning compared to Articles 96 and 302 of the Constitution.

Although Article 302 refers to the first presidential indirect universal suffrage as an “exceptional matter” because it was during the transitional phase, it does not mean the Articles of the Constitution must be read in isolation. Instead the Constitution ought to be read in whole so that Article 96 should complement Article 302.

It is imperative that even though President Nkurunziza’s first term was elected under an indirect suffrage in terms of Article 302 in 2005, it would still have counted as a

⁷⁵ EACJ *v* Attorney General of Burundi and Others.

term in respect of Article 96 of the Constitution. But, the EAC's mandate in terms of the Treaty is to promote constitutionalism. Therefore, the Treaty obliges the Member States to abide by the principles of good governance, including adherence to the principles of democracy, rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of Human and Peoples' Rights.

Referring to the EACJ's rational thinking, it can be deduced that the EACJ did not fail in its mandate because it had no jurisdiction to interpret the matter which had already been decided under the national law of Burundi by the CCB. It seems, however, that all legal remedies were exhausted and President Pierre' Nkurunziza was eligible to serve the third term. It is interesting to point out that the court never attempted 'for the sake of convenience' to interpret or even provide its opinion on Nkurunziza's third-term mandate. As it stands, it seems both CCB and EACJ were not ready to apply their minds and rule against Nkurunziza's perceived third-term mandate, contrary to the Arusha Peace Agreement and Constitution.

4.5.1 Article 96 vs. 302 debate

On the basis of the above, it is worth reflecting on the contents of both articles 96 and 302 which brought controversies in the "impugned decision". Article 96 provides that "the President of the Republic is elected by universal direct suffrage for a mandate of five years renewable one time".

Article 302 on the other hand stipulates:

Exceptionally, the first President of the Republic of the post-transition period is elected by the National Assembly and the elected Senate convened in Congress, with a majority of two-thirds of the members. If this majority is not obtained on the first two ballots, further ballots are held immediately until a candidate obtains the votes equal to two-thirds of the members of the Parliament...

The interpretation that tends to trigger any given constitutional fallacy as the *EACSO* case suggests, has to consider the nature of society and the objectives it seeks to achieve. Perhaps the fundamental issue to be mindful of is the intention of the legislature and the language used in both Articles 96 and 302 that ought to guide the judicial interpretation. While articulating on the contents of the above-stated articles, it can be construed that in most post-conflict society related cases the courts usually have to weigh up between the historical accounts of the past injustices and the political needs where the former may take precedent.

Interestingly, a referendum of changing the Constitution of Burundi in May 2018 proposed the change of presidential term limit from five years to seven years like Rwanda.⁷⁶ Out of 96% (4.7 million people) who registered to vote, 73% voted in

⁷⁶ *IOL News* "'Yes' Votes Ahead in Burundi Constitutional Referendum" <https://www.iol.co.za/news/africa/yes-votes-ahead-in-burundi-constitutional-referendum-15044270> (2018-05-18).

favour of amendment to the Constitution on extending the presidential term from five to seven years.⁷⁷

Fairly, Burundi's third-term legal framework, as Vandeginste has revealed, was characterised by loopholes with an unintended uncertainty of the legal norm and an omission in the enforcement order.⁷⁸ This enabled the executive to maintain a legality which is derived from rule of adherence on legitimacy of executive powers.⁷⁹ Certainly, this shows how Burundi's national law and practice have been tested and measured against the constitutional framework. But Vandeginste, while referring to transitional justice, also pointed out that there is a remarkably sinister discrepancy between Burundi's policies and practice.⁸⁰

4.5.2 Arusha Peace Agreement modalities

It is important to note that the Post-conflict Constitution of Burundi was adopted in 2005 based on the Arusha Peace Agreement modalities. Undeniably, the Arusha Peace Agreement as a founding document has an historical importance and a conceptual framework of trying to move Burundi from the culture of armed conflicts to peace and human security. For example, the explanatory memorandum of the Draft Constitution of 18 March 2005 referred to the Arusha Agreement and widely recognised the same as Burundi's foundational roadmap to peace and stability.⁸¹ The parties resolved to put aside their political differences in order to promote the issues of their common understanding and interests of Burundian citizens. Furthermore, these parties reaffirmed and resolved to maintain peace, stability, justice, the rule of law, national reconciliation, unity and development. They also determined to put an end to the root causes underlying the recurrence of violence, bloodshed, insecurity, political instability, genocide and unfair discrimination of the past and to promote diversity.⁸²

However, the ambiguities in the Arusha Peace Agreement itself have allowed the ruling party CNDD-DD government to disregard its relevance, specifically on the following aspects:

- It did not clearly address the presidential third-term issue.
- It has been viewed as a political agreement that was signed by the political parties with several reservations at the expense of interest of all Burundian citizens.

77 See *Sunday Times* "Burundi Approves New Constitution Extending Presidential Term Limit" <https://www.timeslive.co.za/news/africa/2018-05-21-burundi-approves-new-constitution-extending-presidential-term-limit/> (2018-05-21).

78 Vandeginste (n 27) 43.

79 Beetham *The Legitimation of Power* (2013).

80 Vandeginste "Transitional Justice for Burundi: A Long and Winding Road Study" 2007 20. A paper presented at the International Conference on Building a Future on Peace and Justice, Nuremberg, 25-27 June 2007.

81 The Preamble to Protocol I of the Arusha Agreement that deals with the nature of the Burundi conflict, problems of genocide and exclusion and their solutions.

82 See articles 1-8 of Protocol I of the Arusha Peace Agreement.

- There were other subsequent peace and ceasefire agreements like the Pretoria Protocol of 2003 and the Dar es-Salaam Comprehensive Ceasefire and Peace Agreement of 2006 which brought an end to the armed conflicts in Burundi but which were not given the same constitutional status as those of the Arusha Peace Agreement.
- In terms of legal hierarchical norms, an agreement may not be superior to the Constitution which is supreme law of the country;⁸³ that means, a mere agreement should not be considered superior to the Constitution.

Similarly, the uncertainties posed by the combination of Articles 96 and 302 of the Constitution did not advance the spirit and letter of Arusha Peace Agreement. As such, it has been contended further that the proposal to amend the Burundi Constitution in 2014 did not seek to amend Article 96 which advocates for the two-term limit. However, the draft amendment logically proposed removing of the Constitution's Transitional Chapter XV, which includes Article 302.⁸⁴

It has been argued further that the proposed constitutional amendment of 2014 was an attempt to delay the application of the term limit until 2020 as it fell one vote short of the required four-fifths majority in the National Assembly.⁸⁵ The relevance of this argument lies in the fact that the CCB's "impugned decision" was mindful of the historical factor of an unpleasing human rights track record since Burundi's independence in the wake of preparatory initiatives of the 2020 elections when the incumbent, President Nkurunziza, indicated he would step down as a head of state.⁸⁶

It must be emphasised also that within the constitutional framework in Burundi, there is the need for setting up independent and impartial prosecution agencies in order to have an effective maintenance of democracy, rule of law and respect for human rights. As stated in the Guidelines on the Role of Prosecutors,⁸⁷ Member States to the UN and regional organisations like the African Union (AU), are under an obligation to uphold the principles of international and national criminal justice, supported by the Constitution. The Preamble to the Guidelines on the Role of Prosecutors states:

The Guidelines should be respected and taken into account by governments within the framework of their national legislation and practice, and should

83 UN Security Council (2015a), Report of the Security Council Mission to the Central African Republic, Ethiopia and Burundi www.un.org/ga/search/view_doc.asp?symbol=S/2015/503 (2016-08-23). UN Peace-building Commission, regional actors also insisted on the supremacy of Burundi's Constitution.

84 Vandeginste (n 27) 43.

85 See the Chairman of the National Assembly at the time www.africania-news.com/partie2-nkurunziza-tente-de-modifier-la-constitution-et-echoue-de-justesse (2016-08-23).

86 Africa News "Burundi's president Pierre Nkurunziza made a surprise announcement on Thursday, saying he will not contest in the country's next presidential elections in 2020" <http://www.africanews.com/2018/06/07/burundi-pierre-nkurunziza-says-he-will-not-run-for-president-in-2020/> (2018-10-22).

87 Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 27 August to 7 September 1990 U.N. Doc. A/CONF.144/28/Rev.1 (1990) 189.

be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general.⁸⁸

According to the Guidelines, democracy must be in line with the national legal framework. For example, if substantive democracy can be complemented with procedural democracy, the problems of presidential term limits in Burundi could have been clarified, prioritised and resolved within the constraints of the law. Durotoye (2016) has analysed attempts made by autocratic leaders in Africa to abrogate presidential term limits.⁸⁹ Such an abrogation is usually done through dual strategies of co-optation⁹⁰ and intimidation.⁹¹ Although the term “limit enforcement” has proven to be amongst the biggest challenges for limiting presidential power,⁹² using presidential term limits generally can be an indicator for the institutionalisation of power.⁹³ In the context of the discussion above, it is prudent to suggest that the presidential term evasion attempts do not ignore the constitution completely. Instead, Heads of State in Africa generally show minimal respect for the constitution by using constitutional rules and procedures in order to evade term limits through amending the constitution.

4.6 CONCLUSION

The credibility and effectiveness of constitutionalism in modern societies depend upon the nature of the society and objectives it aims to achieve. It is imperative that constitutionalism and democracy in Burundi, for example, must involve, amongst other things, making choices and principles which Burundians may deem effective and operational. Certainly, constitutionalism in Burundi must reflect back and recall the country’s history to shape Burundi’s past, present and anticipate the country’s future. As Nchalla has observed, the concept of constitutionalism is a prerequisite for the existence of a legitimate constitution.⁹⁴ The proponents of modern constitutionalism, for example, have considered that constitutionalism, from a theoretical point of view, is more concerned with rules, values and choices. However, in practice, it is a legal and political principle that is based on both rules

88 Above 189.

89 Durotoye “Resurgent Backsliding and Democracy in Africa” 2016 18 *International Journal of African and Asian Studies* 39.

90 A process of adding members to an elite group at the discretion of members of the body, usually to manage opposition and so maintain the stability and *status quo*.

91 Durotoye (n 89) 39.

92 Posner and Young “The Institutionalization of Political Power in Africa” 2007 *Journal of Democracy* 126.

93 See Tull and Simons “The Institutionalisation of Power Revisited: Presidential Term Limits in Africa” 2017 *Africa Spectrum* 79.

94 Nchalla “Tanzania’s Experience with Constitutionalism, Constitution-making and Constitutional Reforms” in Mbondenye and Ojienda (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (2013) 21.

and values.⁹⁵ As Backer has suggested, constitutional legitimacy is grounded in the development of a single system that is designed to give authoritative autonomy to the accustomed values of the community of nations that together make up the value systems of constitutionalism and constitutional legitimacy.⁹⁶

The existence of a constitution that articulates democratic values and principles is not sufficient ground to establish a political system that is democratic.⁹⁷ However, it is equally accepted that a democratic constitution is a prerequisite for the development of democratic constitutionalism. That means, if there is a democratic constitution, a constant review of the compliance with democratic principles is of paramount importance in order to promote or to strengthen the transformative constitutionalism. The proposed amendments to the constitution in order to set a limit of two seven-year presidential terms,⁹⁸ must strive to take Burundi to another level of the country's reconciliation and reconstruction.

Over decades, the Tutsi-led military regimes and insurgent groups have been accused of committing serious international crimes. While reflecting on the law, development and responsible governance in post-conflict Burundi, accountability and responsibility for the past wrongs and putting an end to the culture of impunity in Burundi remain unfruitful. There is failure of the post-conflict government to cement national reconciliation and healing which could have brought about effective transformative constitutionalism and democracy. The CCB's impugned judgment in the case of *EACSO v Attorney General of Burundi* demonstrate a call to limit the outrages of the ongoing armed conflicts in Burundi by pointing out the flaws of the constitutional provisions and Arusha Peace Agreement which have proven to be incompatible.

The CCB in the *EACSO* case affirmed that the renewal, for at least one last time, of the presidential term of five years was not contrary to the Constitution. What remains unclear is whether the 2018 amendments to the Constitution, which have extended the presidential term to seven years like the neighbouring Rwanda, will continue to embrace the tenets of democracy and uphold constitutionalism.

Finally, the post-conflict government must be responsive to the political, social and economic needs of Burundian citizens while striving for true national reconciliation and reconstruction and avoiding the legacy of the military regimes which was revealed in the 2015 crisis that included an attempted *coup d'état*. The popular will, *inter alia*, that allows the citizens to consider human security, peace, good governance, respect for human rights, rule of law and economic achievements like Tanzania, Rwanda

⁹⁵ Above.

⁹⁶ See Backer "From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems" 2009 *Penn State Law Review* 113.

⁹⁷ Nchalla (n 94) 20.

⁹⁸ Arabnews "UN Chief Takes Aim at Burundi Leader's Bid to Extend Rule" 6 February 2018 <http://www.arabnews.com/node/1240851/world> (2018-02-22).

and Burundi can be cited amongst examples. But, it seems that the popular will can also be easily usurped or overpowered by military and the Parliament as the DRC's and Uganda's experiences suggest. While constitutions are domestic instruments that should reflect and cater for local needs, it is evident that modern constitutions are nothing but *sui generis*.⁹⁹ Thus, the envisioned transformative constitutionalism of South Africa, for example, could provide a good model that could be used as an ideal one to fit the peculiar situation in Burundi, should there be political will to have responsible governance of the country.

99 Kibert and Fombad (n 7) 365.