



**RESTRAINING THE IMPERIAL PRESIDENT: TERM LIMITS AND THE
CONSOLIDATION OF DEMOCRACY IN UGANDA**

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“The problem of Africa in general and Uganda in particular is not people, but leaders who want to overstay in power which breeds impunity, corruption and promotes patronage...For us in NRM/A, we shall be here for only four years, after which we shall hand over power to a free and fairly elected civilian government.

Yoweri Kaguta Museveni, 29 January 1986

Executive Summary

This paper analyzes one critical challenge that has haunted Uganda’s democratic journey – that of restraining presidential power. It traces the attempt to limit this power through the design of the 1995 Constitution, and demonstrates the ways in which that effort was proved, by subsequent events, to have been a futile one. The paper concludes that national legal mechanisms – including the Constitution itself – have not been effective in checking executive power; and that international and supranational avenues do not themselves present significantly greater prospects for success. This situation, if unchecked, might result in violent conflict – and even genocide. The challenge that Uganda faces is a primarily political, rather than legal, one. This implies that a more progressive and democratic order can only realistically, effectively and sustainably be achieved through honestly addressing the foundational and historical illegitimacies of the State itself.

1.0 Introduction

Uganda has had a difficult past with regard to the experience of democracy. The very foundation of the state – as is the case with many colonial states – was a deeply traumatic act, in which military force, or the threat thereof – was used to establish and consolidate power. This was followed by about half a century in which the ‘natives’ of the Uganda protectorate were at the receiving end of power – as subject – without enjoying any of the usual benefits of citizenship – including the right to vote.¹ While the Uganda Protectorate was declared in 1894, the first attempt at electoral democracy in Uganda was in 1958² – barely four years towards the grant of independence in 1962. Even then, the 1958 elections had a limited franchise, based on literacy, property, income and employment.³

The hurried arrangements towards independence in 1962 only allowed for a limited experiment in electoral democracy rather than genuine democracy – and it was little wonder that the post-independence period was quickly marred by political instability and militarism.⁴ The country would experience a series of extra-constitutional changes of government – in 1966, 1971 and 1979 - rigged elections in 1980, and a civil war from 1981 to 1986, which eventually saw the National Resistance Movement/Army (NRM/A) finally capture state power in 1986.⁵

¹ See, generally, GSK Ibingira (1973) *The forging of an African nation: The political and constitutional evolution of Uganda from colonial rule to independence, 1894-1962*; SR Karugire (2010) *A political history of Uganda*; TB Kabwegyere (1995) *Politics of state formation and destruction in Uganda*; PM Mutibwa (2016) *A history of Uganda: The first 100 years 1894-1994*; G Thompson (2003) *Governing Uganda: British colonial rule and its legacy*; GW Kanyeihamba (2002) *Constitutional and political history of Uganda: From 1894 to the present* and M Mamdani (2004) *Citizen and subject: Contemporary Africa and the legacy of late colonialism*.

² Mutibwa (n 1 above) 161.

³ G Bauer ‘Reserved seats for women MPs: Affirmative action for the national women’s movement or the National Resistance Movement?’ In M Tremblay (ed) (2012) *Women and legislative representation: Electoral systems, political parties and sex quotas* at 31.

⁴ For an account of this period, see B Kabumba, D Ngabirano and T Kyepa (2017) *Militarism and the dilemma of post-colonial statehood: The case of Museveni’s Uganda* 9-58; Kabwegyere (n 1 above) 199-234; and Karugire (n 1 above) 144-197.

⁵ See Kanyeihamba (n 1 above) 88-237; RJ Reid (2017) *A history of modern Uganda* 53-99 and O Ori Amaza (1998) *Museveni’s long march from guerrilla to statesman* 5-37.

Although the NRM had pledged to hold onto this power for four years only, before organizing elections, in 1989 the National Resistance Council (its legislative wing) extended the Movement's mandate for another four years, arguing that the circumstances of the time – particularly the effort to make a new constitution for the country - required this.⁶ It is noteworthy, in this regard, that the Constitutional Commission (also known as the 'Odoki Commission', after its chairperson Justice Benjamin Odoki) had been appointed just a year before, timing which provided a convenient foundation for the argument for extension which followed in 1989.⁷ The Constitutional Commission would itself go on to extend its mandate beyond the time initially envisaged – again relying, among other things, on the argument of the enormity of the task faced by the Commission.⁸ The constitution-making process would only be completed in October 1995, about eight years after its initiation.⁹ The Constitution-making process was long and expensive,¹⁰ and resulted in a lengthy and elaborate document.¹¹

2.0 The design for limitation of power under the 1995 Constitution

The 1995 Constitution sought – at least in terms of its text - to limit, among other things, presidential power. This concern was foregrounded in the Preamble to the Constitution, which referenced the country's problematic past recognized the peoples' struggles against the forces of tyranny and oppression, and expressed a commitment to building a better future, founded upon respect for democratic principles.¹² Aside from the usual arrangements in this regard (separation of powers, checks and balances) the 1995 Constitution also provided two critical guarantees against the danger of an imperial president: i) a limitation on presidential terms – by length (five years)¹³ and by number of terms (two)¹⁴ - and ii) an age limit (75 years).¹⁵

The first of these was tested in 2005, and failed – with the Constitution being amended to allow for an open-ended presidential term. The second of these was tested in 2017 – and also failed – with the Constitution once again being amended to suit the purposes of the incumbent. On these two critical fronts, therefore, the main limitations on presidential power under the 1995 Constitution have – from experience – been shown to have failed to serve the purpose for which they were intended. On 20th December 2017 the Parliament of Uganda enacted the Constitution (Amendment) Act. Under the terms of the Act, Article 102 (b) of the Constitution was repealed –

⁶ Ori Amaza (n 5 above) 155-156 and Kabumba, Ngabirano and Kyepa (n 4 above) 68-69.

⁷ Kabumba, Ngabirano and Kyepa (n 4 above) 70.

⁸ See BJ Odoki (2005) *The search for a national consensus: The making of the 1995 Constitution* 27-33.

⁹ Mutibwa (n 1 above) 424.

¹⁰ See A Mari Tripp 'The politics of constitution-making in Uganda' available at https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter6_Framing.pdf at 161 ('The process of constitution making was expensive, long, and drawn out. It was originally planned to take two years, beginning in 1989; instead, it took six years to produce a constitution. Some say the NRM extended the length of the process as a delaying tactic to give it more time in power. The entire constitution-making exercise cost \$20 million, 42 percent of which came from the government of Uganda and 58 percent from foreign donors. The European Union, the United States, the United Kingdom, Japan, Denmark, and the United Nations Development Programme were among the largest contributors to the exercise').

¹¹ Mari Tripp (n 10 above) at 161 ('With 287 articles and seven schedules, the 1995 Ugandan constitution is one of the longest in the world, several times longer than most European constitutions and ten times the length of the U.S. constitution'). The Constitution contained extensive provisions regarding the nature of constituent power and the form of the republic; protection of human rights; popular representation; separation of powers; public finance; public service and local government; defence and national security; land and environment; traditional institutions and public accountability.

¹² Preamble, 1995 Constitution.

¹³ Article 105 (1), 1995 Constitution.

¹⁴ Article 105 (2), 1995 Constitution.

¹⁵ Article 102 (b), 1995 Constitution.

doing away with the age-limit. One week later, the President assented to the Bill, and it became law. A court challenge to the age limit provision failed.¹⁶

It would appear that most memoranda received by the Odoki Commission suggested a term of 5 years.¹⁷ This was adopted in the final Constitution as Article 105 (1).¹⁸ The majority view in the memoranda was also that the term of office of the president be limited to two terms. This was also eventually adopted in the final Constitution as Article 105 (2).¹⁹

It is particularly noteworthy that, as Oloka Onyango observes, '[n]ot a single delegate to the CA either opposed the idea of a fixed term of office, or of the limitation of the number of terms to only two.'²⁰ Interestingly, this consensus appeared to also exist on the part of the government. According to Justice Odoki, interviews with members of the government showed 'remarkable agreement' on most issues and, in particular, there was 'general agreement' on, among other things, the fact that '[t]here should be an executive president who should be directly elected by universal adult suffrage for only two terms of five years each'.²¹

In his view, the provisions relating to the president provided for a 'popular but tamed president',²² a result which was achieved through, among other things, the limitation of the presidential term to two terms of office, each of five years.²³

Ahead of the Constituent Assembly (CA) debate, Oloka Onyango had presciently cautioned against providing any room for the amendment of term limits under the Constitution:

Article 108, concerning limiting the tenure of Presidents to only two five-year terms, should not be subject to amendment in any circumstance. In light of the historical tendency of our Presidents to extend their tenures beyond the periods initially mandated, and sometimes for life, there should be no way for the tenure of the President to be extended.²⁴

3.0 Amendments to the 1995 Constitution: From term limits to no terms and back to term limits

3.1 The 2005 Amendment

Unfortunately, the broad consensus reflected under Article 105 (2) was not sufficiently protected from manipulation. In the event, just ten years after the adoption of the Constitution, which was

¹⁶ See B Tusasirwe 'The Basic Structure Doctrine and constitutional restraint: Take-away from the "Age Limit" decision', Keynote address at Dialogue on the independence of the Judiciary as an oversight institution and custodian of the rule of law, 22 May 2019, convened by the Centre for Public Interest Law, available at <https://cepiluganda.org/wp-content/uploads/2019/06/Basic-Structure-Doctrine.pdf> at 1.

¹⁷ See J Oloka Onyango (2006) *Dictatorship and presidential power in post-Kyankwanzi Uganda: Out of the pot and into the fire* HURIPEC Working Paper No.3 available at http://www.huripec.mak.ac.ug/images/Docs/Publication_series_3.pdf at 2.

¹⁸ Oloka Onyango (n 17 above) 2.

¹⁹ As above.

²⁰ As above.

²¹ Odoki (n 8 above) 151.

²² Odoki (n 8 above) 317.

²³ Odoki (n 8 above) 318.

²⁴ J Oloka Onyango 'Taming the President', cited in Oloka Onyango (n 17 above) at 1.

supposed to be a ‘durable’ one,²⁵ Article 105 (2) was amended to allow for a presidency of indefinite duration.

This was achieved through a ‘quid pro quo arrangement’ in which the NRM government accepted a change from the so-called ‘Movement system’ (in reality a *de facto* one party state) to multipartyism, more or less in return for the removal of the two term limit on the presidency.²⁶ In one of the lowest moments in parliamentary history, over 70 percent of the Members of Parliament received UGX 5,000,000 (about USD 3,000 at the prevalent rate) in return for voting for the amendment to Article 105 (2), although this was ostensibly an ‘allowance’ meant to facilitate ‘consultation’ with their constituents.²⁷ The voters who supported the change presumably received no such inducement, but they had to vote ‘Yes’ or ‘No’ to the entire package, multipartyism and the term limit removal.

3.2 The 2017 amendment

Although the 2005 amendments had shown that the attempts to ‘tame’ the presidency by constitutional means were futile, many still held out the hope that the president would respect the last check under the Constitution - the age limit – and step down upon attaining the age of 75. In a May 2012 interview to local press²⁸ the President had indicated unwillingness to serve beyond the age of 75. Five years later, in an April 2017 interview with *Al Jazeera* he had become more guarded.²⁹

Thus, it was that in December 2017, the Constitution was amended once again – removing the age restriction under Article 102 (b). At the same time, and in an apparent attempt to allay fears about the spectre of a life presidency, the same amendment restored term limits for the presidency, and extended the term of Parliament from 5 to 7 years.

4.0 Ugandan constitutionalism in context: Rule by law

The relative ease of the amendment of the 1995 Constitution – in 2005 and 2017 – is a clear demonstration of the failure, on a critical point, of the Constitution itself. The Constitution has failed to be the durable compact it was heralded to be, mutilated by the very forces which brought it into being.

Indeed, the whole process – of the enactment, adoption and subsequent multiple amendments of the 1995 Constitution – is a classic case study of the phenomenon known as ‘rule by law’ in which the law, and its institutions, are instrumentalized to undermine, rather than consolidate, democratic gains. In the 2014 case of *Elias Lukwago v Attorney General and 3 Others*³⁰ Mugambe J

²⁵ Preamble, 1995 Constitution.

²⁶ Mari Tripp (n 10 above) at 171.

²⁷ As above.

²⁸ See I Musa Ladu ‘I won’t lead Uganda beyond 75, says Museveni’ available at <https://www.monitor.co.ug/Magazines/PeoplePower/689844-1404384-qilox1z/index.html> (‘That one I think we had ignored. We had not discussed it, but it can be discussed. But I think after the age of 75 there is some scientific idea there that may be the vigour is not as much as before. So that one I would quarrel so much, I know there are some leaders who have been leading even beyond the age of 75 but I think if you want very active leaders it is good to have ones below the age of 75’).

²⁹ See, ‘Yoweri Museveni: A five time-elected dictator?’ Talk to Al Jazeera available at <https://youtu.be/hGQ6W4td72E> (At 27:18, saying ‘We will follow the Constitution of Uganda’).

³⁰ Miscellaneous Application No.94 of 2014 (Arising from Misc. Application No. 451 of 2013; arising from Misc. Application No. 445 of 2013; itself arising from Misc. Cause No. 362 of 2013) available at <https://ulii.org/ug/judgment/hc-civil-division-uganda/2014/47>.

was constrained to observe that the trend of events before her demonstrated not just a violation of rule of law, but indeed, a pattern of rule by law – a more sophisticated and insidious challenge. Her observations in that matter, which involved the disregard of court orders in the context of a political struggle between the elected Lord Mayor of Kampala (from the opposition) and the government-appointed Executive Director of Kampala City Council Authority (KCCA), are of some length, but are pertinent:

... there is the notion of rule by law, where the law is used for and at one's convenience, without clear justification or appeal to a higher authority that acts as some kind of benchmark. For the analysis before me, the higher authority is the Constitution ... If I put all the events before me in one room, I see rule by law as the big elephant in the room. This is demonstrated through the reliance on sections in the KCCA Act to deny Lukwago his rights as ordered by court. By disobeying these Orders ... [t]o use provisions in the EC or KCCA Acts to defeat, or in whatever manner, ignore and/or refuse to give effect to the Court Order of 25th November 2013 and the ruling of 28th November 2013, in the circumstances before me, is to conveniently rule by law, in total disregard for respect for the rule of law ... this big elephant in the room in the name of rule by law, in the circumstances before me, appears to have blinded all the respondents in the application before me. Resultantly, they disregarded respect for the rule of law through their utter disregard of the Court Order and ruling ... while acknowledging that they received or otherwise know it exists. That, with reckless abandon and effrontery, they/or their agents continue to do the same in whatever manner they cloth it, in my view, is blasphemous and deplorable given they are all in one way or another agents or servants of government – which is mandated to ensure such respect for the rule of law...the proverbial big elephant called rule by law, should not be allowed to suffocate or kill respect for the rule of law just because of its size. It should have no place in the room if the constitutional principles of good governance, democracy and respect for human rights are adhered to. It must be tamed by all means and it is the duty of all Ugandans, as mandated by the constitution, to do this by, in the circumstances before me, jealously protecting respect for the rule of law through respect for orders of courts of judicature as a part of upholding the independence of the judiciary.

According to the Judge, one way by which this 'rule by law' could be contained was through the invocation of a higher order – the Constitution.³¹ However, what happens where the Constitution itself is used in much the same way as she noted the Electoral Commission and Kampala City Council Authority Acts were? What happens when it is manipulated, not crudely as Idi Amin did, but through an apparently legal process in Parliament and further affirmed by the highest courts in the land?³²

Uganda is evidently at a difficult moment in its national life: even the Constitution – as a means of effectively restraining executive power – has proven unavailing. In this Section, we briefly discuss two possible responses to the dilemma in which Uganda finds itself: i) resort to internal legal mechanisms; ii) international and supranational approaches.

4.1 Attempts to protect the Constitution through national mechanisms

³¹ As above ('For the analysis before me, the higher authority is the Constitution. It follows therefore, that for as long as rule by law violates the Constitution, it cannot stand as it becomes an arbitrary instrument for abuse of rule of law').

³² In fact, according to some observers, not only has the 1995 Constitution been significantly violated, it has in fact, been killed – see J Oloka Onyango 'Constitucide: Or the birth and death of democratic constitutionalism in Uganda' in J Oloka Onyango (2015) *Battling over human rights: Twenty essays on law, politics and governance* 434 ('Indeed, it is my suggestion that Uganda has suffered a form of 'Constitucide'), citing a think piece authored by Andrew Karamagi.

The 2017 amendment was challenged before the Constitutional Court by a number of actors.³³ One of the main thrusts of the court challenge to the amendment was founded on the idea of the Basic Structure Doctrine (BSD). The doctrine is credited to a 1973 decision of the Indian Supreme Court in *Kesavananda Bharati v The State of Kerala*, in which the court suggested that a Constitution had certain critical pillars, any alteration of which would be to change the very character and nature of the document. To the Court, those parts of the Constitution were beyond reach of amendment, even by Parliament.³⁴

The Uganda Constitutional Court delivered its decision on 26th July 2018, upholding the validity of the amendment by a majority of 4-1. The Judges were however unanimous in finding that the BSD was applicable in Uganda. What they differed on was which parts of the 1995 Constitution could be said to be part of its basic structure.³⁵

The decision was appealed to the Supreme Court. As with the Constitutional Court, there was broad unanimity among the Justices of the Supreme Court as to the applicability of the BSD in Uganda.³⁶ At the same time, the Justices were unanimous that Article 102 (b) was not a fundamental pillar of the Constitution, in the terms envisaged by the BSD.³⁷ For most of them, the parts of the Constitution which could be said to form a part of its basic structure were those which had been entrenched under Article 260 of the Constitution.³⁸

A reading of the decisions of most, if not all, the Justices who handled this case shows that they struggled with the decision they had to make. Aware of the illegitimacy of the constitutional amendment, but at the same time recognising the determination of the President to have his way by constitutional means or otherwise, the majority seem to have delivered what was expected of them by the State, while leaving significantly heavy hints regarding their distaste for the task they performed.

³³ The petitions filed were: *Male Mabirizi v Attorney General*, Constitutional Petition No.49 of 2017; *Uganda Law Society v Attorney General*, Constitutional Petition No.3 of 2018; *Gerald Karubanga v Attorney General*, Constitutional Petition No.5 of 2018; *Prosper Businge v Attorney General*, Constitutional Petition No. 10 of 2018 and *Abaine Jonathan Buregyeya v Attorney General*, Constitutional Petition No.13 of 2018.

³⁴ The idea of the BSD has been considered by a number of Courts around the world, with some accepting it and others rejecting it, and some lying somewhere in between. In Africa, an example of acceptance of the doctrine in principle is the South African case of *Executive Council of Western Cape Legislature v The President of the Republic of South Africa and Others* CCT/27/95; [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 ('There are certain fundamental features of parliamentary democracy not spelt out in the Constitution but which are inherent in its nature, design and purpose ... there are certain features of the constitutional order so fundamental that even if parliament followed the necessary amendment procedures it could not change them').

³⁵ (1973) 4 SCC 225). According to Owiny Dollo, the basic structure consisted of Articles 1 (sovereignty of the people); 2 (supremacy of the Constitution); provisions relating to democratic governance and practices, the unitary nature of the State, separation of powers, and the independence of the judiciary; as well as Chapter 4 (the Bill of Rights). In his view, these were a part of the basic structure in so far as they were entrenched under Article 260 of the Constitution. Justice Kasule considered the basic structure to be constituted by Articles 1, 2, 3 (defence of the Constitution), 44 (non-derogable rights), democracy – particularly the right to vote, and non-establishment of a one-party State. Justice Musoke was of the view that the basic structure was composed of Articles 1 and 44, while Cheborion Barishaki thought only Article 1 fell in this category. For his part, Justice Kakuru would have elaborated an even wider category, which would include Articles 1 and 2, as well as the ideas of 'political order through a durable and popular constitution'; 'constitutional and political stability based on the principles of unity, peace, equality, democracy, freedom, social justice and free and fair elections'; rule of law; separation of powers, observance of human rights; regular free and fair elections; accountability of government to the people; non-derogable rights; the notion that land belongs to the people and cannot be alienated without suitable compensation; the notion that the State holds natural resources in trust for the people; the duty of citizens to defend the Constitution; and the abolition of a one-party State – See Tusasirwe (n 1 above) 4-5.

³⁶ Tusasirwe (n 16 above) 6.

³⁷ As above.

³⁸ As above.

This is perhaps best demonstrated by the Deputy Chief Justice Owiny Dollo in the Constitutional Court.³⁹ After referencing the lengthy, participatory, painstaking and costly process of the making of the 1995 Constitution,⁴⁰ which had been necessitated by the country's problematic history;⁴¹ and referring to the 'earnest hope' on the part of Ugandans that the new Constitution had 'ushered in the much-desired dawn to a new political dispensation',⁴² the Deputy Chief Justice observed:

The 1995 Constitution is still in its infancy; it being just a couple of decades old. However, and most unfortunately, before it has sufficiently been tested, or put differently, before the ink with which the promulgation was signed has dried, the Constitution has already been subjected to as many as five amendments ... the frequency with which it has been subjected to amendments is disturbing; and is cause for serious and genuine concern ... Indeed, the frequency with which the Constitution has been amended negates one of the core principles that form the bedrock of the Constitution; which is clearly expressed in the preamble to the Constitution ... Owing to the peoples' desire to have a popular and durable Constitution for themselves and posterity, it is justified for them to seek to know the compelling change that has occurred in our aspiration and values, so soon after the promulgation of the Constitution, to merit the extravagant alterations to the Constitution at the infant stage of its life span.

The people harbour legitimate concern over the apparent deviation from our earlier desire and chosen direction declared in the Constitution itself; namely to have a durable Constitution that would ensure a just socio and political order. We are justified in being apprehensive of what the future holds with regard to the nature and substance of our Constitution by the time we celebrate the silver jubilee of its historic promulgation. Indeed, whether acting by themselves, or through their representatives in Parliament, the people must always keep in mind that in exercising their constitutional right to amend the Constitution, it may not be sufficient justification that such amendment or alteration is in fact clothed with legality. It is more important that amendments or alterations of the Constitution reflect the popular will of the people; thereby enjoying legitimacy alongside, or over, legality. The Constitution is not made for the present generation alone; but is also intended to ensure that we, of the present generation, bequeath a worthy and stable country to future generations ...

The distinguishing by the Deputy Chief Justice between legitimacy (meaning acceptance by the people) and mere legality is critical, as it suggests an acknowledgment on his part of the misuse of legality at the expense of best democratic practice.

Evidently, the national legal mechanisms for the defence of constitutionalism in Uganda are at a dead end. Although the judiciary is able to, and has in the past, rendered decisions which have expanded democratic space and safeguarded human rights, in the main these have been in contexts in which presidential power was not under serious challenge.

Yet it is precisely at these junctures that the Constitution needs to be alive and to work. If it fails here, as it so often has, it retains little respect on the part of the led, or those in power. The failure

³⁹ *Male Mabirizi & Ors v Attorney General* Consolidated Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018.) [2018] UGCC 4 (26 July 2018) available at <https://ulii.org/ug/judgment/constitutional-court-uganda/2018/4>

⁴⁰ Owiny Dollo DCJ in *Mabirizi* (n 43 above) ('The entire national Constitution making enterprise was characterized by a painstaking, elaborate, exhaustive, and costly, but justifiable and legitimate undertaking').

⁴¹ Owiny Dollo DCJ in *Mabirizi* (n 43 above) ('This owed to the fact that the Constitution making process was conducted against the tragic backdrop of our sad post independence history ... Indeed, we held the firm belief that this would mark a break with our politics of the past, whose hallmark included the high handed and reckless abuse of the Constitution in furtherance of narrow self-interest; resulting in unspeakable repercussion, which manifested itself in the tragic upheavals and incessant haemorrhage that ensued and bedeviled our country').

⁴² Owiny Dollo DCJ in *Mabirizi* (n 43 above).

by the Constitutional and Supreme Courts to defend the 1995 Constitution at this most critical moment effectively buries that document as a credible limit to presidential power in Uganda.

4.2 International approaches

There might be scope for using international mechanisms to safeguard democracy at the national level.

At the African Union level, for example, there is some scope for protection of national constitutions from unprincipled and regressive amendments. In terms of the Lomé Declaration, for instance, the ‘preparation, content and method of review’ of national constitutions has to be ‘in conformity with the generally acceptable principles of democracy’. Similarly, the African Charter on Democracy, Elections and Governance (ACDEG) requires that any process of constitutional amendment be based on national consensus ‘obtained if need be, through referendum’.⁴³ The Peace and Security Council of the AU has also emphasized that constitutions must ‘not be manipulated in order to hold on to power against the will of the people’ and that constitutional amendment processes should ‘not be driven by personal interests and efforts aimed at undermining popular aspirations’.⁴⁴

More fundamentally, Article 23 (5) of the ACDEG stipulates one of the ‘illegal means of accessing or maintaining power’ which constitutes ‘an unconstitutional change of government’ and must attract ‘appropriate sanctions by the Union’ is ‘[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.’ This is a critical safeguard, which recognizes the sophisticated nature of more contemporary challenges to constitutional democracy on the continent.

At the same time, Wiebusch and Murray provide an interesting insight into the concessions that resulted in the current Article 23 (5) framing:

This last situation [Article 23 (5)] is of particular interest in the context of presidential term limits because the ACDEG’s travaux préparatoires show that the drafters initially considered referring to the ‘[a]mendment or revision of constitutions and legal instruments, contrary to the provisions of the constitution of the State Party concerned, to prolong the tenure of office for the incumbent government’. A consensus was clearly growing within the AU that term limit change needed to be addressed and possibly sanctioned. However, during the preparation of the ACDEG, Uganda (which had removed term limits in 2005) entered a reservation to this wording and, during the final meetings of the AU policy organs, other member states raised further objections. The rejection of the earlier proposal reflects the different positions among AU member states. Some see removing or weakening term limits as a direct challenge to the continental agenda of consolidating democratic institutions; others are wary of continental interference in what they see as internal affairs and, sometimes, more specifically, their agenda for prolonging the power of an incumbent president. Nonetheless, although the principles of democratic change of government remain poorly articulated, the ACDEG now formally confirms that, for the AU, certain constitutional provisions or certain processes of constitutional amendment will not comply with these principles. This means that changes of government may infringe AU norms, even in the absence of the violence of a coup or disregard for the outcome of elections, for instance if they are based on manipulated constitutional change.⁴⁵

⁴³ Article 10 (2), ACDEG.

⁴⁴ See Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa (2009).

⁴⁵ See M Wiebusch and C Murray ‘Presidential term limits and the African Union’ *Journal of African Law* 63, S1 (2019) available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/1F134034E67D93524560D31A067779B7/S0021855319000056a.pdf/presidential_term_limits_and_the_african_union.pdf at 149-150.

The author does not quite share the authors' optimism in this regard. True, the language of Article 23 (5) remains broad enough to potentially cover amendments such as those to the 1995 Constitution in 2005 and 2017. However, the explicit exclusion of any specific mention of amendments aimed at extending presidential term limits, and the prominent role that Uganda played in effecting this result, does not bode well for the effectiveness of that provision in restraining presidential power in national contexts.

In my view, the same can be said for other international, regional and sub-regional mechanisms, including the United Nations system and the East African Community. Although individuals and peoples have made significant strides as actors in international law, States continue to dominate international society and, in this regard, often cooperate – on the basis of reciprocity – in defeating critical democratic and human-rights based claims.

It also bears noting that, in spite of growing global consensus regarding the need for presidential term limits,⁴⁶ and their increased inclusion in African constitutions,⁴⁷ the actual practice on the continent – in terms of respecting presidential term limits – remains mixed.⁴⁸ Only a number of countries have actually respected set presidential term limits,⁴⁹ with constitutional term limits being modified in Cameroon, Chad, Djibouti, the Democratic Republic of Congo, Eritrea, Gabon, Republic of Congo, Rwanda, Togo, Uganda and Sudan. Presidential term limits have been variously flouted through 'abolishing, amending or ignoring them, or by simply not holding elections'.⁵⁰ In other contexts, such as Burundi, incumbents have exploited loopholes in national constitutions to extend tenures.⁵¹ A limited number of attempts to amend term limits have not been successful,⁵² but these seem to be the exception rather than the norm. As Tull and Simmons note, the practice on the African continent with regard to term limits appears to be:

⁴⁶ See, generally, G Maltz 'The case for presidential term limits' 18, 1 *Journal of Democracy* (2007) 128; C Fombad and NA Inegbedion 'Presidential term limits and their impact on constitutionalism in Africa' in C Fombad and C Murray (eds) *Fostering Constitutionalism in Africa* 1 and B Gelfeld *Preventing deviations from presidential term limits in low and middle-income countries* (2018) Unpublished PhD Dissertation available at https://www.rand.org/content/dam/rand/pubs/rgs_dissertations/RGSD400/RGSD419/RAND_RGSD419.pdf.

⁴⁷ Gelfeld (n 50 above) 7 citing I Zamfir (2016) *Democracy in Africa - Power alternation and presidential term limits* available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI\(2016\)580880_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580880/EPRS_BRI(2016)580880_EN.pdf) ('[s]ince the 1990s ... term limits have in fact become the norm in presidential regimes throughout the world. In Africa, 33 of the 48 constitutions enacted in sub-Saharan Africa during the 1990s included presidential term limits, as compared with only six beforehand'). In a number of other countries, such as Ethiopia, Gambia, Lesotho and Morocco, term limits were not included in the constitution in the first place - Hendricks and Ngah Kiven (n 51 above).

⁴⁸ Indeed, as Hendricks and Ngah Kiven observe, this mixed practice is not just evident on the African continent, but is has been adopted by two major players in international society: Russia and China - Hendricks and Ngah Kiven (n 51 above). ('Extending or abolishing term limits is not unique to the continent. Russia's President Vladimir Putin won a fourth term in March 2018 after changes to the constitution and some nimble political footwork. And the Chinese parliament recently voted to abolish term limits allowing for the possibility of President Xi Jinping becoming president for life. Given that Russia and China play an influential role on the African continent these events don't bode well for the future of presidents sticking to term limits on the continent').

⁴⁹ A famous example was Nelson Mandela's choice to step aside as president of South Africa after the end of his constitutional term. Presidential terms have now been respected in Tanzania, Namibia, Mozambique and Benin.

⁵⁰ Hendricks and Ngah Kiven (n 51 above).

⁵¹ In Burundi, Pierre Nkurunziza recently opted to run for a 'third term' – exploiting a less than clear provision in the country's Constitution. This was validated by a decision of the Burundi Constitutional Court. In the event he did not use the opportunity.

⁵² Hendricks and Ngah Kiven (n 51 above) ('Some bids to remove or extend term limits and have failed. These include Frederick Chiluba in 2001 and more recently Edgar Lungu in Zambia, Olusegun Obasanjo of Nigeria (2005), Mamadou Tandja of Niger (2009-2010) and Blaise Compaore of Burkina Faso (2014)'). It bears noting, in this regard, that West Africa seems to have been more successful in moving towards compliance with term limits - Hendricks and Ngah Kiven (n 51 above).

evidence of the remarkable resilience of Africa's autocratic rulers and their strong capacities of adaptation to changing environments. These rulers are extremely successful not only in staying in power, but in maintaining power through legal means and, since 1990, in a new democratic context ... Africa's autocrats have demonstrated their adaptive skills in the face of changing and often adverse circumstances for many decades, whether in the context of the Cold War, the economic crisis of the 1980s and the concomitant structural adjustment programmes, or in terms of their adaptation to "democracy" in the early 1990s. Thus, term-limit evasion is another manifestation of historical continuities. And as in previous periods, African autocrats have not just proven their skill in softening or eluding political pressure – it is fair to say that these rulers have turned these threats to their advantage, in the process legitimising and entrenching their power. If it has been noted that autocratic rulers have managed to turn democratic institutions such as elections or parliaments into tools of political domination, the same conclusion can be drawn with respect to the term-limit challenge in that it has strengthened their power vis-à-vis both outside donors and local foes.⁵³

A number of leaders once believed to constitute 'a new breed' of African leaders have proved to be novel in terms of the methods they use to achieve the same objectives of the older cohort of autocrats. When naked coups and legal one-party states went out of fashion, this new breed found ways of holding onto power using the paraphernalia of quasi-constitutional acts and *de facto* single-party systems. As the *travaux préparatoires* (preparatory documents) of the ACDEG demonstrates, this same strategy appears to continue to be employed at the African Union level, to ensure that the framework of guidance adopted by the AU does not effectively constrain the room for continued manipulation of national constitutions.

5.0 Concluding thoughts

Museveni's Uganda has come full circle. Thirty-four years after their assumption of power in 1986, the NRM has demonstrated all, if not more, of the democratic deficits they accused the Obote II regime and other previous leaders of. At the same time, given the manner in which they assumed - and have retained – power, essentially through the military, they appear unwilling, and unlikely, to allow for a democratic and constitutional change of government.

Taken together with other factors which make up the cauldron that is contemporary Ugandan political, social and economic society – ethnicity, class, religion among others – the stage appears set for a repeat of Uganda's problematic and traumatic past.

The exercise of power invites resistance. Unfortunately, the ultimate resistance, in a situation where all legal and constitutional means have been closed, may take the form of conflict, and perhaps, even genocide. To quote again from the Deputy Chief Justice in the *Male Mabirizi* case:

It would ... be most unfortunate and lamentable, in view of the still fresh, and indelible, memory of the repercussions that resulted from the failure of the immediate post independence political leaders to nurture the Constitution, to enable the rule of law to prevail. Instead, they sacrificed the rule of law on the altar of political expedience, in some instances for petty advantage; and for which we have, as a people, paid a dear price, and continue to do so, as the consequences are still reverberating to date. Should we fail to rise up to the occasion, and take the necessary action in the protection, defence, and preservation of the Constitution, then for sure, posterity, which we owe a duty, and must always have in mind in all we do, will be irreconcilably unforgiving of our generation. Future generations will justifiably hold us complicit, either by our explicit or implicit action, in letting our country again sink into the chaos, turbulence, and mayhem, we have had a nasty experience of; and swore to ourselves never to go through again when we made this Constitution. They will be furious and extremely harsh in their judgment over us, for having

⁵³ See DM Tull and C Simons 'The institutionalization of power revisited: Presidential term limits in Africa' (2017) 52, 2 *Africa Spectrum* available at <https://journals.sagepub.com/doi/pdf/10.1177/000203971705200204> at 96.

bequeathed unto them a tragedy, which we had the power and means to avert or avoid; but failed to do it due to the lack of will and courage to do so.

It is evident that Uganda's current crisis is a primarily political, rather than legal, one. While legal responses – such as the *Male Mabirizi* case against the age-limit amendment – are important, they cannot and should not replace the need to engage frontally with the structural, historical and foundational illegitimacies of the Ugandan State. The State was founded in the violence and trauma of colonialism – and has since been maintained, by successive governments, primarily through violence. Old questions, linked to the autonomy and self-determination of the various peoples who constitute the Ugandan State, continue to linger and struggle for expression.

These questions – including proposals for a federal arrangement for Uganda – should be discussed honestly, if a more effective and sustainable peace is to be achieved. This is hard work. However, it is the work that activists and other democracy-seeking forces should be prepared to engage with if the cycle of violence in Uganda is to be broken.