

University of the Western Cape

Faculty of Law

**Erosion of Presidential Term Limits in Practice: A Comparative Study of
Unconstitutional Constitutional Amendments in African States**

By

Sinozuko Juta

Student Number: 4162231

A Mini thesis submitted in partial fulfillment of the requirements for the degree of Master of
Laws (Legum Magister)

Prepared under the supervision of

Prof. Yonatan Fessha

10 November 2023

Declaration

I declare that **Erosion of Presidential Time Limits in Practice: A Comparative Study of Unconstitutional Constitutional Amendments in African States** is my own work, that has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Date: 10 November 2023

Signature: *Sinozuko Jita*

Supervisor: Prof. Yonatan Fessha

Date:

Signature:



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Keywords

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Constitutional Coup

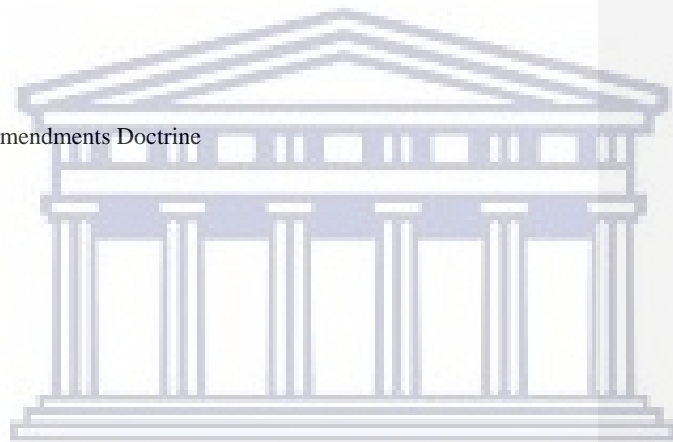
Democracy

Democratic Backsliding

Executive Term Limits

Term Limit Evasion

Unconstitutional Constitutional Amendments Doctrine



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Abstract

Tracing the constitutional strategies of incumbents in African countries, the study documents the range of constitutional strategies these incumbents have pursued when they reached the end of their prescribed term to remain in office. The study shows that in many African countries amendments are frequently passed by following formal democratic procedures but result in anti-democratic constitutional outcomes, helping powerful presidents extend their term in office. The incumbents universally display nominal respect for the constitution by using constitutional rules and procedures to circumvent term limits, abusing the numerical advantages of two-thirds attempting to amend the constitution. The study presents the unconstitutional constitutional amendments doctrine as an institutional device for preventing a coup by constitutional means to erode term limits. Limiting the power of constitutional amendment can have clear democratic benefits. One way to do this is via a judicially enforceable unconstitutional constitutional amendments doctrine. The study establishes how judiciaries across jurisdictions have successfully deployed the unconstitutional constitutional amendments doctrine to prevent attempts of term limit evasion.

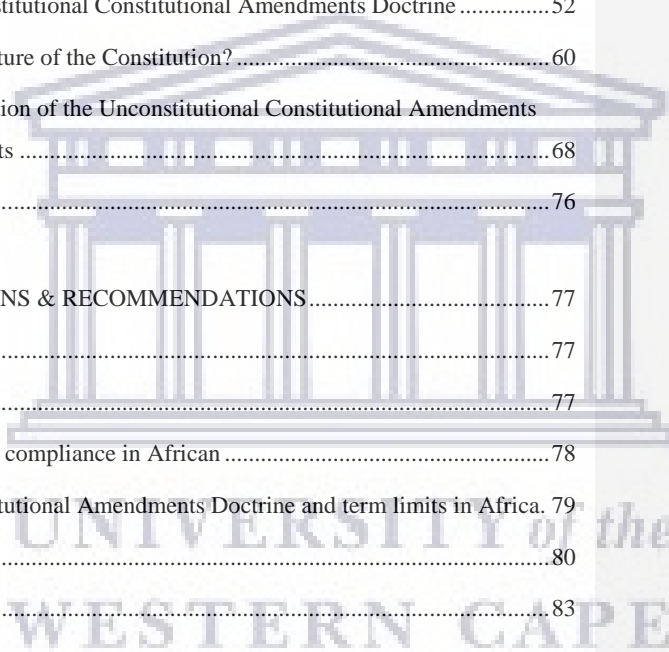


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CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

In an attempt to hold on to power, history on the African continent has demonstrated that leaders, despite using democratic procedures to achieve power, often utilise constitutional mechanisms, like amendments, to cement their political positions for more extended periods than the constitution allows.¹ Amendments are usually approved via ostensibly democratic processes but have anti-democratic constitutional consequences, such as permitting strong presidents to serve longer than acceptable terms. In certain African nations, presidents have obtained enormous influence via constitutional amendments that swing toward amending a country's constitution to accommodate a president's demands.² Due to the constitutional amendments, incumbent Presidents defy calls to resign and continue in office over their constitutionally mandated terms of office.³ In this scenario, constitutional amendments tilt authority in favour of the president. This results in a fundamental reversal of the constitutional commitment to democracy rooted in the country's past.⁴

Presidential term limits are widely viewed as a cornerstone of contemporary democratic regimes.⁵ Their existence has been suggested to be a critical intervention tool for averting certain undemocratic consequences connected with power and status advantages concerning the governance of a country.⁶ As a result, presidential term limits have become a defining component of democracy in Africa.⁷ Term limits are a trait many political systems seek to

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¹ Dixon R & Landau D 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13 *International Journal of Constitutional Law* 606.

² Maltz G 'The Case for Presidential term Limits' (2007) 18 *Journal of Democracy* 128.

³ Baker B 'Outstaying One's Welcome: The Presidential Third Term Debate in Africa' (2002) 8 *Contemporary Politics* 285.

⁴ Enonchong SL 'Unconstitutional constitutional amendment or constitutional dismemberment? A reappraisal of the presidential term limit amendment in Cameroon' (2022) *Global Constitutionalism* 2.

⁵ Murray C and Wiebusch C 'Presidential Term Limits and the African Union' (2019) 63 *Journal of African Law* 131.

⁶ Enonchong SL (2022) 1.

⁷ Baturo A 'The Stakes of Losing Office: Term Limits and Democracy' (2010) 4 *British Journal of Political Science* 637.

adopt to enhance democratic governance.⁸ The difficulty has been in enforcing the term limits of the head of government.

Evidence suggests that even though the vast majority of African states have enacted presidential term limits, compliance has proved a daunting task.⁹ African presidents continue to defy calls for orderly departure, and many have stayed in power past their constitutionally mandated terms. Several African countries are increasingly witnessing constitutional modifications and amendments aimed at undermining constitutional democracy. Constitutions are amended to abolish the presidential term limit, leading to ostensible signs of a democratic decline in the African continent.¹⁰ Evidence suggests a tendency towards circumventing term limits through constitutional changes by presidents to outstay the prescribed terms of office. Contravention of term limits has harmed democratic participation by fostering the flaws related to power and status benefits and perpetuating unfairness due to lengthy stays in presidential offices.¹¹

The transgressions violate the fundamental commitment to democracy embodied in the constitutions of several African governments. The tendency of term limits erosion demonstrates the various means by which long-serving and strong presidents maintain their hold on power.¹² Constitutional amendments aimed at eliminating term limits can substantially impact the fundamental pledges to democratic governance enshrined in a constitution.¹³ Further, constitutional amendment procedures have occasionally been manipulated to promote self-serving and arbitrary demands.¹⁴ In the African context, the amendment protocols have been chiefly used to advance personal interests and aspirations to eliminate constitutional limits and balance of powers that protect democracy.¹⁵

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⁸ Murray C and Wiebusch C (2019) 134.

⁹ Okurut E 'Eliminating presidential term limits in Africa: The new form of dictatorship' (2018) 26 *University of Botswana Law Journal* 1.

¹⁰ Enonchong SL (2022) 2.

¹¹ Enonchong SL (2022) 2.

¹² Dixon R & Landau D (2015) 608.

¹³ Abebe A 'Taming regressive constitutional amendments: The African Court as a continental (super) Constitutional Court' (2019) 17 *International Journal of Constitutional Law* 115.

¹⁴ Ginsburg T, Melton J, Elkins Z 'On the Evasion of Executive Term Limits' (2011) 52 *William and Mary Law Review* 37.

¹⁵ Abebe A (2019) 115.

1.2 Problem Statement

This study seeks to analyse the constitutional amendments of the term limit provisions of the head of government and its contribution to the ostensible democratic decline on the African continent. Moreover, this study seeks to investigate if the unconstitutional constitutional amendments doctrine possesses the capacity to protect against the utilisation of constitutional amendment mechanisms to undermine democracy.

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To achieve its objective, the research will address the following points:

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- To what degree do presidential term limits contribute significantly to a country's democratic fabric?
- How can constitutions safeguard themselves against term limit erosion or backsliding while staying amendable and adaptable to the development of democracy?
- How shall constitutional drafters incorporate certain procedural and substantive reasons into the constitution that a court can later utilize to deem a constitutional amendment unconstitutional?
- Is the unconstitutional constitutional amendments doctrine applicable to safeguard term limits in the context of democratic backsliding.

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The argument advanced in this mini-thesis is that, while these constitutional amendments adhere to standard constitutional amendment procedures, the gradual alteration of the constitution results in an intrinsic destabilisation of the constitutional commitment to democracy enshrined in most African constitutions.¹⁶ Eliminating presidential term limits by constitutional amendments may gradually erode the essential commitments to democratic governance, good administration, democratic polity, and democratic accountability included in African constitutions.¹⁷

1.3 Objectives of the Study

The study will address the most efficient way to safeguard democracy on the African continent against unconstitutional constitutional amendments that violate the cornerstone commitments to participatory democracy, social stability, progressive politics, and democratic accountability

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¹⁶ Enonchong SL (2022) 6.

¹⁷ Enonchong SL (2022) 3.

enshrined in African constitutions through term limits. The study aims to assess the options for galvanising democracy on the African continent toward achieving good governance and protecting emerging democracies across the continent. It further aims to suggest an institutional mechanism aimed at strengthening good governance and guarding emerging democracies against the erosion of presidential term limits.

The study will examine trends and practices involving circumventing presidential term restrictions through unconstitutional constitutional amendments. It then aims to identify a method that will qualify as a sufficient answer to the African continent's dilemma.

The study's aims are the following;

- Examine the developments on the African continent regarding presidential term limits compliance.
- Conduct a limited comparative analysis of selected African nations concerning unconstitutional constitutional amendments regarding presidential term limits and the threat they pose to constitutional democracy on the African continent.
- Outline, and argue a constitutional response to the danger of democratic backsliding on the African continent of presidential term limits.
- Examine the applicability of the unconstitutional constitutional amendments doctrine to curb term limits erosion in the African context. For example, is this doctrine sufficient to exclude constitutional amendments manifesting in long serving and strong presidents who have an intent of extending their hold on power, a typical occurrence in Africa.

1.4 Significance of the study

This research is significant because it outlines a constitutional response to the danger of the persistent pattern and practice of presidents who cunningly erode presidential term limitations via unconstitutional constitutional means across the African continent. This study helps safeguard emerging democracies in Africa from democratic backsliding and the restoration of democracy and equitable participation. It is timely and appropriate to assess the mechanisms' potential to defend democracy against the behaviors associated with extended tenures in power by African Presidents. The significance of this study is to provide strategic tools for its overall value in protecting Africa's developing democracies. This paper reflects a modest pioneering effort to reverse the African continent's breakdown of presidential term limits.

1.5 Limitations of the Study

First, it is worth noting that this is a modest attempt to resolve presidential time limit evasion in the African continent through unconstitutional constitutional reforms. Thus, this study does not seek to offer conclusive answers or end the present dispute. Instead, it aims to provide perspectives and argumentation that might aid future research on the subject. The objective is to conduct an enlightened analysis of the subject and, in the process, construct a cohesive collection of ideas to understand the African continent's dilemma. The study's primary objective is to design, propose, and defend a constitutional solution to the issue of erosion of presidential term limits in Africa. The paper's factual analysis will critically examine the idea that transnational constitutional law and how institutions may help protect constitutional democracies against undemocratic dangers. It only seeks to identify techniques that may be used to stave against the deterioration of democracy in Africa.

1.6 Research Methodology

This is a modest research effort that relies on library research-based materials. This academic effort will include findings and a study of the available literature on unconstitutional constitutional amendments related to presidential term limit evasion on the African continent. The African case study is evaluated via the lens of similar sources of information and legal precedent in selected African nations to provide a comparative study of practices and trends.

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1.7 Literature Review

In the last decade, the dilemma of erosion of term limits of head of government has assumed great debate from scholars from its threat to the future of constitutional democracy of fledgling democracies in the African continent. This literature discusses the trend of African presidents who tend to accumulate power through unconstitutional constitutional amendments that follow the democratic process to ensure their perpetuation in office indefinitely. The literature delves in the suggested ways to curb the threats to constitutional democracy. Few academic works have explored the possibility of using the judicially enforceable unconstitutional constitutional amendments doctrine in Africa against constitutional changes to the constitution that results in undemocratic outputs.

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The literature review has been classified according to various suggested ways by scholars to curb the erosion of head of government term limits. The first group argues that countries should

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not prosecute leaders for the crimes conducted during their tenure as this encourages them to cling on to power. This practice is intended to dissuade them from retaining power for extended periods and participating in constitutional coups. Other authors hold that the presence of a dynamic and well-informed civil society is crucial to effectively address the challenges posed by the amendment of term limits. An alternative perspective posits that countries should establish immunities and privileges as a means of motivating current officeholders to voluntarily abandon power, hence discouraging their involvement in the modification of term limits. Another group of scholars holds that countries should offer substantial retirement benefits, including a substantial pension for government leaders. However, there has been a failure to analyse the applicability of the Unconstitutional Constitutional Amendment doctrine in relation to the erosion of term limits for heads of government.

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Fombad writes that one way to combat unconstitutional constitutional amendments that alter the nature of government in Africa is for the constitutions to include clauses that shield incumbent presidents from prosecutions for crimes committed during their tenure.¹⁸ Fombad contends that incumbents' fear of marginalisation, condemnation, degradation, and persecution at the hands of a successor, particularly from the opposing party, might motivate them to remain in power through unconstitutional means.¹⁹ The author suggests the incumbent needs judicial impunity to slow down the unconstitutional modifications plaguing the African continent. The author advocates that incumbents should be protected from administrative and executive prosecutions resulting from their terms in office. The author views this as a positive mechanism to prevent unconstitutional amendments since leaders assume that expanding their authority will grant them immunity from imprisonment. Posner and Young²⁰ shares the same sentiments as Fombad²¹ they argue that most countries with fragile democracies have leaders who cease to step down because they have perpetrated human rights violations during their tenure, causing them to fear being indicted by their successors. Consequently, incumbents cling to power for extended periods because they fear punishment when they vacate office.²² Although important,

¹⁸ Fombad C & Inegbedion N 'Presidential term limits and their impact on constitutionalism in Africa' in Fombad C & Murray C *Fostering constitutionalism in Africa* (2010) 23.

¹⁹ Fombad C & Inegbedion N 'in Fombad C & Murray C (2010) 23.

²⁰ Posner DN & Daniel JY 'The Institutionalization of Political Power in Africa' (2007) 18 *Journal of Democracy* 135.

²¹ Fombad C & Inegbedion N 'in Fombad C & Murray C (2010) 23.

²² Ginsburg T, Melton J & Elkins Z (2011) 1865.

the paper's contribution to the debate on the erosion of the term limits in Africa but it is very limited in providing an effective and efficient constitutional response as the statistics of term limits erosion remains prevalent in the continent.

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Fombad in his other scholarly work argued that a robust civil society is necessary to defend constitutional democracy against incumbents who aim to destroy democracy in Africa by removing term limits by unconstitutional constitutional modifications.²³ The author suggests that members of civil society should be mindful of their constitutional rights and refrain from voting for referendums that will result in constitutional alterations, which will threaten the future of constitutional democracy. The researcher notes the importance of opposition parties being robust enough to push against changes that undermine democratic constitutional safeguards. Vencovsky suggests that African states shall have dynamic civil societies as a constitutional response against incumbents in African countries, incumbents may be prevented from attempting to secure terms in office beyond the term limits.²⁴

Saoyo notes that a mechanism to prevent the deterioration of term limits in Africa is through issuing incentives, such as well-compensated, internationally recognised professions that guarantee incumbents a decent standard of living after their tenure.²⁵ However, this has not been sufficient to convince all African leaders to step down eventually, as the current trends show that incumbents continue to erode the term limits to hold onto power. Maltz suggests that the international community shall strengthen the democratic norm of term limits by vigorously defending them.²⁶ Maltz contends that term limits are essential to the proper operation of democracy and hence should be given higher international donor priority.²⁷

The study concurs with the authors who defend the unconstitutional constitutional amendments doctrine to safeguard the term limits against unconstitutional alterations by incumbents who may attempt to entrench themselves in power for prolonged periods. Moreover, scholars view

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²³Fombad C & Inegbedion N 'in Fombad C & Murray C (2010) 22.

²⁴ Vencovsky D 'Presidential Term Limits in Africa' (2007) 2 *Conflict Trends* 20.

²⁵Saoyo TG *Prospects and challenges of enforcing presidential term limits in Africa through regional instruments* (LLM Thesis, University of Pretoria, 2012) 16.

²⁶ Maltz G (2007) 141.

²⁷ Maltz G (2007) 141.

the judicial duty of enforcing limitations on ‘constitutional modification’ as consistent with preserving the constitutional order.

Landau supports the enforceable judicial unconstitutional constitutional amendments doctrine which blocks amendments to the fundamental structure of the constitution, such as term limits, against unconstitutional amendments.²⁸ He supports the applicability of the unconstitutional constitutional amendments doctrine against incumbents who may intend to entrench themselves in power indefinitely. In addition, according to Roznai, the capacity to amend the Constitution cannot include the authority to alter the basic structure of the Constitution.²⁹ The basic structure comprises constitutional rights, term limits, and the separation of powers. These normative arguments concur that amendments are only acceptable if they aim to maintain or enhance the political system adopted by the constituents during the constitution-making history.³⁰

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Halmai argues that countries with a history of military dictatorship and totalitarian rule, like Africa countries, deserve restrictions on amendment powers.³¹ Against this backdrop, Halmai argues that the unconstitutional constitutional amendments doctrine is credible to speed bump constitutional amendments that undermine democracy due to its potential to block threats to the constitution.³² In his paper, the author describes the doctrine of unconstitutional constitutional amendments as a plausible institutional design viable for successfully applying term limits and protecting democracy.

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In sum, recent studies on the defense of democracy against unconstitutional constitutional amendments in Africa have yet to examine the applicability of the unconstitutional constitutional amendments doctrine for the African continent for avoiding a coup via constitutional means. On the other hand, there is a large body of literature on different mechanisms for successfully implementing term limits in Africa. However, the suggested institutional designs have proven less effective as we continue to see a rise in the erosion of

²⁸ Landau D ‘Abusive constitutionalism’ (2013) 47 *U.C. Davis Law Review* 189.

²⁹ Roznai Y ‘Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea’ (2013) 61 *The American journal of comparative law* 651.

³⁰ Roznai Y (2013) 651.

³¹ Halmai G ‘Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?’ (2012) 19 *Constellations* 195.

³² Halmai G (2012) 195.

term limits in the continent. This mini thesis thus aims to contribute to the literature on the **deterioration** of term limits from the perspective of presenting a viable institutional design and how the unconstitutional constitutional amendments doctrine can play an essential role in preserving constitutional democracies against the amendment of presidential term limits.

1.8 Chapter Outline

The study contains four chapters. Chapter Two analyses democratic backsliding via the historical perspective of the adoption of presidential term limits. It delves to the development of presidential term limits erosion in African states, such as the emergence of populism and its danger to the future of constitutional democracy on the African continent, using comparative methods of different African states.

Chapter Three explores the unconstitutional constitutional amendments doctrine and its proficiency in preventing constitutional changes that would eliminate the Presidential term limits. Additionally, this chapter discusses other ways of responding to such an amendment. Finally, this chapter critically assesses the argument advanced by leading researchers considering the critical role of transnational constitutional law and institutions in defending national constitutional democracies against undemocratic threats such as presidential term limits amendment.

Chapter Four summarises the study's principal findings. Second, it offers critical insights that may aid in putting democracy into practice by reflecting on intriguing new prospects for future research on democratic backsliding in Africa because of the erosion of Presidential term limits.

2.1 Introduction

As noted in the introductory chapter of the thesis, presidential term limits are the distinguishing characteristic of democracy in nearly every nation on earth. Presidential term limits have become a defining component of democracy, hence, a trait many political systems adopted to enhance democratic governance.³³ The presidential term limits enjoy overwhelming support in most states. Interestingly, despite the overwhelming support for term limits, it is common that some states are seldom free of term limit erosion. The key contributing factor is the reluctance of the head of government to relinquish power at the end of the term to honour the obligation of stepping down from power. In most democratic countries, support for term limits for elective public office bearers is widespread. Given the popularity among citizens and proponents of democracy, several high-profile incidents of world leaders attempting to remove term limits have led to condemnations. This chapter examines the evolution and logic behind the adoption of term limits, the primary justifications for term limits, and whether the African continent's increasing disregard of presidential term limits contributes to the decline of democracy in many African countries.

The argument put forward in this chapter is that the rise of democracy decline in the African continent is partly attributed to the tweaking of presidential term limits which is undemocratic in nature. The evidence suggests that African countries are plagued with unconstitutional constitutional amendments that erode democracy by adopting presidential term limit extensions.³⁴ Some attempted to do this by suppressing the fundamental principles which include checks and balances of the constitution to achieve their goals. Term limits are an essential democratic norm that must be observed when constructing a state with a system of leadership rotation. The position is that no leader, regardless of their effectiveness, should be

³³ Murray C and Wiebusch C (2019) 134.

³⁴ Oita E & Nhlengethwa TT 'The Attrition of Democratic Gains in Africa: An Appraisal' (2016)16 *Research on humanities and social sciences* 72.

regarded as indispensable. Based on these and other arguments, this chapter argues that term limits are democratic because they serve as a deterrent against presidents' endless reigns.

The chapter is structured as follows. First, the chapter introduces term limitations and traces the implementation across history through ancient Greece, Rome, and the United States of America. Emphasis will be placed on investigating the rationale behind their implementation in these ancient civilizations. Next, the chapter discusses the history of long-serving presidents on the African continent and demonstrates how it primarily led to the necessity to implement presidential term limits. The discussion is followed by sections that discuss various justifications for concerning preserving democracy. Finally, the chapter ends by analysing patterns in the erosion of presidential term limits across the African continent and their effects on democracy.

2.2 The Origins of Term Limits

The term limits that exist today can be traced back to ancient civilisations of the Roman Empire and Greece.³⁵ The first historical evidence of term limits dates back to the 7th century BC when the residents of the Greek state of Dreros-on-Crete enacted a rule limiting the number of terms a participant may hold the office of the *Kosmos*.³⁶ The *Kosmos* was one of ancient Greece's most important political positions, serving as the State's prominent magistrate. The legislation was engraved in stone, stipulated that a person who had served as *Kosmos* for ten years could not continue serving in that capacity again before at least ten years had elapsed.³⁷ Notably, if an individual chooses to be *Kosmos* before the 10-year period has elapsed, his rulings as a term-limited Magistrate would be nullified, and he would be alienated of several civic abilities, including the ability to hold public office for life.³⁸ The term-limited 'Magistrates' verdicts were meaningless and invalid to the degree that they lacked legal consequences for those against whom they were rendered. The term-limited magistrate was deemed worthless for his

³⁵ Ginsburg T, Melton J & Elkins Z (2011) 1806.

³⁶ Dulani BM *Personal Rule and Presidential Term Limits in Africa* (Unpublished PhD thesis, Michigan State University, 2011) 63.

³⁷ Eze K 'The Efficacy of Presidential Term Limits in Africa Mandela Institute for Development Studies Discussion Paper 3-4' available at https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-YouthDialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf (accessed 22-07-2022) 3.

³⁸ Dulani BM *Personal Rule and Presidential Term Limits in Africa* (Unpublished PhD thesis, Michigan State University, 2011) 63.

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life, and his status as a Kosmos lacked legal effect. The term limitations in Ancient Greek were viewed as an institutional arrangement for office rotation. Accordingly, they reduced the chance of developing a Kosmos who could be re-elected in the same office several times. In addition, the limits reflected a considerable apprehension of the possibility of tyranny if prominent, influential individuals were permitted to possess and exercise power for extended periods without any limitations.

The ancient Roman Republic (509 BC - 27 BC) also had a system of elected rulers with term restrictions.³⁹ In the Roman Republic, selected executive and prestigious elected offices were subjected to term limitations that outlawed re-election after serving a specific period. The highest executive authorities included the tribune of the Consul, Censors, and the Praetor, all of which had term limits after the lapse of a certain period after acquiring the positions.⁴⁰ The Consuls were the highest executive office and the most prestigious in the Republic. The power of the Consuls was equivalent to that of the Prime Minister. A person in the Consul's office may only serve for one year.⁴¹ The Consuls' terms were limited to an institutional design to safeguard against monopolising or personalizing power.⁴² The restriction was meant to prevent the executive from accumulating excessive authority. Another term-limited position was that of the Praetors, who served as judges, while the Censors had financial responsibilities and were considered tax enforcers. These positions were limited to one year, with re-election prohibited for the next ten years.⁴³ The decision to implement the term-limitation law represented an effort to formalize the custom of non-re-election.⁴⁴ In addition, the Roman Republic eradicated its

³⁹ Altman A 'A Brief History of Term Limits' TIME 03 October 2008 available at <http://content.time.com/time/nation/article/0,8599,1846988,00.html> (Accessed 24 July 2022).

⁴⁰ Eze K 'The Efficacy of Presidential Term Limits in Africa Mandela Institute for Development Studies Discussion Paper 3-4' available at https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-YouthDialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf (accessed 22-07-2022) 3

⁴¹ Altman A 'A Brief History of Term Limits' TIME 03 October 2008 available at <http://content.time.com/time/nation/article/0,8599,1846988,00.html> (accessed 24 July 2022).

⁴² Eze K 'The Efficacy of Presidential Term Limits in Africa Mandela Institute for Development Studies Discussion Paper 3-4' available at https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-YouthDialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf (Accessed 22 July 2022) 3.

⁴³ Altman A 'A Brief History of Term Limits' TIME 03 October 2008 available at <http://content.time.com/time/nation/article/0,8599,1846988,00.html> (accessed 24 July 2022).

⁴⁴ Heyl C & Llanos M 'Presidential Term Limits in Africa and Latin America: Contested but Resilient' (2020) *GIGA Focus Global* 2.

monarchical status at the beginning of the Republic.⁴⁵ One should note that the royal position afforded too much power to the members who held power. The history of term limits in early civilisations demonstrates that term limitations lowered the likelihood of a person with distinct preferences that are not inevitably the same as those of the general populace. In addition, the term limits encouraged frequent rotation in Council executive officers. Term limits result in power-sharing among people. In other words, term limitations shall be viewed as an institutional mechanism for populating central government offices with a representative sample of the various people of the state.

Scholars do not exclude the United States of America as one of the historical states that adopted the term limits.⁴⁶ Term limits have begun with an unofficial tradition in which no president served more than two terms for more than 150 years. From 1933 until he died in 1945, President Franklin D. Roosevelt stood for re-election for an unprecedented four times.⁴⁷ However, the US Constitution was changed to give the two-term-limit tradition full Constitutional legitimacy after Roosevelt's administration.⁴⁸ The United States imposed term limits to encourage leadership rotation at the expense of presidents who sought to overstay their terms and were overthrown by coups d'état.

Today, modern states actively impose term limits by limiting the number of times a given political office holder can be re-elected to a particular office. Contemporary political term limits provide adequate and considerable checks on executive power.⁴⁹ Eze observes further that the current dominance of term limitations inhibits the desire of modern states to exert limitations

⁴⁵ Heyl C & Llanos M (2020) 4.

⁴⁶ Heyl C & Llanos M (2020) 2.

⁴⁷ Eze K 'The Efficacy of Presidential Term Limits in Africa Mandela Institute for Development Studies Discussion Paper 3-4' available at https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-YouthDialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf (accessed 22 July 2022) 5.

⁴⁸ Eze K 'The Efficacy of Presidential Term Limits in Africa Mandela Institute for Development Studies Discussion Paper 3-4' available at https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-YouthDialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf (accessed 22 July 2022).

⁴⁹ Namakula SC 'The Efficacy of Presidential Term Limits in Africa.' *MINDS Annual African Youth Dialogue 3-4 August 2016 Discussion Paper* available at: [The efficacy of presidential term limits in Africa \(researchgate.net\)](https://www.researchgate.net/publication/354111111) (accessed on 01 September 2022) 4.

of executive authority.⁵⁰ The prevalence of the term limits can be noted in their imposition on the holders of executive political offices in the administration. The widespread use of presidential term limits in contemporary politics is evidenced by the high percentage of presidential systems that apply them.⁵¹ Several countries have adopted term limits in the constitutions.⁵² Globally, roughly three-quarters of all presidential governments implemented presidential term limits.⁵³ It is not altogether unexpected that worldwide support for presidential term limits persists. In modern politics, term limits are a popular precaution against presidents who might easily abuse power and possibly contribute to the decline of democracy.⁵⁴

2.3 Term limits in Africa

2.3.1 The Long tenured Presidents and introduction of term limit

One of the significant changes that African countries experienced during the beginning of the 1990's was the so-called 'third wave of democratization.'⁵⁵ Huntington⁵⁵ defines a 'wave of democratisation' as a series of changes from non-democratic to democratic regimes that take place within a specific timeframe.⁵⁶ The 'third wave of democratization' is intricately connected to a constitutional revolution that aimed to eliminate long-term rulership by implementing restrictions on presidential terms.⁵⁷ Before the 1990s, most African countries constitutions excluded provisions stipulating presidential term limits.⁵⁸ The 'third wave of democratisation' which occurred between 1974 and 1990 began in Southern Europe then in

⁵⁰ Eze K 'The Efficacy of Presidential Term Limits in Africa Mandela Institute for Development Studies Discussion Paper 3-4' available at https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-YouthDialogue-Discussion-Paper_Term-Limits_Kevin-Eze.pdf (accessed 22 July 2022) 5.

⁵¹ Reyntjens F 'A New Look at the Evidence' (2016) 27 *Journal of Democracy* 63.

⁵² Parry L, Tauyekel S, Tempesta E & Tres P 'Presidential Term Limits in Africa' (2021) *Comparative Politics & Development* 8.

⁵³ Dulani BM *Personal Rule and Presidential Term Limits in Africa* (Unpublished PhD thesis, Michigan State University, 2011) 63.

⁵⁴ Dulani B 'The struggle for presidential term limits' in Lynch G & VonDoepp P (eds) *Routledge Handbook of Democratization in Africa* 1 ed (2019) 6.

⁵⁵ Huntington SP *The third wave: Democratization in the late twentieth century* (1992) 15.

⁵⁶ Huntington SP *The third wave: Democratization in the late twentieth century* (1992) 15.

⁵⁷ Huntington SP (1992) 15.

⁵⁸ Parry L, Tauyekel S, Tempesta E & Tres P (2021) 5.

Latin America and Africa.⁵⁹ During the time the Third Wave of Democratization reached the territories of the African continent, most nations adopted presidential two-term limits. The term limits were aimed at limiting incumbents to single re-election.⁶⁰ In the 1990s, Africa's political status quo underwent a significant shift, as some governments' constitutions included term limitations for their presidential office.⁶¹ In the early 1990s, approximately two-thirds of African countries had term restrictions.⁶² Since the late 1980s, the establishment of presidential term limits has been one of the democratic practices essentially institutionalized throughout Africa.⁶³

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The dawn of the third wave of democratization in Africa in the early 1990s saw the transfer of power from one president to another by including presidential term limits in their constitutions.⁶⁴ During this period, countries began incorporating democratic ideas and moved away from authoritarianism. As a result, a total of 37 African countries amended their constitutions to include multiparty elections, and only four of those did not have a term limit restriction.⁶⁵ Before the 1990s, however, presidential term limits were not entirely foreign to the African political arena.⁶⁶ Presidential term limits were primarily integrated into the constitutions of some nations with the rise of substantial decolonization waves on the African continent in the 1960s, which saw the introduction of creative constitutions to regulate the exercise of power in the new states.⁶⁷ Senegal enacted and included presidential term limits in its constitution in 1970, Mali in 1974, and Togo in 1963, all before the 1990s.⁶⁸ In the 1980s,

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⁵⁹ Huntington SP (1992) 15.

⁶⁰ Osei A, Akinocho H & Mwombela S 'Presidential Term Limits and Regime Types: When Do Leaders Respect Constitutional Norms?' (2021) 55 *Africa Spectrum* 254.

⁶¹ Chigowe LT 'One Step Forward, Two Steps Backwards: The Threat of 'Third Termism' on Democracy Rule of Law and Governance in Africa' (2020) 34 *Spec Juris* 13.

⁶² Parry L, Tauyekel S, Tempesta E & Tres P (2021) 5.

⁶³ Reyntjens F (2016) 64.

⁶⁴ Reyntjens F (2016) 62.

⁶⁵ Grauvogel J & Heyl C (2021) 217.

⁶⁶ Grauvogel J & Heyl C (2021) 217.

⁶⁷ Wiebusch M & Murray C 'Presidential Term Limits and the African Union' (2019) 63 *Journal of African Law* 134.

⁶⁸ Grauvogel and Heyl (2021) 217.

Tanzania, Liberia, and Sierra Leone were among several nations that imposed term limits from the 1990s.⁶⁹

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'Big man politics' was prevalent on the African continent before the initiation of presidential term limits.⁷⁰ The 'Big man politics' refers to the arrogant, authoritarian, and sometimes dictatorial leadership of a country by an individual.⁷¹ Furthermore, 'the Big man syndrome' was distinguished by corrupt practices, oppression, partisanship, elitism, and an insatiable desire to keep power by all means at the cost of the personal freedom of the entire nation.⁷² During the reign of the big man syndrome, the African continent was dominated by an individual or group of persons who sought total dominion or dominance over those perceived to be their subordinates.⁷³ During this 'Big man politics' period rulers had the arbitrary ability to disregard or circumvent official institutions and laws, transforming government into a highly personalized exercise governed by the emperor and his entourage.⁷⁴

The continent was home to presidents who ignored conventional political institutions to such a degree that they believed the institutions were irrelevant. For many years, the 'Big-Man' paradigm has characterised African politics and contributed significantly to the fragility of the governments they rule.⁷⁵ As a result of the Big man syndrome, the populace has borne the brunt of the negative repercussions, while the 'Big Man' became highly affluent.⁷⁶ It is worth mentioning the most prominent examples in the African continent include Former President

⁶⁹ Loada A 'La limitation du nombre de mandats présidentiels en Afrique francophone.' (2003) 3 *Revue Électronique Afrilex* 142.

⁷⁰ Posner DN & Young DJ (2007) 128.

⁷¹ Teja IA 'The 'Big Men' of Africa: Origins, Tactics, and Implications of Rule by Mugabe and Museveni' (2018) 4 *Liberated Arts* 4.

⁷² Hyden G *African Politics in Comparative Perspective* (2005) Cambridge: Cambridge University Press 13.

⁷³ Bratton M & van de Walle N *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (1997) 63.

⁷⁴ Nyangulu D 'Big Men and Performances of Sovereignty in Contemporary African Novels' (2018) 49 *Research in African Literatures* 104.

⁷⁵ Posner DN & Young DJ (2007) 126.

⁷⁶ Shawa LB *Exploring Anti-Democratic Practices in University Policy-Steering, Management and Governance in Malawi: A Critical Theory Perspective* (unpublished Ph.D. thesis, Victoria University of Wellington, (2011) 27.

Robert Mugabe of Zimbabwe and Yoweri Museveni of Uganda.⁷⁷ Both these Statesman were known for their corrupt practices, oppression, partisanship, elitism, and an insatiable desire to keep power at all means in their respective countries.⁷⁸ An example, Mugabe and Museveni have been involved in a discourse over the utilisation of threats and physical force to win elections.⁷⁹ Both Mugabe and Museveni have been known to engage in undemocratic activities. It can be argued that violence has played a pivotal role in Mugabe's political survival strategy. The efficacy of this intimidation approach is exemplified by the 2000 Zimbabwean elections, as cited in legal discourse.⁸⁰ Mugabe has also faced investigation for allegations of his involvement in the deaths of more than 20,000 individuals during the 1980s.⁸¹ In a manner reminiscent of Mugabe, Museveni has likewise made amendments to his nation's constitution with the intention of extending his term limit and prolonging his stay in office. Under the presidency of the two leaders Uganda and Zimbabwe exhibit a dominant-party system, wherein a single political party holds significant control over the governance of the respective countries.⁸² The executive branch in both nations tends to exceed its prescribed limits of power, leading to an imbalance in the distribution of authority. In both the countries these head of government the power was concentrated in the hands of them as dominant individuals, the presence of an impartial court system or an electoral governance agency is sometimes scarce, making it exceedingly challenging to conduct an election without encountering irregularities.⁸³ For instance, both Robert Mugabe and Yoweri Museveni have presided over governments that have demonstrated an inability to adequately fulfill their duty of efficiently serving their respective citizenries.⁸⁴ This deficiency can be attributed to factors such as improper allocation of resources, pervasive corruption, and the presence of inept institutional frameworks.⁸⁵

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⁷⁷ Teja IA (2018) 4.

⁷⁸ Teja IA (2018) 7.

⁷⁹ Teja IA (2018) 7.

⁸⁰ Teja IA (2018) 4

⁸¹ Nyangulu D (2018) 101.

⁸² Nyangulu D (2018) 102.

⁸³ Teja IA (2018) 8.

⁸⁴ Teja IA (2018) 9.

⁸⁵ Nyangulu D (2018) 104.

The big man syndrome gave the president practically limitless authority with little democratic accountability.⁸⁶ It is worth noting the examples of leaders encapsulating the big man syndrome, the leaders are Kwame Nkrumah of Ghana, and Hastings Kamuzu Banda of Nyasaland, present day Malawi, proclaimed themselves presidents for life in their states.⁸⁷ Certain African nations embraced the one-party state system, removing elections and the transfer of political power, resulting in oppression, strife, and pervasive underdevelopment, destabilizing the majority of newly independent governments.⁸⁸ One such effect was the increase in coups d'état.⁸⁹ Massive human rights violations, the exploitation of security personnel, and almost constant electoral corruption when legitimate elections were held had become usual.⁹⁰

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Early in the 1990s, two-thirds of all African nations with semi-presidential forms of government had implemented presidential term limits.⁹¹ The change arose mainly due to internal efforts to protect against the dangers of direct personal control.⁹² The term restrictions were weaved into the constitutions to restrain the exercise of power. The main goal of the adjustments in the 1990s was to reduce the intensity of 'Big-Man' rulers, as discussed in the preceding sections regarding Africa's lengthy, and complex history of personal control.⁹³ The mitigating of Big man rulers was to be accomplished by adopting new institutions meant to restrict leaders' capacity to control politics and wield power.⁹⁴ These included Electoral politics, enactment of new constitutions, multi-partyism and constitutional changes in government became quite common.⁹⁵ During this period, African governments changed their constitutions to, among other things, re-establish multiparty competition, improve civil rights

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⁸⁶ Corey W (2010) 3.

⁸⁷ Chigowe LT (2020) 13.

⁸⁸ Chigowe LT (2020) 16.

⁸⁹ Chigowe LT (2020) 16.

⁹⁰ Wiebusch M & Murray C (2019) 135.

⁹¹ McKie K 'The Politics of Institutional Choice Across Sub-Saharan Africa: Presidential Term Limits' (2017) 52 *Studies in comparative international development* 439.

⁹² Mangala JR 'Presidential term limits, the never-ending debate' In Mangala JR (ed) *The Politics of Challenging Presidential Term Limits in Africa* (2020) 13.

⁹³ Elkins Z, Ginsburg T & Melton J *The Endurance of National Constitutions* (2009) 65.

⁹⁴ Posner D & Young DJ 'The Institutionalization of Power in Africa' (2007) 18 *Journal of Democracy* 127.

⁹⁵ Posner D & Young DJ (2007) 128.

and liberties. This fresh wave of optimism implies that the period of personal rule in Africa was meant to be ended due to these shifting institutional circumstances. They aim to limit personalism, avoid authority abuse and encourage political party competitors and power turnover.⁹⁶

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By limiting the number of terms an individual may serve as president, term limits were intended to reduce personal rule in Africa via constitutional constraints.⁹⁷ Consequently, this necessitated the holding of democratic elections. A number of the new constitutions also impose age limits on the presidency, making it difficult for an individual to remain in office after reaching the limit.⁹⁸ An example of a country that adopted an age limit in the constitution is Uganda in its 1995 Constitution.⁹⁹ In Uganda the eligibility criteria for individuals seeking the presidential post include an age restriction, specifically limiting candidates to a maximum age of 75 years.¹⁰⁰ The adoption of term limits served as a means to prevent the possible monopolization of power.¹⁰¹ During the third wave of democracy, there was a broad consensus in favor of democratisation and the growth of democratic institutions.¹⁰² Consequently, the maximum number of terms a president started to be considered essential to the liberalisation of African politics. These shifts featured decentralised judicial authority protection and enlarged legislatures. The initiatives also produced consistent free and fair elections woven into the fabric of African constitutions. Every advancement was regarded as an instrument of democratization. The transformation experienced in the 1990s fundamentally altered the political terrain of Africa.¹⁰³ The presidential term limits contributed to the democratisation of the political system by providing a remedy for the often-disastrous long-term presidencies of authoritarian leaders.

⁹⁶ Heyl C and Llanos M (2020) 1.

⁹⁷ McKie K (2017) 439.

⁹⁸ McKie K (2017) 439.

⁹⁹ Durotoye A 'Resurgent Backsliding and Democracy in Africa' (2016) 16 *International Journal of African and Asian Studies* 39.

¹⁰⁰ Durotoye A (2016) 39.

¹⁰¹ Durotoye A (2016) 39.

¹⁰² Prempeh HK 'Africa's 'Constitutionalism revival': False start or new dawn?' (2007) 5 *International Journal of Constitutional Law* 469.

¹⁰³ Durotoye A (2016) 39.

The significant political shifts in Africa since 1990 have made it necessary for the continent's leaders to conform to more restrictive formal institutions in politics and policymaking than they did in the past.¹⁰⁴ According to Posner, how 'political leaders come into the office or depart power' is the most evident expression of the institutionalization of power and move away from 'big man syndrome'.¹⁰⁵ As a shred of evidence, elected African Presidents have been sharing the rule of polls with new institutions, and opposition parties having the opportunity to win elections. Key examples in the African continent are President Aristides Pereira of Cape Verde and Kenneth Kaunda of Zambia, which saw governing presidents being defeated at the elections and an acceptance of the results for the first time. Before the institution of the term limits, the most common method to remove a standing president was using the barrel of a gun and revolts.¹⁰⁶

2.3.2 The Necessity of term limits

During the Third Wave of Democratisation in the 1990s, the constitutions of the majority of African countries stipulated presidential term limits of two terms in their constitutions. Following Africa's independence, introducing term limits was a successful bulwark against the unrestrained personal control that plagued the continent.¹⁰⁷ As a result of the personal rule, presidents controlled political power. Consequently, presidential term limits were required to alter the character of the African presidency style. Additionally, there was a growing consensus that to stop the personalisation of power in African politics, the early 1990s adjustments and institutional advancements were necessary.¹⁰⁸ Presidential term limits were required to promote a democratic transfer of power from one leader to the next, a crucial feature that was required due a long history of dictators.¹⁰⁹ Also Term limits were necessary to promote party alternation. Party alternation is a suitable catalyst for democratisation which fosters the participation of people to stand for office.¹¹⁰ Lindberg says that the chances of the opposition

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¹⁰⁴ Posner DN & Young DJ (2007) 128.

¹⁰⁵ Posner Dn & Young DJ (2007) 128.

¹⁰⁶ Osei A, Akinocho H & Mwombela S (2021) 259.

¹⁰⁷ Prempeh HK (2007) 469.

¹⁰⁸ Prempeh HK (2007) 469.

¹⁰⁹ Okurut E (2018) 5.

¹¹⁰ Dixon R & Landau D (2020) 359.

party winning elections increase when the current president is barred from running for office.¹¹¹ One cannot overlook from historical records that dictatorships and autocrats abound throughout global history.¹¹² Vencovsky proposes that term limits were crucial to maintaining leadership turnover, a fundamental component of the democratic element.¹¹³ According to this view, an arrangement that acknowledges term limits promotes democracy and offers a universal solution to the problems associated with or posed by long-serving presidents and authoritarian leaders.¹¹⁴

Presidential term limits were required since African presidents are now more likely to resign through political and non-violent means following the lapse of the prescribed term.¹¹⁵ An excellent example is Liberia where term limits encourage peaceful transition.¹¹⁶ Liberia experienced its first peaceful transfer of power when President Ellen Sirleaf Johnson stepped aside for President George Weah following the end of her second term.¹¹⁷ When alternative forces cannot take over peacefully, they may conclude that their only option is violence.¹¹⁸ Before 1990, African presidents were twice as likely to be defeated by opposition party leaders using guns to outstay their positions. In addition, the average number of years African presidents serve in office has gradually declined due to this new situation's more significant leadership turnover.¹¹⁹

The personalisation of power by the powerful politician demanded the presence of term limitations in the political context of Africa. The increasing number of African presidents who have left office at the end of their maximum term while considering extending it reflects the degree to which presidential term restrictions are transforming the structure of the African presidency. Between the mid-1960s and early 1980s, African politics were defined by

¹¹¹ Lindberg S & Moehler D 'Narrowing the Legitimacy Gap: Turnovers as a Cause of Democratic Consolidation' (2009) 71 *The Journal of Politics* 1450.

¹¹² Fombad C & Inegbedion N 'in Fombad C & Murray C (2010) 2.

¹¹³ Vencovsky D (2007) 15.

¹¹⁴ Fombad C & Inegbedion N 'in Fombad C & Murray C (2010) 17.

¹¹⁵ Posner Dn & Young DJ (2007) 128.

¹¹⁶ Teja IA (2018) 4.

¹¹⁷ Teja IA (2018) 4.

¹¹⁸ Heyl C & Mariana L (2022) 3.

¹¹⁹ Heyl C & Mariana L (2022) 3.

authoritarian states and one-party republics in which constitutions were frequently considered mere paperwork.¹²⁰ Due to inadequate constitutional, political, and societal restraints on presidential power, it became normal for authoritarian leaders to seek re-election after their term.¹²¹ A notable example in Africa is that the South African government expanded political involvement to the black majority, finally leading to the country's first multi-racial polls in 1994. It is vital to highlight that Africa experienced the fall of autocracies and shifted to more elected governments due to this wave. Electoral politics, adopting new constitutions, multi-partyism, and constitutional political changes emerged as one of the continent's most significant transformations.¹²²

A fundamental change in African politics and the presidential rule was noted in the 1990s.¹²³ Africa's democratising political institutions endorsed presidential term limits as a counterweight to the frequently disastrous long-term presidencies of autocratic dictators.¹²⁴ As an outcome, Political freedom on the African continent was increasing. In addition, voted into office, African Presidents have been sharing the rule of elections with political systems, and opposition parties have been given a recognised voice in national politics.¹²⁵ Notable, for the first time, President Aristides Pereira of Cape Verde and Kenneth Kaunda of Zambia, the continent of Africa, witnessed ruling presidents defeated at the polls and accepted the results.¹²⁶

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Pre-1990s Africa Constitutions were either disregarded, altered to conform to the dictator's whim, or suspended by military authorities.¹²⁷ In the 1990s, several presidents relinquished power at the end of their tenures, and several nations were effectively democratised. An illustration of African presidents who observed term limits includes Ali Hassan Mwinyi, a

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¹²⁰ Obasanjo I 'Curing Africa's Big-Man Syndrome: Individual versus Population Approach?' (2013) *Foreign Policy Journal* 1.

¹²¹ Posner DN & Young DJ (2007) 126.

¹²² Tull DM & Simmons C (2017) 11.

¹²³ Tull DM & Simmons C (2017) 11.

¹²⁴ Parry L, Tauyekel S, Tempesta E & Tres P (2021) 5.

¹²⁵ Elisabet AH 'Parliaments in Africa: Representative Institutions in the Land of the Big Man' (2011) 17 *The Journal of Legislative Studies* 68.

¹²⁶ Elisabet AH (2011) 68.

¹²⁷ Tull DM & Claudia S 'The Institutionalisation of Power Revisited: Presidential Term Limits in Africa' (2017) 52 *Africa Spectrum* 91.

Tanzanian politician who assumed the position of the second president of the United Republic of Tanzania from 1985 to 1995¹²⁸. Additionally, Alpha Oumar Konaré, a Malian politician, served as the President of Mali for two consecutive five-year terms from 1992 to 2002.¹²⁹ Notably, both leaders voluntarily relinquished their positions upon the completion of their mandated tenures. Substantial political shifts since 1990 have pushed African leaders to increasingly restrictive formal structures.¹³⁰ In politics and policy decisions, these institutions encompass presidential term limits, political changes, legal institutions, judicial decisions, laws, and compliances.¹³¹ The most evident example of the institutionalization of power and the move away from ‘big men’ is how political leaders enter the office and exit power.¹³² As empirical evidence shows, in the 1990s, the share of those who left presidents who left power via regular means surpassed irregular means such as Coup d’état. Before the 1990s, the method by which African heads of state vacated office was irregular, but constitutional term limitations now govern it in the vast majority of countries.

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The influence of ‘Big-man’ dictators in Africa has waned. Big man has decreased, as a result leadership is more bound by formal laws, compelling them to accept election setbacks and term-limit compliance even when they want to remain in power. However, the erosion of term limits is reversing the democratic gains and progress made in the 1990s. Examples are leaders who amend the terms limits imposed in constitutions such as the late Gnassingbe Eyadama of Togo abolished term limits in 2002,¹³³ followed closely by presidents Omar Bongo of Gabon in 2003 and Yoweri Museveni of Uganda in 2005 amongst many others who recently abolished term limits from their constitutions hence allowing them to run for office for unlimited number of terms.¹³⁴ In the African context, term limits since the 1990s have created a meaningful opportunity for an opposition victory, which saw a decline in one political party dominance which counteracts the prevalence of the supremacy of one-party states. Although term limitations may not always ascertain positive outcomes, case studies indicate this is a likely

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¹²⁸ Tull DM & Claudia S (2017) 90.

¹²⁹ Tull DM & Claudia S (2017) 90.

¹³⁰ Posner DN & Young DJ (2007) 128.

¹³¹ Posner DN & Young DJ (2007) 128.

¹³² Posner DN & Young DJ (2007) 128.

¹³³ Maltz G (2007) 128.

¹³⁴ Murray C & Wiebusch M (2018) 18.

outcome for opposition parties. Maltz cites Kenya and Croatia as instances in which the opponents only had a realistic chance of winning if the constitution required the incumbent to resign immediately.¹³⁵ John Kufour of the New Patriotic Party (NPP) could mainly win the polls in Ghana after President Rawlings left after 19 years in office.¹³⁶ Term restrictions serve not only the interests of voters but also those of potential candidates, particularly in African nations where elections are typically neither free nor fair.

In the contemporary African political landscape term limits remain relevant. In stark contrast to the United States and European countries, where law and order and constitutionalism have a lengthy history, African democracies are still in teething phases.¹³⁷ As a result, elections in Africa are marred by fraud such as rigging, bribery, intimidation, human rights violations, violence, underrepresentation, and the legacy of dictatorship obscuring people's will.¹³⁸ In light of these everyday experiences and impediments to developing democracy on the continent, the impact of presidential term limits in Africa must be evaluated. One cannot erase that most of the continent's worst battles were related to political instability stemming from succession contests.¹³⁹ Countries such as South Sudan, the Democratic Republic of the Congo, and Somalia are beset by political crises that have wreaked havoc and crippled institutions for growth and the welfare of the people. In addition, numerous African nations fear election periods due to the violence and breaches of human rights. Consequently, presidential term limits shall be highlighted as an integral aspect of democracy, and those leaders should stand aside at the expiration of their tenure.

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Democracy is impractical when presidents reign for over 20 years, which is prevalent in Africa.¹⁴⁰ An example of a president who ruled for long periods is the late Robert Mugabe who governed for 37 years as president of Zimbabwe.¹⁴¹ When he was eventually forced to resign,

¹³⁵ Maltz G (2007) 128.

¹³⁶ Maltz G (2007) 128.

¹³⁷ Murray C & Wiebusch M (2018) 18.

¹³⁸ Obse KN *The Emerging Regional Regulation of Domestic Constitutional Law in Africa* (Unpublished Degree of Doctor of Law, University of Graz, 2015) 36.

¹³⁹ Gyimah-Boadi E 'Political parties, elections and patronage: Random thoughts on neo-patrimonialism and African democratization' in Basedau M, Erdmann G & Mehler A (eds) *Votes, money and violence: Political parties and elections in sub-Saharan Africa* (2007) 103.

¹⁴⁰ Okurut E (2018) 127.

¹⁴¹ Okurut E (2018) 127.

there were massive celebrations since a new government would be established. However, Zimbabwe's economy had reached an all-time low by the time he was forced to retire in 2017, owing to widespread poverty, fraud, and a lack of essential services. **lit** is significant to mention the significance of presidential term limits and how they may play an essential role in the African political climate by restricting the number of terms a president may serve.

2.3.3 The Erosion of Term limits

The African is currently experiencing a concerning pattern where politicians intentionally reverse the progress that was achieved in the 1990s during the Third Wave of Democratisation in Africa. One of the problems has been the extension and abolition and elimination of the president term limits in the constitutions.¹⁴² Several African governments have altered, abolished, or eliminated presidential term restrictions since the 1990s.¹⁴³ To comprehend these recent developments, it is imperative that we analyse the how the head of governments have weakened term limits using various techniques. The strategies adopted by these leaders include but not limited to utilisation of the judiciary to creatively interpret term limits to benefit an incumbent.¹⁴⁴ Second, the other strategy used by the leaders involves crafting parliamentary changes that would allow elected officials to serve beyond their statutory tenure without eliminating term limits.¹⁴⁵ Third, the other technique is to abolish term limitations either by referenda or by a decision made in parliament.¹⁴⁶ These mechanisms have gained significant momentum among incumbents in recent years.

Prominent leaders like the deceased former president Gnassingbe Eyadama of Togo and the deceased former president Omar Bongo of Gabon eliminated term restrictions in 2002 and 2003, respectively. **Another leader** is the current president Paul Biya of Cameroon, the current president of Uganda Yoweri Museveni of Uganda, Idriss Deby of Chad, Ismail Omar Guelleh of Djibouti, Abdelaziz Bouteflika of Algeria, and **several other leaders** have eliminated term

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¹⁴² Fombad FC 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa.' (2007) 55 *The American Journal of Comparative Law* 3.

¹⁴³ Oita E & Nhlengethwa TT (2016) 72.

¹⁴⁴ Murray C and Wiebusch C (2019) 131.

¹⁴⁵ Murray C and Wiebusch C (2019) 131.

¹⁴⁶ Murray C and Wiebusch C (2019) 131.

restrictions from their own constitutions. The presidents circumvent constitutional requirements that restrict the length of their presidency. They **achieved** this by employing innovative interpretations of the constitutions through the courts, some prolonging their tenure through parliamentary means, or eliminating term limits entirely.¹⁴⁷ Interestingly, the majority of these leaders who persistently want to eliminate term limits are the **exact** leaders who adopted the first inclusion of this clause in their constitutions.¹⁴⁸

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First, these leaders employ the judiciary to engage in an innovative interpretation of the constitution to benefit the current officeholder. Judges in most African nations are nominated by presidents and serve at their discretion, the courts provide an easy means for presidents to circumvent term limitations.¹⁴⁹ The judiciary has been the popular mechanisms employed by various African regimes to violate term limits. Maltz characterises this manipulation as a ‘soft violation’ to extend one’s time in office beyond the prescribed tenure, without completely abolishing term limits.¹⁵⁰ These instances of constitutional coups have been effectively employed by former president Blaise Compaore of Burkina Faso, and by Abdoulaye Wade of Senegal in January 2012.¹⁵¹ These leaders who employed judicial means to prolong their time in office, without explicitly advocating for the elimination of term limits. These leaders tacitly recognise the significance of term limits and possess an understanding that they should not retain power indefinitely. These leaders have effectively taken advantage of their vulnerable judicial systems, which are primarily made up of individuals appointed by the president. For example, president Blaise Compaore of Burkina Faso contended through the court in 2005 that the term limits in terms of Article 37 of the Constitution did not apply retrospectively after he had served two consecutive tenures, enabling him to serve two further terms until 2014.¹⁵² Senegalese president Abdoulaye Wade employed the same technique in 2012, reliant on the judiciary to secure the verdict that allowed him to run for a third term, only to lose the

¹⁴⁷ Tull DM & Simons C (2017) 52 *Africa Spectrum* 76.

¹⁴⁸ Tull DM & Simons C (2017) 76.

¹⁴⁹ Wiebusch M & Murray C (2019) 136.

¹⁵⁰ Maltz G (2007) 128.

¹⁵¹ Murray C and Wiebusch C (2019) 131.

¹⁵² Tull DM & Simons C (2017) 83.

subsequent election.¹⁵³ He claimed that the restrictions did not apply retrospectively to his first time in office.¹⁵⁴

Another example of the use of the judiciary to engage in an innovative interpretation of the constitution to benefit the current officeholder.¹⁵⁵ In Burundi President Nkurunziza circumvented term limitations. He accomplished this by selectively interpreting the constitution and manipulating the Constitutional Court to rule in favour of his proposal to amend the term limits.¹⁵⁶ Article 96 of Burundi constitution 'states that the president is elected by universal direct suffrage for a five-year term that is renewable once.'¹⁵⁷ Article 300 of the transitional clause holds that 'Except, in exceptional circumstances, the first President of the Republic of the post-transition phase is elected by the elected National Assembly and the elected Senate meeting in the Congress with a two-thirds majority of the members.' The opening word of Article 302 emphasises the exceptional nature of the first presidential election following the end of the civil war.¹⁵⁸ The fact that a president elected under this clause is constitutionally in office for a valid term is unaffected. The Constitutional Court determined that, even though the constitution limits presidents to two terms, President Pierre Nkurunziza's first term did not qualify because he was not elected by the Burundian people but by parliament.¹⁵⁹ This argument, which allowed him to be elected for a third term, was especially controversial because, according to the constitution established by the 2000 Arusha Accords, Nkurunziza's first term would have counted as one of his two allowed terms. Despite this, he won the election for a third term.¹⁶⁰

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¹⁵³ Murray C & Wiebusch M (2019) 136.

¹⁵⁴ Tull DM & Simons C (2017) 76.

¹⁵⁵ Wiebusch M & Murray C (2019) 134.

¹⁵⁶ Murray C and Wiebusch C (2019) 131.

¹⁵⁷ Wiebusch M & Murray C (2019) 134.

¹⁵⁸ Opalo B 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi' available at <https://constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi> (accessed 01 September 2022) 2.

¹⁵⁹ Opalo B 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi' available at <https://constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi> (accessed 01 September 2022) 2.

¹⁶⁰ Wiebusch M & Murray C (2019) 133.

Second, some incumbents who have successfully abolished term limits have relied on taking advantage of their influential political parties in parliament to expediently push through their proposals to amend term limit restrictions.¹⁶¹ An example is Idriss Deby, the leader of Chad, who successfully eliminated the term limit of serving only two terms in 2006. This change of term limit limitations was made possible by the dominance of the ruling party, the Patriotic Salvation Movement, in the parliament. In a similar vein, the ruling party of Cameroon, known as the Cameroon People's Democratic Party, successfully passed a measure that made amendments to the constitution. In 2008, Paul Biya forced through the Cameroonian parliament the repeal of Article 6 (2), which eliminated term restrictions.¹⁶² This amendment granted President Paul Biya the opportunity to serve an unlimited number of terms as the country's leader. In some cases, aside from relying on powerful political parties, incumbents exploit specific vulnerabilities to effortlessly prolong their time in office. In 2008, Paul Biya forced through the Cameroonian parliament the repeal of Article 6 (2), which eliminated term restrictions. In 2008, Paul Biya forced through the Cameroonian parliament the repeal of Article 6 (2), which eliminated term restrictions.¹⁶³ The elimination of term limits in Chad and Cameroon exemplifies the bold and ambitious actions certain presidents have taken to exploit the parliamentary authority of their ruling parties.¹⁶⁴ Through the significant proportion of ruling parties, incumbents have regularly introduced legislation to abolish term limits from the nation's constitution in the legislature.¹⁶⁵ In 2002, Gnassingbe Eyadema of Togo eliminated term limits through the legislature after obtaining a parliamentary majority in an election rejected by major opposition parties. Omar Guelleh of Djibouti, elected unopposed in 2005, was also re-elected by the parliament in 2010.¹⁶⁶ In addition, Rwandan President Paul Kagame abolished term limits, allowing him to remain in power beyond 2017. This decision was also supported by the ruling party's overwhelming legislative majority.¹⁶⁷ However, the unquenchable desire of politicians to work with the courts and parliaments to change

¹⁶¹ Abebe A (2019) 115.

¹⁶² Enonchong SL (2022) 2.

¹⁶³ Enonchong SL (2022) 2.

¹⁶⁴ Oita E & Nhlengethwa TT (2016) 72.

¹⁶⁵ Abebe A (2019) 115.

¹⁶⁶ Tull DM & Simons C (2017) 84

¹⁶⁷ Tull DM & Simons C (2017) 82.

constitutional provisions to prolong their excessive tenure in power continues to be a problem for the continent.¹⁶⁸

Another example, incumbents who have successfully abolished term limits have relied on taking advantage of their influential political parties in parliament to expediently push through their proposals to amend term limit restrictions.¹⁶⁹ Namibia is one of the countries that have previously extended the term of an incumbent by utilising parliament, without eliminating term limits from their constitution. The most noteworthy incident on the African continent occurred in 1999 in Namibia, when President Samuel Nujoma amended the constitution to run for a third term. According to Article 29 (3) 'A person may only serve as president for a maximum of two terms'.¹⁷⁰ Like Nkurunziza in Burundi, Nujoma claimed that the constitutional limit did not apply to him since he was indirectly elected in 1989 before beginning his first term. He was successful in the legislature, serving a third term until leaving in 2004.¹⁷¹

2.4 Conclusion

The chapter has demonstrated that the history of term restrictions stretches back to ancient Athens and Rome. During this period in the ancient republics, term limits were implemented to foster leadership rotation. Likewise, in today's politics, incumbents of executive political office are subject to term restrictions on their respective offices. Term limits help reduce the likelihood of the emergence of careerist political elites by fostering a culture of regularly rotating leadership. In addition, term limits also open the door for many average citizens to run for public office by promoting a culture of regular leadership rotation.

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The chapter demonstrated that big man politics and insufficient institutional checks and balances on presidential authority were endemic to Africa in the past. However, in the 1990s, the implementation of presidential term limits contributed to a shift away from arbitrary power.

¹⁶⁸ Enonchong SL (2022) 2.

¹⁶⁹ Murray C and Wiebusch C (2019) 131.

¹⁷⁰ Opalo B 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi' available at <https://constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi> (accessed 01 September 2022) 2.

¹⁷¹ Opalo B 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi' available at <https://constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi> (accessed 01 September 2022).

In addition, as demonstrated by the evidence, the change shifted toward executive legal constraints and considerably helped the democratic government by successfully restricting the authority of incumbent rulers. In the African setting, term limits are pertinent to restrain personalism, avoid power abuse, and encourage party competitiveness and power changeover. The following chapter focuses on the doctrine of unconstitutional constitutional amendments as an institutional design and its capacity to curb a constitutional change that would eliminate the term limits for the presidency office. The chapter will analyse other ways of responding to an unconstitutional amendment that threatens democracy.



CHAPTER THREE: THE UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT DOCTRINE AND EXECUTIVE TERM LIMITS

3.1 Introduction

The African continent incumbents engage in undemocratic conduct that leads to the deterioration of democracy in Africa. The attempt to build democracy in the African continent has seldom succeeded due to constitutional amendments that follow formal democratic procedures but result in anti-democratic constitutional outcomes to help influential presidents extend their term in office.¹⁷² In the contemporary world, it is evident now that the greatest threat to democracy is the full-scale takeover of constitutional change that includes attempts by influential presidents to extend their term in office.¹⁷³

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It is common for leaders to employ multifaceted techniques to achieve power for extended periods, either by distorting, suspending, or completely abolishing the term limits, which is

¹⁷² Landau D 'Democratic Erosion and Constitution-Making Moments: The Role of Transnational Legal Norms' in Shaffer G, Ginsburg T & Halliday T (eds) *Constitution-Making and Transnational Legal Order* (2019) 234.

¹⁷³ Scheppele, KL 'Autocratic Legalism' (2018) 85 *UC. Law Review* 547.

anti-democratic in nature.¹⁷⁴ The unconstitutional amendments make it much harder to unseat influential presidents by granting them control over institutions such as courts that serve as checks and balances on their authority.¹⁷⁵ Most constitutional regimes are ill-equipped to deal with modern exigencies and dangers to democracy, especially the deterioration of term limits.¹⁷⁶ It is now evident that the traditional limits in the constitutions, which are supposed to regulate against massive executive powers, are not efficient against the tools used by autocrats to erode democracy.¹⁷⁷

In response to the pervasive erosion of term limits in Africa, the chapter discusses the enforceable doctrine of unconstitutional constitutional amendments as a practical tool to maintain and block the risks to the constitutional order that come through the amendment powers to parliament. This chapter aims to evaluate the relevance of the doctrine of unconstitutional constitutional amendments in curbing constitutional coups in the African continent. The discussion assesses if this judicially enforceable doctrine of unconstitutional constitutional amendments may have evident democratic benefits for constitutional democracy on the African continent.

3.2 The unconstitutional constitutional amendments doctrine

A constitution of the country can be formally changed through the amendment procedure set in the constitution text. However, the question that we need to ask is whether there are any substantive limitations on the power to amend constitutions.¹⁷⁸ Put otherwise, the issue is whether the scope of the amendment power is sufficiently broad to permit any amendment whatsoever, including those that violate fundamental rights or basic principles of the

¹⁷⁴Dixon R & Landau D (2015) 606.

¹⁷⁵ Landau D (2013) 191.

¹⁷⁶ Choudhry S 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment: A reply to Rosalind Dixon and David Landau' (2017) 15 *International Journal of Constitutional Law* 828.

¹⁷⁷ Landau D (2013) 189.

¹⁷⁸ Lima J 'Unconstitutional constitutional amendments: the limits of amending powers' (2018) *Jurisprudence* 3.

constitution. To answer the question, we analyse the doctrine of unconstitutional constitutional amendments.

The doctrine of unconstitutional constitutional amendments holds that if the amendments infringe upon the constitutionally protected principles, such an amendment is 'unconstitutional'.¹⁷⁹ In a nutshell, the basic structure doctrine is a legal doctrine according to which even in the absence of explicit limitations on the constitutional amendment power, there are implied constitutional limitations by which the constitution cannot be amended in a way that changes the basic structure of the constitution. The premise of the basic structure doctrine is that constitutional amendments may be invalidated through the courts even though they meet the procedural prerequisites for amendment outlined in the constitution if they threaten the constitution's underlying principles, its existence, spirit, or rationale.¹⁸⁰ The idea is that amendments that are enacted according to the amendment procedure could be declared 'unconstitutional' on the grounds that their content is at variance with the existing constitution and its fundamental tenets. Certain purported amendments to constitutions may be invalid if they conflict with the constitutions' existing characters. After all, it is not the purpose of amendments to change or destroy the existing constitution's content.

The doctrine points that the legislature, in the absence of explicit limitations on the amendment powers, cannot change the fundamental pillars of the constitution supporting its constitutional authority.¹⁸¹ There are implied limitations beyond the wording of the constitution that protect the systematic principles underlying and connecting the provisions of the constitution which give coherence to the constitution and make it an organic whole.¹⁸² Roznai argues that implied constitutional constraints protect constitutional changes that impact a country's constitutional

¹⁷⁹ Bernal C 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *JCON* 343.

¹⁸⁰ Elson M 'Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion' (2018) 13 *Asian Journal of Comparative Law* 333.

¹⁸¹ Roznai Y 'Towards a Theory of Constitutional Unamendability' (2017) 5.

¹⁸² Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014) 54 & 59.

identity in the absence of explicit constitutional amendment power restrictions.¹⁸³ The fundamental theoretical justification for limiting amendment powers is that constitutional amendment authority is not infinite to the degree that it permits changes that undermine the fundamental principles.¹⁸⁴ Every written constitution includes specific essential ideas and goals that serve as its fundamental pillars and around which the whole constitution is built. The constitution will lose its fundamental and innate identity if these fundamental pillars are removed or eliminated from the constitution.

The doctrine of unconstitutional constitutional amendments implies that there are constitutional principles that are so fundamental that they carry a supra-constitutional status in the sense that they cannot be amended even through the formal amendment procedure.¹⁸⁵ The theoretical premise of the doctrine of unconstitutional amendments mandates the precepts of recognizing the essential values and significant tenets of the constitution that cannot be significantly altered because they are regarded as constituting its theoretical foundation.¹⁸⁶ The doctrine informs what can and should courts do when they face a question in the form of a constitutional amendment adopted according to the amendment procedure but that changes the constitution's basic structure.¹⁸⁷ The prescribed amendment procedures confer enabling power for amendment, but the amendment procedures cannot be used to swallow the constitutional fabrics. While the amendment power is wide, it is 'not that wide to abrogate the constitution or to transform its purpose and nature adopted in the constitution-making history'.¹⁸⁸ According to the doctrine, the court has the power to undo or strike off an amendment if it transgresses its limit and alters a basic structure of the constitution.¹⁸⁹ The doctrine curbs radical constitutional

¹⁸³ Roznai Y 'The Basic Structure Doctrine arrives in Kenya: Winds of Change for Constitutionalism in Africa? *VerfBlog*,' available at <https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/> (accessed 29 October 2022.)

¹⁸⁴ Roznai Y *Unconstitutional constitutional amendments: the limits of amending powers* 1ed (2017) 368.

¹⁸⁵ Landau D 'Rescuing the Unconstitutional Constitutional Amendment Doctrine: A Reply to Richard Albert' (2018) *Yale Journal of International Law* 6.

¹⁸⁶ Doyle O 'Constraints on Constitutional Amendment Powers' in Albert R, Contiades X & Fotiadou A the *Foundations and Traditions of Constitutional Amendment* (2017) 4.

¹⁸⁷ Roznai Y (2017) 368.

¹⁸⁸ Bernal C (2013) 343.

¹⁸⁹ Bernal C (2013) 343.

changes brought about through an amendment procedure, by declaring them not as an amendment but an act of revolution or coup d'état by those holding the amendment power.¹⁹⁰

The unconstitutional constitutional doctrine imposes that if an amendment is inconsistent with the character of the constitution in which it was established, or with the nature of the system of the state, then such a change would go beyond what is allowed by the amendment power bestowed on the congress or the parliament of the country.¹⁹¹ George Skinner and William Marbury contend that amendments cannot vary from the original constitution's structure and purpose, nor can they change the nature of government.¹⁹² Roznai contends that an amendment to a constitution must be harmonious with the body of the instrument and if an amendment negates the body of the instrument, it becomes unconstitutional.¹⁹³ Roznai points that the parliament, when making amendments, must be genuine and not replace a constitution since an entirely new constitution can be accepted only by the same authority that created the existing constitution.¹⁹⁴ Any alterations to the nature of the constitution need democratic engagement at a higher level, using adequate channels of higher-level participatory democracy and deliberations such as the return to the country's constitution-making.¹⁹⁵ In essence, the theory mandates that some changes to the 'basic structure' or basic tenets' go via a constitution-making procedure rather than the regular amendment procedures, allowing judges to construct a rather rudimentary form of tiering inferred from the constitution.

The doctrine preserves the people's powers against delegated powers by blocking any avenue for shaping the constitution away from the founding values that were agreed upon in the constitution making.¹⁹⁶ The fundamental constitutional principles that are of elementary nature to an extent that that the maker of the constitution himself is bound by them. Accordingly,

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¹⁹⁰ Roznai Y (2017) 368

¹⁹¹ Roznai Y (2017) 368.

¹⁹² Albert R 'Constitutional Amendment and Dismemberment' (2018) 43 *Yale Journal of International Law* 8.

¹⁹³ Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014) 54 & 59.

¹⁹⁴ Bernal C (2013) 343.

¹⁹⁵ Krishnaswamy S *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (2006) 88.

¹⁹⁶ Colón-Ríos, J *Weak Constitutionalism* 1 ed (2012) 27.

leaders vested with the amendment powers cannot perform amendments that exceed the scope provided by the constitution.¹⁹⁷ The argument here is that representatives of the people do not have the authority to make fundamental changes to the constitution but only to make minor modifications to reflect changing political realities.¹⁹⁸ Parliament cannot expand its limited authority into an ultimate authority to destroy its fundamental components. If parliament could eliminate a fundamental element of the constitution, it would cease to be a creature of the constitution and become its master. Constitutional principles, typically enshrined in the national constitutions, must be protected permanently and cannot be modified out of existence until the people replace it as the primary power bearers, not via the ceded powers of the government. Bernal asserts that parliament may change, abolish, and replace as many constitutional provisions as it desires, so long as the instrument keeps the same character as the current constitution.¹⁹⁹

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The doctrine, in practice, addresses the issues posed by the arbitrary use of constitutional amendment powers by providing comprehensive protection against the erosion of a constitution's fundamental structure and identity.²⁰⁰ The doctrine is a tool to prevent modifications to the basic structure of the constitution that may take place through constitutional coups by leaders seeking to consolidate their regimes indefinitely.²⁰¹ Through this notion, courts through judges act as a mechanism to block influential leaders who seek to perform constitutional reform to destroy democracy.²⁰² It permits judges to uphold the constitutional order without being bound by the constitution's text, instead taking into account the constitution's underlying spirit and the historical context in which it was adopted.²⁰³ The

¹⁹⁷Dixon R & Landau D 'Tiered Constitutional Design' (2018) 86 *George Washington Law Review* 438.

¹⁹⁸ Bernal C (2013) 340.

¹⁹⁹ Bernal C (2013) 343.

²⁰⁰Colon-Rios J 'Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America' (2013) 44 *Victoria University of Wellington law review* 522.

²⁰¹ Landau D (2013) 239.

²⁰²Roznai Y & Brandes HT 'Democratic Erosion, Populist Constitutionalism and The Unconstitutional Constitutional Amendments Doctrine' (2019) *SSRN Electronic Journal* 4.

²⁰³ Roznai Y 'The Migration of the Indian Basic Structure Doctrine', in Lokendra M (ed) *Judicial Activism in India - A Festschrift in Honour of Justice V.R. Krishna Iyer* (2012) 240.

doctrine expressly grants the judiciary the authority to restrict the parliament's unconstrained ability to amend the constitution's foundational principles.²⁰⁴

3.3 The Origins of the Basic Structure Doctrine

India is the initial case study for the preliminary developments and applications of the basic structure doctrine, which arose in the country's legal system. The basic structure doctrine is a judicial doctrine commonly included in India's constitutional law.²⁰⁵ This section traces the origin of the basic structure doctrine across time.

Initially, the Indian legal system rejected the notion of implied constraints on the amendment authority vested in the parliamentary body.²⁰⁶ However, Prime Minister Indira Gandhi's efforts to change the constitution in the 1960s and 1970s led to the judicial establishment of the basic structure theory, which stated that the amendment authority is not absolute.²⁰⁷ The view was that the amendment powers do not include the capacity to annul or alter the substance of the constitution or its core elements.²⁰⁸ The Indian Supreme Court has invoked this approach of the basic structure doctrine multiple times to evaluate and even overturn constitutional revisions.

The events that led to the establishment of the 'basic structure doctrine' date back to the early days of the Indian Republic, when the government sought to implement broad land reforms that impacted landowners' constitutional right to property.²⁰⁹ In *Shankari Prasad v India* of 1951,²¹⁰ the court was faced with the First Amendment that sought to curtail property rights. The Supreme Court determined that fundamental rights do not fall beyond the scope of the

²⁰⁴ Albert R, Nakashidze M & Olcay T 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70 *Hastings Law Journal* 646.

²⁰⁵ Van Staden M 'Property Rights and The Basic Structure of The Constitution: The Case of The Draft Constitution Eighteenth Amendment Bill' (2020) 14 *Pretoria Student Law Review* 8.

²⁰⁶ Van Staden M (2020) 8.

²⁰⁷ Krishnaswamy S (2010) 88

²⁰⁸ Krishnaswamy S (2010) 88.

²⁰⁹ Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014) 54.

²¹⁰ *Shankari Prasad v India* AIR 1951 SC 458.

amending power. Again, in *Singh v Rajasthan* of 1965,²¹¹ a case concerning the 17th Amendment, most of the Supreme Court bench disagreed with the idea that amendments are not allowed to take away basic rights. Two judges opposed this decision.

In 1967, the Supreme Court of India was faced with another challenge on the *Golaknath v State of Punjab*. The matter was heard by a bench of eleven judges.²¹² The history of the challenge dates back to 1953 when the Punjab state government enacted the Punjab Security of Land Tenures Act, 1953. This Act was placed under the ninth schedule of the constitution of India by the 17th Constitutional Amendment Act, of 1964. The family of Henry and William Golaknath was in possession of over 500 acres of farmland in Jalandhar, Punjab. Under the Punjab Security and Land Tenures Act, the government held that the brothers could keep only thirty acres of land each, a few acres would go to tenants and the rest was declared surplus. This was challenged by the family of Golaknath within the courts. This case was heard by the Supreme Court in 1965. The family filed a petition under Article 32 challenging the 1953 Punjab Act on the grounds that it denied them their constitutional right to acquire and hold property.

The main contention of the petitioner was that the Fundamental rights provided under Part III of the constitution of India are an essential and integral part of the constitution. They cannot be taken away by an Act of Parliament. The constitution without fundamental rights is like a body without a soul. He contended that the constitution drafted by the constituent assembly is of a permanent nature. Any act which changes or tries to bring about a change is unconstitutional. The amendment cannot eradicate or be in variance with the current provisions of the constitution. Any changes, if made, should be in accordance with the basic idea of the constitution.

In the *Golaknath* case, the idea of ‘basic structure’ was initiated and introduced in the hearings by MK Nambyar, one of the petitioner’s solicitors who represented the petitioner.²¹³ MK Nambyar was inspired by the lecture of Dietrich Conrad, a German academic, who was a pioneer in South Asian law. In February 1965, Conrad traveled to India and spoke at the

²¹¹ *Singh v Rajasthan* AIR 1965 SC 845.

²¹² *Golaknath v State of Punjab* AIR 1967 SC 1643.

²¹³ Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014) 54.

College of Law of Banaras Hindu University on ‘implicit restrictions’ of the amending authority.²¹⁴ Nambyar was intrigued by the paper that served as the basis for the lecture.²¹⁵ In October 1966, Nambyar sought permission from Conrad to incorporate the paper of his arguments when standing before the Supreme Court to amplify his argument. It is indicated that Conrad excitedly consented and stipulated that the entire paper be utilised to argue before the court.²¹⁶ Nambyar contended before the Supreme Court, predicated on Conrad’s lecture and paper, that implicit constraints exist on the amendment power such that amendments cannot impair the constitution’s intrinsic structure or ‘basic structure’.²¹⁷

Taking a different stance from its prior rulings, a significantly divided court (six to five) ruled that Parliament’s power to pass a constitutional amendment could not be used to abrogate basic rights because an amendment was considered to be a ‘law’ under Article 13, which forbade Parliament from enacting any law abrogating fundamental rights. The court in its verdict, observed and held that ‘There is substantial weight in this reasoning’; nonetheless, focused on the narrower subject of the extent of the amendment authority concerning basic rights and it judged it unnecessary to express an opinion in this respect.²¹⁸

Even though the Court issued a prospective ruling that did not nullify the challenged changes, this ruling prompted a strong political reaction. It marked the beginning of a great struggle between legislative and judicial supremacy in India.²¹⁹ In response to the *GolakNath* case, Indira Gandhi the Prime Minister of India attempted to restore legislative authority. In 1971, Indira Gandhi, in response to the political urge for social changes and following Gandhi’s Congress Party’s significant election victory, which gave it two-thirds of the seats in Parliament, introduced the 24th and 25th Amendments that were passed through the dominant numbers in the parliament. The 24th Amendment aimed, in exercise of its constituent power, Parliament may amend by way of addition, variation or repeal any provision of the constitution,

²¹⁴ Krishnaswamy S (2010) 88.

²¹⁵ Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014) 54.

²¹⁶ Krishnaswamy S (2010) 88.

²¹⁷ Landau D (2018) 6.

²¹⁸ Krishnaswamy S (2010) 88.

²¹⁹ *Golaknath v State of Punjab* AIR 1967 SC 1643.

including those protecting fundamental rights. The 25th Amendment was aimed to permit property reforms.

In 1973, in the case of *Kesavananda Bharati v State of Kerala*,²²⁰ before thirteen judges of the Supreme Court, these amendments that came through the 24th and 25th Amendments were challenged. The major question was whether the parliament reserves the power to amend the constitution in any manner. The court found that the parliament has the prerogative to alter the constitution on the sole condition the amendment does not interfere with the fundamental structure of the constitution hence rendering it spiritless. The Parliament could not change the basic structure of the constitution. In a judgment that was not unanimous, seven of the judges concluded that the amending power does not include the power to alter the essential structure or framework of the constitution to alter its identity, establishing what has been known as the 'basic structure doctrine'.²²¹ Six judges strongly disagreed, claiming that all sections of the Constitution are of equal standing and can all be altered.

The *Kesavananda* case decision produced a constitutional quagmire in India, more especially in the courts.²²² Indira Gandhi nominated a new Chief Justice upon the retirement of Chief Justice Sikri, one day after the pronouncement of the verdict. Instead of the most senior judge, as was the norm in India, she nominated Justice Ray, the most senior in the minority judgment.²²³

In June 1975, a High Court of India annulled Gandhi's 1971 election as a result of election rigging, prohibiting her from running for office for six years. Gandhi responded by declaring a state of emergency, in which Parliament used its amending power to enact two astounding amendments: the 38th Amendment that made the President's decision to issue a Proclamation of Emergency, as well as any laws passed during the emergency, immune from judicial review. The second amendment was the 39th Amendment that, preemptively, prohibited any court from

²²⁰ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

²²¹ Roznai Y 'The Migration of the Indian Basic Structure Doctrine' in Lokendra M (ed) *Judicial Activism in India - A Festschrift in Honour of Justice V.R. Krishna Iyer* (2012) 240.

²²² *Kesavananda Bharati v State of Kerala* [1973] 4 AIR 255(SCC).

²²³ Roznai Y 'The Migration of the Indian Basic Structure Doctrine' in Lokendra M (ed) *Judicial Activism in India - A Festschrift in Honour of Justice V.R. Krishna Iyer* (2012) 240.

arbitrating any issue concerning the election of the President.²²⁴ Following that, the Supreme Court heard Gandhi's appeal. In *Indira Nehru Gandhi v Raj Narain* in 1975,²²⁵ five judges confirmed the 'basic structure concept' in unanimity. Although the Court upheld Gandhi's election in the 1971 election, it ruled that the 39th Amendment's exclusion of judicial review violated three important elements of the constitutional system: free and fair elections, equality, and separation of powers, and was thus unconstitutional.

In an attempt to eliminate judicial meddling over the affairs of the parliament, parliament replied in 1976 by passing the 42nd Amendment. The 42nd amendment, which had 59 parts, held that, among other things, in section 55: 'No amendment of this constitution shall be called into question in any court for any reason,' and 'for the expulsion of doubts, it is hereby proclaimed that there shall be no restriction on the power of Parliament to change the constitution by adding, changing, or getting rid of parts of it'.²²⁶ Although Gandhi's party was defeated by the Janata Party, the Jananta party, in the 1977 elections, managed to curtail the government's and Parliament's powers during the emergency. It was unable to reverse the 42nd Amendment's Sections dealing with Parliament's absolute amendment power. After Gandhi's return to power in 1979, the 42nd Amendment was contested in the Supreme Court for destroying the Constitution's fundamental framework and basic structure.

In *Minerva Mills v Union of India* of 1980,²²⁷ four months after Gandhi's rise to prominence, five Supreme Court justices unanimously ruled that section 55 of the Amendment, which removed all limitations on the Parliament's amendment power and gave it the authority to destroy the constitution's fundamental characteristics or basic structure, was beyond the scope of Parliament's amendment authority and therefore null and void. The Court thus affirmed Parliament's limited amending authority by holding that since the constitution had conferred a limited amending power on the Parliament, the Parliament cannot expand its restricted authority into an absolute power while exercising this limited power. In addition, according to Article 368, Parliament cannot use its modifying authority to obtain the authority to abolish or abrogate the Constitution or to destroy its fundamental elements.²²⁸ The restricted power cannot

²²⁴ Krishnaswamy S (2010) 88.

²²⁵ *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 458.

²²⁶ Issacharoff S 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 49.

²²⁷ *Minerva Mills v Union of India* of 1980.

²²⁸ *Minerva Mills v Union of India* 1980.

be converted into a limitless one via the use of that authority. The Supreme Court clarified that if Parliament was conferred unrestricted amendment power through a constitutional amendment, it would completely stop being an authority under the constitution and instead become supreme over it, as it would be able to alter the entire constitution, including its fundamental structure, and even abolish it by radically altering its identity.²²⁹

In all the discussed court rulings in India, the restricted character of the amendment authority is now a fundamental constitutional law concept. Since *Minerva Mills* case,²³⁰ the basic structure doctrine has been accepted and invoked by the courts to bolster their decisions to protect the constitution's identity.²³¹

3.4 Philosophical Rationale Underlying the Basic Structure Doctrine

A constitution is a nation's most sacred document made by a democratic assembly on behalf of the people to keep its supremacy as a lofty idealism for the nation. The existence of a constitution is not the mere formal existence of the document, but rather it includes the constitution's essential features and symbolizes the nation's desired living principles. Each constitution has certain fundamental core values or principles, which form the 'spirit of the constitution'.²³² The constitution has certain fundamental principles and structural pillars which it is erected upon, and if these are taken away, the constitution will lose its original and inherent identity.²³³ According to constitutionalism theory, the fundamental identity and character of the constitution must be safeguarded at all times as they represent the founding aspirations of the people in the constitution-making process.²³⁴ The body entrusted with the amendment powers of the state is obliged to perform its powers within the framework of the constitution and maintain its constitutional identity. It cannot expand its limited authority into

²²⁹ Krishnaswamy S (2010) 88.

²³⁰ *Minerva Mills v Union of India* 1980.

²³¹ Krishnaswamy S (2010) 88.

²³² Doyle O 'Constraints on Constitutional Amendment Powers' in Albert R, Contiades X & Fotiadou A the *Foundations and Traditions of Constitutional Amendment* (2017) 4

²³³ Landau D (2018) 6.

²³⁴ Doyle O 'Constraints on Constitutional Amendment Powers' in Albert R, Contiades X & Fotiadou A the *Foundations and Traditions of Constitutional Amendment* (2017) 4

an authority to destroy the core fundamental structure of the constitution. If the body entrusted with the amending powers possessed the authority to repeal the basic provisions of the constitution, it would cease to be a creature of the constitution and become its master.²³⁵ It is worth noting that the body entrusted with the amending powers derives its powers from the constitution, making it a creature of the constitution.

The theoretical premise of the basic structure doctrine places the precept of recognizing the essential values and significant tenets of the constitution that cannot be significantly altered because they are regarded as constituting its basic foundation.²³⁶ The values reflect certain basic political-philosophical principles, which form the constitution's foundational substance, and its essence.²³⁷ The constitution is structured upon these basic principles, and it is no longer the same without them if they are taken away. Just as the amendment power cannot destroy the constitution, it cannot destroy the constitution's fundamental principles. Every constitution consists essentially of such principles, which determine the totality of the constitutional order and make up the spirit of the constitution. The main principles of the constitutional order have clear priority. One shall be cognisant that a constitution is valid only so long the core of the constitution maintains its existence. If the core of the constitution is destroyed, then the entire constitution is wiped out, even if individual constitutional precepts of inferior rank continue to be legally valid.²³⁸

The basic structure doctrine rests on a solid theoretical ground that the amendment power is delegated and thus implicitly limited in scope.²³⁹ The delegated amendment power is the internal method that the constitution provides for its self-preservation and to stand the changing needs of society. When the body vested the amendment powers destroys the constitution, the delegated power subverts its *raison d'être* and achieves nothing.²⁴⁰ Choudhry wrote that 'the

²³⁵ Dixon R & Landau D (2018) 439.

²³⁶ Doyle O 'Constraints on Constitutional Amendment Powers' in Albert R, Contiades X & Fotiadou A the *Foundations and Traditions of Constitutional Amendment* (2017) 4.

²³⁷ Enonchong SL (2022) 285.

²³⁸ Roznai Y 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' (2013) 61 *The American journal of comparative law* 651.

²³⁹ Rosalind Dixon & Landau D (2015) 606.

²⁴⁰ Enonchong SL (2022) 285.

authority to revise the constitution to meet the changing needs of the country does not include the authority to create a completely new constitution'.²⁴¹ To amend the constitution one needs not to destroy it and create a new constitution as that would be an action ultra vires. A usurpation of the amendment power that 'the people' have not delegated to the amendment authority.²⁴²

The underpinning of the basic structure doctrine is that the state's citizens are the sole owners of constitutional such as the supremacy of the constitution and democracy. The guiding principle is to protect the essence of the constitutional order of the country, the rights and liberties of countries individuals, and the spirit of the Constitution.²⁴³ The constitutional pillars are safeguarded against amendments that might take place through the country's prescribed amendatory procedure. The premise of this argument is that the whole constitution will become meaningless if these underpinnings are stripped away or compromised by the parliament.²⁴⁴

The basic structure doctrine coins that an amendment cannot annihilate or eliminate the constitution, amending its basic elements and principles is prohibited, just as eliminating the constitution is prohibited. As Roznai & Brandes wrote, if certain principles, values, and norms of the constitution are seriously altered, the life of the constitution has come to an end. From the ashes of the constitution, a new political regime emerges.²⁴⁵ The alteration of the constitution's core results in the collapse of the entire constitution and its replacement by another. The amendment power was introduced to preserve the constitution, not destroy it. The basic structure doctrine is protecting the inviolable core features of the constitution that ensures the constitution's stability and permanence and preserve it against changes that might annihilate its essential nucleus or cause disruption to the constitutional order itself.²⁴⁶ The constitution is structured upon these basic principles, and it is no longer the same without them.

²⁴¹ Choudhry S (2017) 828.

²⁴² Rosalind Dixon & Landau D (2015) 606.

²⁴³ Roznai Y & Brandes HT (2019) 4.

²⁴⁴ Doyle O 'Constraints on Constitutional Amendment Powers' in Albert R, Contiades X & Fotiadou A the *Foundations and Traditions of Constitutional Amendment* (2017) 4

²⁴⁵ Roznai Y & Brandes HT (2019) 4.

²⁴⁶ Choudhry S (2017) 828.

3.5 What Constitutes the Basic Structure of the Constitution?

In this section of the chapter, we look at what constitutes the basic structure, by analysing the constitutional limitations on constitutional amendment. To understand what constitutes the basic structure of the constitution, it is important to analyse the substantive explicit and implicit limitations on constitutional amendment powers even if it follows the recognised formal amendment procedure set in the constitution. The focus is thus both on explicit and implicit limitation on amending certain constitution provisions. These themes will be discussed through the selected constitutions worldwide and judicial pronouncements by the courts in different legal systems.

3.5.1 Explicit Limitations on The Constitutional Amendments Powers

Across the world, there is an increasing trend in the world to include in national constitutions explicit mention of provisions that limit the amendment power from amending certain constitutional subjects. Explicit limitations on the amendment powers have become a popular constitutional design across continents and different legal systems.²⁴⁷ The explicitly mentioned prohibitions are considered fundamental to protect the constitutional order and the constitutional identity to the extent that they should be beyond the amending power.²⁴⁸ The explicit limits on constitutional amendments may be found in the text of the constitution prescribing that certain provisions are unamendable of the constitution.²⁴⁹ Constitutional clauses which provides that certain constitutional provisions, principles, or subjects are immune from amendments are known as explicit limits.²⁵⁰ The aim is to protect essential characteristics of the constitutional order or principles that are perceived as being at great risk of repeal via the democratic process, in light of historical atrocities and experiences to protect the constitution.²⁵¹

²⁴⁷ Roznai Y (2015) 77.

²⁴⁸ Roznai Y (2017) 368

²⁴⁹ Roznai Y (2017) 113.

²⁵⁰ Albert R 'Constitutional Handcuffs' (2010) *Arizona State Law Journal* 663.

²⁵¹ Polzin M 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 *International Journal of Constitutional Law* 412 & 412.

One of the notable constitutions that contain explicit limits on amendment powers is Article 291(1) of the 2007 constitution of Thailand,²⁵² which protects the democratic regime of government with king as head of the State.²⁵³ Likewise, Article 313(1) of the 1997 Constitution of Thailand,²⁵³ explicitly limits the amendment powers by holding that a motion for amendment that has the effect of changing the democratic regime of government with the King as Head of the State or changing the form of the State shall be prohibited.²⁵⁴ Again, another notable country that explicitly puts the form of government as unamendable property in its constitution is Cambodia which prohibits amending of the monarchy regime'.²⁵⁵ Taing Ratana suggests that the entrenchment of these features may be an attempt to insure against repeated political regime changes, which Cambodia had experienced since the first constitution was enacted in 1947.²⁵⁶ Similar to the explicit unamendability provision in the Cambodian 1947 Constitution, the Constitution of Lao of the same year included an explicit unamendability clause, according to which the provisions relating to the monarchic, unitary, and indivisible form of the state, the representative character of the regime, and the principles of liberty and equality guaranteed by the present constitution may not be the subject of any amendment.²⁵⁷ Article 37(5) of the 1945 constitution of Indonesia states that 'provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended'.²⁵⁸ This refers to Article 1(1) of the Constitution, according to which, the state of Indonesia is a unitary state which has the form of a Republic'.²⁵⁹ This unamendability provision thus protects both the 'unitary form of State' and the 'Republic' as the form of government that forms the basic structure of the Indonesian Constitution.²⁶⁰

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Several constitutions explicitly protect the state's political structure such as the federal structure, the equality of representation of states in the Senate, the unitary structure, the

²⁵² Thailand Constitution (2007), Article 291(1).

²⁵³ Thailand Constitution (1997) Article 313 (1).

²⁵⁴ Roznai Y *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 1 ed (2017) Oxford University Press 111.

²⁵⁵ Cambodia Constitution (1993).

²⁵⁶ Ratana T 'Constitutional Change and Amendment in Cambodia' (2019) 14 *Journal of Comparative Law* 97.

²⁵⁷ Lao Constitution (1947), Article 33.

²⁵⁸ Indonesia constitution (1945), Article 37(5).

²⁵⁹ Indonesia constitution (1945), Article 1.

²⁶⁰ Indonesia Constitution (1945), Article 1.

bicameral system, or local autonomy.²⁶¹ An example of a constitution that explicitly protects the country's political structure is Article 60(4) of the 1988 constitution of Brazil which states that 'No proposed constitutional amendment shall be considered that is aimed at abolishing the following; the federalist form of the national government'.²⁶² The political structure of the State of Bahrain is also explicitly protected. Article 120(c) of the 1973 constitution of Bahrain explicitly emphasises that it is not permissible **to propose an amendment** under any circumstances **to propose the amendment** of the constitutional monarchy and the principle of inherited rule in Bahrain, as well as the bicameral system and the principles of freedom and equality established in this Constitution.²⁶³

Several constitutions protect the principle that protects the democratic order such as the 'Rule of law'. Article 1 of the 1982 constitution of The Republic of Turkey states that it is a democratic, social state governed by the rule of law; and based on the fundamental tenets set forth in the Preamble.²⁶⁴ Another group of elements that constitute the basic structure and is unamendable property of the constitution includes the provisions that protect the 'sovereignty of the people'. Such provisions receive a considerable mention in most constitutional texts as these constitutions stipulate that the government is 'elective' and 'representative', protecting the modes and characteristics of elections and representation, such as 'multiparty or pluralistic system'.²⁶⁵ Article 141 of the 1985 constitution of Guatemala holds that 'Sovereignty is rooted in the people who delegate it for its exercise to the legislative body, executive, and judicial organs'.²⁶⁶ This constitution places Article 141 of the 1985 constitution of Guatemala as an unamendable property of the constitution.

Several constitutions protect one or more of the following principles explicitly in the constitution texts. These elements include 'national unity', 'territorial integrity', the 'state's

²⁶¹ Roznai Y 'Unamendability and The Genetic Code of The Constitution' (2015) *European Review of Public Law* 77.

²⁶² The Brazil Constitution (1988), Article 60(4).

²⁶³ The Bahrain Constitution (1973) Article 120(c).

²⁶⁴ Turkey Constitution (1982), Article 1.

²⁶⁵ Albert R, Nakashidze M & Olcay T (2019) 646.

²⁶⁶ Guatemala (1985), Article 141.

existence', 'sovereignty', or 'independence'.²⁶⁷ These principles commonly appear in the constitutions of states that were former colonial territories in order to claim their independence and sovereignty.²⁶⁸ Article 158 of the 1995 constitution of Azerbaijan holds that 'There cannot be proposed the introduction of additions to the Constitution of Azerbaijan Republic with respect to provisions envisaged in Chapter I of the present Constitution regarding the people as the source of power; Sovereignty of people; questions solved by way of nation-wide voting referendum; right to represent the people; unity of people; and inadmissibility of usurpation of power'.²⁶⁹

The other most notable explicit limitation in most constitutions is the protection of human rights within a nation. Such explicit limitation is notable in Article 97 of the 1946 constitution of Japan Constitution.²⁷⁰ It provides that 'The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free, they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate'.²⁷¹ According to this notation, the human rights contained in the Japanese constitution are unamendable property of the constitution.

In Africa, there are some notable constitutions that contain explicit limitations on amendment powers with respect to fundamental constitution provisions. Article 236 of the 2010 constitution of Angola states that alterations to the constitution must respect the local autonomy of the State and the republican nature of the government as well as the unitary nature of the of the state.²⁷² Article 223 of the 1996 constitution of Chad holds that 'No amendment is allowed when it threatens the secular nature of the State or the principle of separation of powers'.²⁷³ According to the constitution of Chad, there is no procedure of revision that can be undertaken or continued if it adversely affects the principle of separation of powers, fundamental rights,

²⁶⁷ Roznai Y (2017) 368.

²⁶⁸ Roznai Y & Brandes HT (2019) 4.

²⁶⁹ Azerbaijan Constitution (1995), Article 158.

²⁷⁰ Japan Constitution (1946), Article 97.

²⁷¹ Japan Constitution (1946), Article 97.

²⁷² Angola Constitution (2010), Article 236.

²⁷³ Chad Constitution (1996), Article 223.

and freedoms of the citizen.²⁷⁴ Article 299 of the 2004 constitution of Mozambique states that constitutional amendment of laws shall have to respect the independence of the judiciary.²⁷⁵

3.5.2 Implicit Limits on The Amendment Powers

The absence of explicit limitation in the constitution text that some constitution provisions are unamendable does not mean that the amendment power has carte blanche to do as it desires to amend any provision of the constitution.²⁷⁶ There is a group of implicit unamendable provisions that constitute the basic structure of the constitution. Implicit limitations describe the idea that even if a constitution is silent with regard to any explicit limitation on the amendment power, this does not necessarily mean that the amendment power is unlimited. There are certain supra-constitutional principles beyond the constitutional power.²⁷⁷

Several countries have held that their national constitutions include a material constitutional core and a set of basic constitutional principles that are implicitly protected against formal amendments.²⁷⁸ In these countries, the courts have ascertained a certain constitutional core, a set of basic constitutional principles which form the constitution's identity, and which cannot be abrogated through the amendment procedure.²⁷⁹ The courts have moved beyond the constitution texts to interpret the constitution-making history to place implicit limitations on the amendment powers.²⁸⁰ Roznai endorses the argument that the constitution's basic substantive principles, such as the state's character, cannot be set aside by the constituted powers, not even through the amending procedure, which was designed to effectuate the essence of the constitution.²⁸¹ Roznai holds that the idea of implicit limits implies that the

²⁷⁴ Chad Constitution (1996), Article 223.

²⁷⁵ Mozambique Constitution (2004), Article 299.

²⁷⁶ Roznai Y 'Constitutional Amendability and Unamendability in South-East Asia' (2019) 14 *Journal of Comparative Law* 4.

²⁷⁷ Ngoc BS 'Globalization of Constitutional Identity' (2017) 26 *Washington International Law Journal* 463..

²⁷⁸ Colón-Ríos J 'Introduction: The Forms and Limits of Constitutional Amendments' (2017) 13 *International Journal of Constitutional Law* 567.

²⁷⁹ Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014) 3.

²⁸⁰ Roznai Y (2017) 113.

²⁸¹ Jacobsohn GJ 'Constitutional Identity' (2006) 68 *The Review of Politics* 361

constitution amending power cannot be legitimately used to negate the fundamental commitments of the constitution's core even in the absence of explicit limits.²⁸²

In India, one of the first states that developed the basic structure doctrine concept, the courts have over time developed features that are essential and constitute the basic structure of the constitution.²⁸³ Indira Gandhi the Prime Minister of India in 1971 as mentioned earlier, passed the 24th Amendment which it holds that, in the exercise of its constituent power, Parliament may amend by way of addition, variation, or repeal any provision of the constitution, including those protecting fundamental rights. This was challenged and the Supreme Court in *Kesavananda Bharati v State of Kerala*²⁸⁴ in 1973 before thirteen judges of the Supreme Court and held that 'the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution to change its identity creating what has come to be known the basic structure doctrine.'²⁸⁵ Some of the judges offered examples of such features, such as the supremacy of the Constitution, the democratic form of government, federalism, the separation of powers, and secularism.²⁸⁶ Sikri, C.J. explained that the most key elements of the basic structure included, the Supremacy of the Constitution, the Republican and democratic form of government, the Secular character of the Constitution, the Separation of powers between the legislature executive and the judiciary, and the Federal character of the Constitution.²⁸⁷ Another judge in the case Shelat, J. and Grover, J. added more basic features to this list; The mandate to build a welfare state contained in the Directive Principles of State Policy, Unity and integrity of the nation, and Sovereignty of the country. Unegde, J. and Mukherjea, J. identified a separate and shorter list of basic features: The sovereignty of India, the Democratic character of the polity, the Unity of the country, Essential features of the individual freedoms secured to the citizens, and Mandate to build a welfare state.²⁸⁸

²⁸² Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014) 3.

²⁸² Roznai Y (2017) 113.

²⁸³ Eddyono LW 'The Unamendable Articles of the 1945 Constitution' (2016) *Constitutional Review* 264.

²⁸⁴ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

²⁸⁵ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

²⁸⁶ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

²⁸⁷ Elson M 'Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion' (2018) 13 *Asian Journal of Comparative Law* 333.

²⁸⁸ Elson M (2018) 333.

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as; Sovereign democratic republic, Justice, social, economic, and political, Liberty of thought, expression, belief, faith and worship and Equality of status and the opportunity.

In contemporary India, there are established principles of the limited nature that are immune from the amendment power which are regarded as property that constitutes the basic structure of the constitution.²⁸⁹ It now includes general features of liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, freedom and dignity of the individual, unity, and integrity of the nation, free and fair elections, federalism, and secularism.²⁹⁰ Some of them are Judicial review, the Parliamentary system, the government of equality, Harmony and balance between the Fundamental Rights, Free and fair elections, and limited power of the parliament to amend the Constitution.²⁹¹ The argument is that India is a democratic and a republican State and hence is driven by its people.

The implicit limitations on the essential features of the basic structure doctrine have migrated to India's neighboring countries. In Bangladesh, the first case to raise the issue of the basic structure was the case of *Anwar Hossain Chowdhury v Bangladesh* which was heard in 1989 before the Appellate Division of the Supreme Court of Bangladesh.²⁹² The court in the case expressly referred to the Indian *Kesavananda* case.²⁹³ In that case, the Constitution (Eighth Amendment) Act 1988, which had affected the judicial review jurisdiction of the Supreme Court by means of the decentralisation of its High Court Division, was declared unconstitutional and void.²⁹⁴ The majority in the Appellate Division endorsed the basic structure doctrine, ruling that although the amendment power is not an ordinary legislative power, but rather a constituent power, it is nevertheless merely a power granted to parliament by the constitution and is thus limited. Because the amending power is a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but it is a power within and not outside the constitution.

²⁸⁹ Polzin M (2016) 413.

²⁹⁰ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

²⁹¹ Eddyono LW 'The Unamendable Articles of the 1945 Constitution' (2016) *Constitutional Review* 264.

²⁹² *Anwar Hossain Chowdhury v. Bangladesh* 1989.

²⁹³ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

²⁹⁴ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

In the case, Judge Ahmed listed several principles, such as the people's sovereignty, the supremacy of the constitution, democracy, unitary state, separation of powers, fundamental rights, and judicial independence, which he contends are the structural pillars of the constitution and therefore beyond the amendment power. According to Ahmed, if the amendment power transgresses its limits, it is in the power of the court to strike down even constitutional amendments.²⁹⁵ This line of reasoning was reaffirmed in subsequent cases in Bangladesh.²⁹⁶ In 2011, in a case before the Supreme Court in Bangladesh, *Abdul Mannan Khan v Government of Bangladesh*,²⁹⁷ the Supreme Court Appellate Division faced a challenge to the constitution of the Thirteenth Amendment Act, 1996 (Act 1 of 1996), which mandated elected governments, on completion of their term, to transfer power to an unelected non-partisan caretaker administration to oversee new parliamentary elections.²⁹⁸ Due to its violation of democratic values, which are basic features of the Constitution, this amendment was prospectively declared ultra vires. The amendment was declared void. Thus, even in the absence of explicit provisions, in a series of cases, it was decided that the amendment power under the constitution of Bangladesh is implicitly limited.²⁹⁹

Taiwan is another country with notable implicit limitations where the courts have made judicial pronouncements on what constitutes the basic structure doctrine.³⁰⁰ On 4 September 1999, the Third National Assembly of Taiwan, fearing abolishment from office, ratified a fifth Amendment to the Constitution, which provides that the Fourth National Assembly shall be appointed from the various political parties according to the ratio of votes each party received in the corresponding Legislative Yuan election.³⁰¹ In other words, the Amendment turned the National Assembly into an unelected body. It also extended the National Assembly term to two additional years. This was challenged by a group of Legislative Yuan lawmakers as

²⁹⁵ Roznai Y (2019) 4.

²⁹⁶ Roznai Y (2019) 4.

²⁹⁷ *Abdul Mannan Khan v Government of Bangladesh* 64 DLR (AD) 169.

²⁹⁸ Yep YJ 'The Conundrum of Unconstitutional Constitutional Amendments' (2015) 4 *Global Constitutionalism* 114.

²⁹⁹ Yap PJ (2015) 114.

³⁰⁰ Roznai Y (2019) 4.

³⁰¹ Yap PJ (2015) 113.

inconsistent with Article 25 of the Constitution, which requires the Assembly to exercise its powers 'on behalf of all citizens of the nation'.³⁰²

On 24 March 2000, the Council of Grand Justices announced Interpretation No. 499, which declared the Amendment unconstitutional on the grounds that it violated certain basic constitutional principles. The Council of Grand Justices stated that although the amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the constitution's very existence, destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Among the constitutional provisions, principles such as establishing a democratic republic under Article 2, sovereignty of the people and by the people under Article 2, protection of the fundamental rights of the people under Chapter Two as well as the **check** and balance of governmental powers are some of the most critical and fundamental tenets of the Constitution as a whole.³⁰³ One month after this judgment, the National Assembly re-amended the Constitution accordingly.³⁰⁴ It was thus argued that with this judgment the Council of Grand Justices not only 'gained trust from the Taiwanese public', but also became the most significant organ for fulfilling the rule of law.³⁰⁵

3.6 The Judiciary and The Unconstitutional Constitutional Amendments Doctrine

The principle of separation of powers is an important tenet of liberal democracy and good governance. Under the principle of separation of powers, the powers and functions of the state are distributed among the legislature, the executive, and the judiciary, with no single organ of state or government exercising complete authority. According to this principle, no organ of government is more 'government' than the others.³⁰⁶ The three organs must complement each other. To prevent this abuse, it is necessary from the nature of things that one power should be

³⁰² Roznai Y (2019) 4.

³⁰³ Roznai Y & Brandes HT (2019) 9.

³⁰⁴ Roznai Y & Brandes HT (2019) 9.

³⁰⁵ Roznai Y & Brandes HT (2019) 9.

³⁰⁶ Polzin M (2016) 411.

a check on another. These safeguards are measures that drive the state towards good government, democracy, and the rights of the people.³⁰⁷

The separation of powers emphasizes that the body vested with the amendment powers within the country is aware of its constitutional limitations. However, this is a self-restraint mechanism, and unfortunately, it is not always enough. To protect the Constitution, it would certainly be vain for a Constitution to declare or imply limitations upon the power to amend it if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained. The separation of powers is important because there would be an end to everything if the same person or body, whether of the nobles or the people, were to exercise all three powers. The principle of separation of powers is designed to prevent arbitrary or tyrannical rule and to protect the governed. Therefore, the basic structure doctrine will serve impartially to determine if the governmental organs observe their constitutional limitations and to safeguard against abuse of the vested powers.

The basic structure doctrine engenders the judiciary as an arm of the separation of powers to adjudicate disputes where there is a risk of the abuse of amending powers by the parliament.³⁰⁸ The basic structure doctrine amplifies the separation of powers and enforces the Constitution. The separation of powers through the judiciary acts as a guardian of the constitution from abuse on either arm of the government. Through the basic structure doctrine, the judiciary has a sensitive and crucial role to play in controlling the exercise of power by the organs of the state and safeguarding the principle of separation of powers.³⁰⁹

The basic structure doctrine fulfills the vertical separation of powers, which exists between the primary and secondary constituent power. It improves the separation of powers between the primary and secondary constituent powers which means that the amending authority is independent within its margins as long as it acts within its authority.³¹⁰ It serves as a mechanism

³⁰⁷ Roznai Y & Brandes HT (2019) 4.

³⁰⁸ Doyle O 'Constraints on Constitutional Amendment Powers' in Albert R, Contiades X & Fotiadou A 2*The Foundations and Traditions of Constitutional Amendment* (2017) 4.

³⁰⁹ Nachan N 'The Issue of Constitutional Instability Caused by the Limitation of Constitution Amendment Procedure Under Article 256 of The Constitution of The Kingdom of Thailand B.E. 2560' (2018) *Songklanakarin Law Journal* 10.

³¹⁰ Van Staden M (2020) 8.

for determining if the amending authority does not surpass its limits. The amending authority bears the function set upon it by the constitution which is to amend the constitution according to the amendment procedure and its possible limitations. It must obey any limits set upon it and preserve the constitution. Amending the constitution is different from destroying it and reconstituting a new constitution.

Fombad contends that there can be no respect for the constitution and the values and principles that underlie it if there are no secure mechanisms, whether by ordinary courts or other specialized courts or bodies, that can independently enforce the provisions of the constitution while checking and controlling any abuses of its provisions.³¹¹ Most will agree that the judiciary has a central role to play in entrenching democracy in modern democracies. The courts should be active guardians of the constitution, the legislature, and the executive, and ultimately the popular majorities who elect them as these may constitute threats from which constitutionalism needs to be protected. The significance of the doctrine is that it blocks amendments that seek to destroy the constitutional identity and pillars from the actions of the executive and the legislature, and it is referred to as the guardian of the constitution.³¹² The court blocks the proposed amendment to the constitution if they are inconsistent with the founding ethos of constitutional order.³¹³ It directs modifications to protect constitutional identity. The powers conferred by the basic structure doctrine ensure that amendments are governed by a goal consistent with the constitution's foundational premise. When an amendment is exposed to the examination of the doctrine, the judicial form of governance enquires about how the amendment contributes to the nation's good governance, forcing the amendments to be directed to their intended aims.³¹⁴ In this context, the objective is to achieve democratic government, avoid dictatorship, and prevent political and constitutional turbulence.³¹⁵ An example of the significance of the doctrine is notable in the absence of a traditional amendment limiting mechanism in a constitution.

³¹¹ Dixon R & Landau D (2015) 609.

³¹² Landau DE & Roznai Y 'From an unconstitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 41.

³¹³ Roznai Y 'The Migration of the Indian Basic Structure Doctrine' in Lokendra M (ed) *Judicial Activism in India - A Festschrift in Honour of Justice V.R. Krishna Iyer* (2012) 240.

³¹⁴ Roznai Y (2017) 4.

³¹⁵ Dixon R & Landau D (2015) 609.

The significance of the basic structure doctrine, like a double-edged sword, gives the judiciary not only the ability to respond to such an amendment but also the authority to restore order to actions of the legislature that are inconsistent with the spirit of the constitution.³¹⁶ In this case, it imposes that the actions of the parliament remain within the ambits outlined in the preamble of the constitutions that reflect the nation's historic struggles towards the attainment of democracy. The preamble of the constitution embodies the spirit of the Constitution, and any amendment that contradicts its preamble is unconstitutional. In providing a brief but essential history of a nation, it gives rise to the spirit that led to the adoption of the constitution or that led to its adaption.³¹⁷ Throughout most countries' preambles, it is stated that the ethos of the Constitution is a recognition of the plights the country endured to achieve democracy before being subjected to these endless amendments, which offered protection against a return to a history marked by tyrannical rule, injustice, and constraint.

There are some controversies surrounding the judiciary's use to implement the unconstitutional constitutional doctrine.³¹⁸ These scholars consider the doctrine inherently at odds with the purpose it seeks to achieve in protecting the constitutional order in a particular democratic choice. The unconstitutional constitutional doctrine undermines deliberative democracy, giving judges too much authority and preventing the current generation from modifying the constitution to meet their changing needs. This is supported by the idea that state sovereignty is delegated to the people through elected members as representatives of the people's will, and judges are not elected by the people.³¹⁹ According to Dixon, Landau, and Roznai, the theory is also susceptible to criticism since it is judge-centered rather than based on a rationale for enabling the parliament to be chosen by the state's citizens.³²⁰ The second argument is that the doctrine permits courts to oppose constitutionally unrestricted amendments, leading to a perception of judicial overreach. In a democratic society, the people, via their government

³¹⁶ Dixon R & Landau D (2018) 438.

³¹⁷ Landau D (2018) 9.

³¹⁸ Albert R 'Counter constitutionalism' (2008) 31 *Dalhousie Law Journal* 48.

³¹⁹ Albert R (2008) 48.

³²⁰ Landau D, Roznai Y & Dixon R 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' In: Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 70.

representatives, should have the final say on all matters of public questions.³²¹ As the people's representative, parliament should be considered the "fountain of all authority" who can amend the constitution as they see fit. Therefore, adopting the doctrine to prevent amendments proposed by the legislature is undemocratic.

Gary Jacobsohn contends that the doctrine supersedes people's choices by entrusting judicial powers to judges who are not principally elected, as opposed to parliaments entrusted to represent the people.³²² This sentiment is echoed by the premise that the legislature is the people's representative. Consequently, the legislature must have unconstrained jurisdiction to amend the constitution as it deems fit.³²³ In a second argument, Albert critiques that the doctrine's theoretical base hinders participatory democracy.³²⁴ Carlos Bernal agrees with the argument by noting that the doctrine may supplant the people's perspective if discretionary power is delegated to unelected judges,³²⁵ privileging the opinions of a handful of unelected and unaccountable judges regarding the interpretation of constitutional provisions. This results in judicial supremacy and disregards cherished principles of representation and political equality in the final resolution of rights issues.³²⁶ As stipulated, the doctrine maintains the original constitutional provisions and is attacked because it robs the current generation of the right to decide for itself. Each succeeding generation ought to have the authority to amend the constitution following the conditions that existed at that time. Bernal contends that the doctrine is incompatible with deliberative democracy because some constitutions have explicit provisions that enable the people's will to be expressed via referendums. The judicial review vitiates this because it will block amendments that the people approve through the referendum.

Commented [A45]: Where is the opening quote?

³²¹ Bernal C (2013) 347.

³²² Jacobsohn GJ 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 *International journal of constitutional law* 460.

³²³ Sijoria S *Unconstitutional Constitutional Amendment: Limiting Amendment Power In India, Colombia And Benin* (Unpublished LLM Thesis, Central European University, 2021) 30.

³²⁴ Albert R (2008) 48.

³²⁵ Dixon R & Landau (2015) 609.

³²⁶ Bernal C (2013) 347.

Another critique of the doctrine is that the courts may exploit it for democratic abuse in which the incumbents may bribe judges.³²⁷ Inadvertently, the central role of the courts can elevate the stakes in political fights over who influences the courts. This might result in constitutional amendments being challenged in court due to political intervention in judicial nominations, removals, and salaries. Consequently, a leader who aspires to be an autocrat may acquire control of the judiciary before changing the limits on the number of terms a president may serve. In addition, they may pack the courts when disagreeing with court decisions and cause instability.³²⁸ The doctrine's historical record indicates that it could be more conducive for autocrats as the president could incorporate the courts with supporters of his agenda in an authorized manner. As a result of the fact that incumbents are the ones who elect judges, the strong judicial process in the hands of political leaders gives them an extra powerful tool that allows them to keep their grip on power.³²⁹

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The doctrine is claimed to offer judges discretionary power, which exceeds their authority. However, the model has been criticised for lacking clarity and precision in its meaning. The ambiguity of the doctrine gives courts the discretionary authority to determine whether a particular provision is part of the basic structure of the constitution. These actions are considered an overreach of the judicial authorities, which are not even granted by the countries' constitution.³³⁰ Landau, for instance, identifies a paradox in the legal doctrine of unconstitutional constitutional changes regarding the sovereignty and the enormous powers of unelected judges not granted by the constitution as an overreach of the judicial authorities.³³¹ According to Gary Jacobsohn, the doctrine of judicial review of constitutional amendments exacerbates the conflict between the legislative and judicial branches. This is because the doctrine prevents the legislative branch from deciding which aspects of the constitution are fundamental and gives the courts the sole authority to make that determination.³³² It is a viewpoint that the lack of reasonable standards for adjudicating cases involving breaches of

³²⁷ Landau D & Dixon R 'Constraining Constitutional Change' (2015) 4 *Wake Forest Law Review* 860.

³²⁸ Landau DE, Dixon R & Roznai Y 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 14.

³²⁹ Roznai Y & Brandes HT (2019) 25.

³³⁰ Dixon R & Landau (2015) 609.

³³¹ Dixon R & Landau (2015) 608.

³³² Jacobsohn G (2006) 463.

basic features of the constitution, the supremacy of the judges is established, even though the constitution itself does not confer this supremacy. Over this, the courts have considerable discretion on constitutional amendments.

The chapter posits that the criticism levelled against the unconstitutional constitutional doctrine is unwarranted, given that the doctrine in question is grounded in the Constitution and embodies the authentic essence of democracy.³³³ Furthermore, the implementation of the doctrine has been utilised to regulate the head of governments attempts to secure permanency in presidential office through the misuse of amendment authority. The doctrine's application has been deemed undemocratic due to its restriction of the Parliament's authority to amend the Constitution, notwithstanding any explicit limitation in the Constitution. First, certain decisions must not be left to the majority, even in a democracy. Furthermore, the level of public support and representation that a government attains in contemporary democracies is subject to scrutiny. In conclusion, the constitutional sovereignty model entails restrictions on legislative authority.

The fundamental aspect of this doctrine is that it transcends the constitutional text and does not precisely apply to a particularly extensive set of provisions in isolation. However, it can serve as a deterrent against the ever-evolving array of tactics employed by autocrats to circumvent presidential term limits. The doctrine allows Judges to conduct granular, case-by-case analyses of potential dangers.³³⁴ Furthermore, the doctrine demonstrates adaptability by considering comparative experiences from other jurisdictions on what constitutes the fundamental elements of the constitution. This allows for caution when nullifying amendments to provisions considered to be foundational pillars of the constitution that ought to remain unchanged, as such action signifies a clear indication of democratic regression.

As the dynamics used by the autocrats evolve, patterns of constitutional abuse may emerge; under such conditions, the doctrine may be applied to counteract these emergent threats. The courts are able to uphold the constitutional order without being limited by the provisions of the constitution due to its adaptable nature. In the third presidential term case in Colombia, as opposed to protecting a single constitutional principle in isolation, the doctrine tends to

³³³ Landau DE, Dixon R & Roznai Y (2019) 14.

³³⁴ Landau DE, Dixon R & Roznai Y (2019) 16.

safeguard the constitution against substantial movement along the spectrum toward authoritarianism, as evidenced by the aforementioned case involving Colombia.

Most significantly, a state's identity is altered whenever its fundamental obligations are disrupted, and the Constitution is amended.³³⁵ Therefore, in the event that the legislature passes an amendment that compromises the Constitution's internal coherence and identity, the Court can use the doctrine of implied limitation to uphold its fundamental principles and values by declaring said amendment unconstitutional.³³⁶ The unamendable principles declared by the courts indicate that the theory has been utilized to identify the constituent parts that comprise the Constitutional identity, considering the specific historical and contextual factors of the state.

Numerous scholars denounce the theory, asserting that it amounts to the courts assuming the legislative role and depriving the current generation of the opportunity to amend the Constitution in response to evolving circumstances.³³⁷ This is supported by the fact that Parliament represents the sovereign's collective will and that genuine sovereignty resides with the people.³³⁸ However, I contend that majoritarian politics and the sovereignty of the people are not synonymous. When a constitutional amendment is being pursued that is supported by the majority of the population, the overwhelming number of the minority may stifle their dissent or concern. With this in mind, I also contend that individuals may become enraged and, in their quest for passion, grant parliament the authority to alter the current constitutional order. **May the individuals who embraced constitutional democracy constitutionally or democratically sanction this political transformation.** Such a transformation, in my opinion, would be contrary to the fundamental principles of separation of powers and constitutionalism. The significance resides in facilitating the judiciary's execution of its constitutional guardianship responsibilities and permitting it to check legislative power by examining whether an amendment satisfies fundamental Constitutional provisions. The theory of checks and balances therefore dictates that in the event that one branch of government can sway public sentiment, another branch must have the capacity to quell public passion. The theory, as

³³⁵ Jacobsohn G (2006) 462.

³³⁶ Landau DE, Dixon R & Roznai Y 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 14.

³³⁷ Landau DE, Dixon R & Roznai Y (2019) 14.

³³⁸ Bernal C (2013) 347.

embraced by the judiciary, empowers it to assume a pivotal role in reconciling public sentiment with constitutional obligations.

3.7 Term limits as the Basic Structure of the Constitution?

More importantly for the purpose of this paper, the remaining question is whether the term limits of the head of government can be regarded as part of the basic structure of the constitution. The analysis is focused on the explicit and implicit pronouncement of term limits of the head of government as a property of the basic structure of the constitution.

Whether the term limits on the head of government constitute the basic structure of the Constitution has much to do with a country's past.³³⁹ Term limits reflect the constitution drafters' ambitions to direct the nation away from past tragedies.³⁴⁰ The aim is to place the country into a more 'just' future to further protect against political agendas that undermine constitutionalism and constitutional stability.³⁴¹ The term limits are regarded as provisions that can transform polities. Constitutions aim to mark a dividing line between the past and the future, representing a new era and attempting to cultivate a distinct political community away from a form of government that is characterized by dictatorship.³⁴² Constitution-makers mainly consider the previous regime's failures, atrocities, and abuses.³⁴³ Emerging out of previous and dysfunctional regimes, new constitutions essentially react to the faults of past political leaders in an attempt to undo historical injustice.³⁴⁴ To break from the past country's constitutions, some include explicit unamendable provisions limiting presidential terms in the constitution. Term limits exist due to a complicated history of military coups, authoritarian rule, and leaders' efforts to seize state control.³⁴⁵

³³⁹Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 54.

³⁴⁰ Erzow N 'Term limits and Succession in Dictatorships' in Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 279.

³⁴¹ Landau D & Dixon R 'Constitutional End Game: Making the Constitutional Term limits Stick' (2020) 71 *Hastings Law Journal* 374.

³⁴² Landau D & Dixon R (2020) 374.

³⁴³ Dixon R and Landau D (2018) 483.

³⁴⁴ Albert R (2010) 687.

³⁴⁵ Maltz G (2007) 141.

In the number of modern democracies, there remains a need to deter elites from abusing their position to hold onto power or to exploit the state's resources, which generates the pragmatic rationale for term limits. Universally it is accepted that power has a corrupting influence, and absolute power adversely affects the country's democratic nature.³⁴⁶ The primary intent to place term limits as an immutable characteristic of the constitution stems from the view to limit indefinite power and equally protect a state's democratic system from an intrusion on democracy.³⁴⁷ The struggle against an established tyrant is a potent cultural symbol that haunts democratic nations; it is necessary in a democratic society and reasonable to prevent the democratic order from degenerating into a monarchy through unamendable term limits.³⁴⁸

Presidential regimes provide incumbents with an unfair advantage while running for re-election. Consequently, term limits are supposed to discourage incumbents from abusing their position to continue in power and to ensure a level playing field for other contenders.³⁴⁹ In a presidential system, the probability of getting a 'republican emperor' is created by the unlimited mandate period.³⁵⁰ In these cases, term limits are intended to prevent the de facto establishment of a dictatorship.³⁵¹ The term limitations may improve a democratic society by imposing a predicted logic of political change. Term limits prohibit the president from exercising limitless authority and safeguard other constitutional values, such as democratic accountability and the separation of powers.³⁵²

Most constitutions in several jurisdictions place explicit limits on the term limits of the head of government as unamendable provisions due to their essence on the constitutional order. Constitutions protect constitutional rules regarding the head of government term limits,

³⁴⁶ Albert R (2010) 687.

³⁴⁷ Maltz G (2007) 141.

³⁴⁸ Negretto GL *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (2013) 63.

³⁴⁹ Negretto GL (2013) 63.

³⁵⁰ Fombad C & Inegbedion N 'Presidential term limits and their impact on constitutionalism in Africa' in Fombad C & Murray C *Fostering constitutionalism in Africa* (2010) 17.

³⁵¹ Albert R (2010) 687.

³⁵² Fombad C & Inegbedion N 'Presidential term limits and their impact on constitutionalism in Africa' in Fombad C & Murray C *Fostering constitutionalism in Africa* (2010) 17.

including the number and duration or eligibility criteria for election.³⁵³ In several countries, both presidential (or semi-presidential) and parliamentary regimes, both directly and indirectly elected presidents explicitly mention the term limits as constitutional provisions immune from amendments. It is evident worldwide where constitutions explicitly distinguish term limits as *Groundnorm* constitutional provisions of the constitution. These countries consider presidential term limits an important normative property of the constitution,³⁵⁴ and raise the political costs of trying to abrogate them by placing limits against the amendments or revisions. The term limits provisions, principles, or subjects are regarded as immune from amendments as they are regarded as the Constitution's fundamental pillars, which is unamendable. Considering the misuse of constitutionalism that pervades worldwide, enshrining term limits as an immutable characteristic of the Constitution provides several advantages to defend the constitutional order.³⁵⁵

Term limits are specifically given heightened constitutional protection from amendments with some frequency of having an explicit mention in constitutions.³⁵⁶ The constitution of Paraguay offers an example: it creates two procedures, amendment and reform, and requires that particular articles, including those treating 'the duration of mandates', can only be changed using the more-demanding reform procedure, which requires a constituent assembly.³⁵⁷ An example of such absolute heightened protection is the Guatemala 1985 Constitution which protects the non-re-electability of the presidency.³⁵⁸ Article 281 explicitly holds that no question relating to the principle of the non-re-electability for the exercise of the Presidency of the Republic be raised in any form, nor may the effectiveness or application of the articles that provide for alternating the tenure of the Presidency of the Republic be suspended or their

³⁵³ Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 40 –57.

³⁵⁴ Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 40 –57.

³⁵⁵ Roznai Y '*Constitutional Unamendability in Latin America Gone Wrong*' in Albert R, Bernal C & Benvindo JZ America (eds) *Constitutional Change and Transformation in Latin* (2019) 93.

³⁵⁶ Landau D, Roznai Y & Dixon R '*Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America*' in Batur A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 13.

³⁵⁷ Paraguay Constitution 1992 & Roznai Y '*Constitutional Unamendability in Latin America Gone Wrong*' in Albert R, Bernal C & Benvindo JZ America (eds) *Constitutional Change and Transformation in Latin* (2019) 93.

³⁵⁸ The Guatemala Constitution (1985), Article 281.

content changed or modified in any other way.³⁵⁹ These provisions explicitly deter any activity in favor of the re-election of the person occupying the presidency of the Republic or in any other way intended to prolong the term fixed by the Constitution for that office. The Dominican Republic is another country that places term limits as an unamendable property of the Constitution.³⁶⁰ The Constitution holds that the power vested in the Congress to reform the constitution does not extend to the form of government, which includes the power to reform the presidential term.³⁶¹ An emphasis is placed on the Dominican Republic constitution that defying the constitutional principle of presidential rotation and non-re-election for the presidency is subject to punishment as it is a gross disturbance of the fundamental pillars of what the state is built upon.³⁶²

Around the world other constitutions place absolute heightened protection in the constitution text on the head of government's term limits as the country's fundamental pillar. Emphasis is placed that any action of reform constitutes a gross violation of the state's integrity and the form of government.³⁶³ One such is the 1983 Constitution of El Salvador, which places absolute heightened protection in the constitution text.³⁶⁴ It provides that 'under no circumstances, may the articles of this constitution, which refer to the principle that a President cannot succeed himself, be amended.'³⁶⁵ Another example of a strict one-lifetime presidential term in the 1982 Constitution of Honduras is likewise among the constitutions that limit the presidents to only one-lifetime term in office, preventing any attempt to change the no-re-election rule by embedding it in the eternity clause. It also provides that anyone attempting to change the term limit would 'cease' to hold office and be barred from doing so for the subsequent ten years.³⁶⁶

³⁵⁹ The Guatemala Constitution (1985), Article 281.

³⁶⁰ The Dominican Republic Constitution of 1881, Article 110.

³⁶¹ The Dominican Republic Constitution (1881) Article 110.

³⁶² Roznai Y 'Constitutional Unamendability in Latin America Gone Wrong' in Albert R, Bernal C & Benvindo JZ America (eds) Constitutional Change and Transformation in Latin (2019) 93.

³⁶³ Roznai Y 'Constitutional Unamendability in Latin America Gone Wrong' in Albert R, Bernal C & Benvindo JZ America (eds) Constitutional Change and Transformation in Latin (2019) 93.

³⁶⁴ El Salvador Constitution, 1983.

³⁶⁵ El Salvador Constitution, 1983.

³⁶⁶ Honduras Constitution 1982.

In the African continent, there is a notable frequency of term limits, which are identified as the unamendable property of the constitution clauses in constitutions. Beyond general references to the republican form of government, there are sometimes attempts to render the term limit of the head of itself unamendable.³⁶⁷ Several states notably explicitly place mention of term limits of a head of government, as fundamental provisions that are not subject to revisions as they are regarded as crucial property of the constitution.³⁶⁸ These constitutions restrict amendments that would preclude the ability of presidents to seek another term or expand the length of the term as the head of the government of the country. Article 234 of the 2020 Algeria Constitution explicitly places a prohibition and unamendability against holding more than two consecutive or discontinuous presidential terms of five years each.³⁶⁹ Another example is Article 165 of the 1991 constitution of Burkina Faso which states that ‘no bill or proposal of revision of the constitution is receivable when it affects’, among others, ‘the limitation clause of the number of presidential mandates’ or ‘the duration of the presidential mandate.’³⁷⁰ Article 165 of the 1991 Constitution of Burkina Faso is an unamendable clause of the constitution as the term limits of the head of state in the country are regarded as the basic structure of the constitution. Similarly, Article 220 of the 2005 constitution of the Democratic Republic of the Congo, explicitly holds that the number of presidential terms cannot be the object of revisions as they constitute the unamendable property of the constitution.³⁷¹ Article 103 of the 2001 constitution of Senegal, holds that the President could only be elected twice.³⁷² Article 99 of the 1991 Constitution of Mauritania places the specific length and number of presidential terms as an unamendable property of the constitution, Article 99 of the 1991 constitution of Mauritania states ‘no procedure of revision of the Constitution can be engaged if it jeopardizes the principle according to which the mandate of the President of the Republic is of five years, renewable one sole time.’³⁷³

³⁶⁷ Dixon R & Ginsburg T & Abebe AK ‘Amendments and Evasion of Term limits in Africa’ in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 47.

³⁶⁸ Dixon R & Ginsburg T & Abebe AK ‘Amendments and Evasion of Term limits in Africa’ in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 46.

³⁶⁹ Algeria Constitution 2020, Article 234.

³⁷⁰ Burkina Faso (1991) Constitution Article 165.

³⁷¹ Burkina Faso (1991) Constitution Article 165.

³⁷² Senegal (2001) Constitution, Article 103.

³⁷³ Mauritania (1991) Constitution Article 99.

The 2003 Constitution of Rwanda explicitly states that if the constitutional amendment concerns the term of the president of the Republic, the amendment must be passed by referendum after adoption by each Chamber of Parliament and no amendment to this article is permitted without this process.³⁷⁴ Article 108 of the 2004 Constitution of the Central African Republic which expressly excluded from constitutional revisions the number and duration of presidential terms, and conditions of eligibility.³⁷⁵ Another example, Article 177 of the 2010 Constitution of Niger, holds that in any case, no person may serve more than two presidential terms or extend the mandate for any reason whatsoever.³⁷⁶ In a similar logic, Article 154 of the 2010 Constitution of Guinea holds that 'the number and the duration of the mandates of the President of the Republic, may not be made the object of a revision'.³⁷⁷ As discussed it is notable that these constitutions do not permit any revisions on the provisions concerning the term limits on the head of government as they are considered among the *jus cogens* of the constitution.

Even in the absence of any explicit limitations in the constitution text, there are some evident constitutional courts' judicial pronouncements that hold that term limits of the head of government cannot be amended or abolished as a component of the Constitution's fundamental pillars. These Constitutional Courts argue that revisions to the term limit provisions, subjects, or articles would be a blatant breach of the constitutional order of the country and would breach the agreements of the constitution-making history.³⁷⁸ Versteeg **documented that courts** have successfully halted attempts to amend on the ground that they protect the form of government which is placed in the basic structure of the constitution.³⁷⁹ In Colombia President Alvaro Uribe attempted to use the route of a referendum to amend the Constitution of Colombia to extend the presidential term, which would allow him to serve for a third term. The Colombian Constitutional Court found the proposed amendments unconstitutional as they amounted to substituting the Constitution. The Constitutional Court of Colombia emphasised that any revision to the term limits would replace the Constitution as an alteration to term limits disturbs

³⁷⁴ The Rwanda (2003) Constitution, Article 193.

³⁷⁵ Central African Republic (2004) Constitution, Article 108.

³⁷⁶ Niger (2010) Constitution, Article 177.

³⁷⁷ Guinea (2010) Constitution, Article 154.

³⁷⁸ Negretto GL (2013) 63.

³⁷⁹ Versteeg M 'The Politics of Presidential Term limit Evasion' *Colombia Law Review* 15.

the basic structure of the Constitution. According to the Court, such a process could only be carried out through a constitutional assembly.³⁸⁰ As evident, in Colombia, the courts have, through judicial pronouncements, outlined term limits dealing with presidential re-election in the absence of explicit mention of the Constitution, which would be in contrast to the Basic Structure of the constitution.

In Africa, the courts have halted referendums and attempts in the absence of explicit mention in the constitution text to amend the amendments of the head of government.³⁸¹ In Benin, in 2011, the Court invalidated a referendum law because it only excluded the expressly unamendable provisions of the Constitution from a referendum.³⁸² Despite the lack of specific reference to the unamendability of the head of government, the court held that term limits of the head of government, the minimum and maximum age for presidential candidates, and the presidential nature of the political system should also have been excluded from referendums. The Constitutional Court essentially extended the list of unamendable constitutional provisions. In 2014, the Constitutional Court ruled that a widely publicised call urging the president to revise the constitution of Benin to allow a third term on the number of terms the head of government was unconstitutional, as term limits are unamendable as established in the court's jurisprudence.³⁸³ This decision essentially banned even official discussions of the possible amendment of the head of government mandates as the basic structure of the constitution. The court evoked the constitution's preamble and highlighted the historical events, such as the violation of human rights, undemocratic governance, and misuse of power that characterised the battle leading up to the constitution's adoption in 1990.³⁸⁴ In addition, it highlighted the adoption of democracy and the rejection of confiscation and individualization of power. If the referendum were to go forward, it would undermine the preamble of Benin's

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³⁸⁰ Landau D, Roznai Y & Dixon R 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' in Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 13.

³⁸¹ Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 41.

³⁸² Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 57.

³⁸³ Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 57.

³⁸⁴ Sijoria S *Unconstitutional Constitutional Amendment: Limiting Amendment Power in India, Colombia, And Benin* (unpublished LLM thesis, Central European University, 2021) 49.

Constitution which is against the holding of office by one person in positions of power for indefinite periods. Therefore, the court ruled that the limit on the number of terms a president may serve is an integral feature of the constitution and cannot be altered by parliament.

As discussed, term limits of the head of state have the effect and primary aim of deterring prominent presidents from prolonging in office, which threatens to undermine the constitutional form of government when a lengthy president is in charge.³⁸⁵ Resultantly, due to the sensitive nature of misuse of amending powers vested in the parliament throughout history, constitutions provide term limitations with highly elevated protection from amendments such as the status of unamendability under any circumstance. The primacy of term limits as an essential property of the basic structure of the constitution can only be altered through the more rigorous reform procedure, which necessitates a constituent assembly with a high level of democratic participation.

Throughout the world, prominent presidents employ various constitutional techniques to extend their tenure in office, while term limits aim to curb their goals and aspirations.³⁸⁶ This argument justifies why term limits of the heads of governments are considered to safeguard democracy which is also a basic structure of the Constitution. As a result, term limitations serve the legitimate purposes of safeguarding civil liberties, democratization, the rule of law, and the avoidance of tranny within a state.³⁸⁷ The unamendable term limits of the head of state provides rationale and assurance that an influential individual cannot entrench himself as a supreme leader.³⁸⁸ However, this compromise rests on the immutability of these provisions. Thus, preventing presidents from overstaying their terms is much possible through the unamendability of the term limit provisions. The term limits as non-amendable rules are essential for preventing monopolistic power grabs at the hands of the to-be- autocrats.³⁸⁹

³⁸⁵Landau D, Roznai Y & Dixon R 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' In Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 13.

³⁸⁶ Dixon R & Landau D (2020) 359.

³⁸⁷ Dixon R & Landau D (2020) 359.

³⁸⁸Landau D, Roznai Y & Dixon R 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' In Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 13.

³⁸⁹ Cheeseman N & Lindberg SI 'Democracy and Elections in Africa' (2011) 77 *Baltimore: Johns Hopkins University Press* 248.

Possibly, the potential of re-election helps to ensure accountability in a State. Hence the amenability of term limitations on re-election fosters those in authority to exercise power responsibly.³⁹⁰

3.8 The Relevance of the Application of the Unconstitutional Constitutional Amendments Doctrine on Executive Term Limits

The unconstitutional constitutional amendments doctrine is a roadblock barrier against unconstitutional forms of constitutional reform, especially erosion of the head of government term limits.³⁹¹ The unconstitutional constitutional doctrine prevents alterations that endanger degradation and adjustments to term limits, especially for presidential system chief executives, who run a great danger due to their nature.³⁹² The unconstitutional constitutional doctrine developed by the courts has sometimes restricted the replacement of term limits and other techniques of consolidating power.³⁹³ The rise of the unconstitutional constitutional doctrine on controlling constitutional change has frequently led to judicial cases in which courts have been tasked with determining whether presidential re-election attempts can go forward or the amendment of term limits of heads of State. In these instances, courts have been tasked with policing term limits as the basic structure of the constitution has arisen in many different continents, such as South America, particularly in Colombia.³⁹⁴ Also, African judiciaries have begun to raise the issue of restricting unconstitutional constitutional amendments through the jurisdictions such as Benin, Niger Central African Republic, Uganda, and Kenya.

In Colombia, the unconstitutional constitutional doctrine was employed to obstruct constitutional amendments on presidential term limits and ensured that the State does not

³⁹⁰Gelfeld B *Preventing Deviations from Presidential Term Limits in Low – and Middle-Income Democracies* (unpublished Doctoral Degree in Public Policy Thesis, Pardee RAND Graduate School, 2018) 9.

³⁹¹ Landau D (2013) 191.

³⁹² Scheppele KL 'Autocratic Legalism'. (2018) 85 *UCLR* 555.

³⁹³ Roznai Y (2017) 4.

³⁹⁴ Landau D, Roznai Y & Dixon R 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' In: Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 13.

remain in the hands of the incumbent for three consecutive terms.³⁹⁵ This case is a clear demonstration that when making constitutional changes that repeal one term limit, the judges have a robust normative power to strike down the bid as an unconstitutional constitutional amendment.³⁹⁶ The court deployed the unconstitutional constitutional doctrine after President Alvaro Uribe, who held power from 2002 until 2010, sought re-election for the third consecutive mandate.³⁹⁷ The first amendment that allowed the re-election was accomplished through the congress that put up a constitutional amendment to permit the then-current incumbent, President Uribe Velez, to seek future re-election for the second time in a row in consecutive elections. Importantly, the Colombia constitution explicitly commands that no candidate shall be allowed to contest elections consecutively or presidential re-election.³⁹⁸ This constitutional provision is considered an essential element of the constitution.³⁹⁹ The amendment for re-election was challenged in the court on procedural grounds. The challenge in the court was grounded on the fact that allowing an amendment that grants an incumbent the ground to run for re-election may lead to the monopolization of the power, which in turn would lead to the abuse of the power by the incumbent. The court acknowledged that allowing a president to serve two consecutive terms did pose certain risks that Uribe might misuse his position but concluded that these risks were marginal and within an allowable threshold.⁴⁰⁰ The court agreed with the argument that allowing the president to run for a second term is not an amendment that replaces the 1991 Colombian constitution and so permitted him to run for a second term. This ruling permitted President Uribe to compete for re-election in 2006, and he went on to win and became the president for another four years in office. The Court allowed the first amendment, permitting Uribe to win a second term in 2006.

³⁹⁵ Landau D, Roznai Y & Dixon R 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' In: Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 54

³⁹⁶ Cepeda-Espinosa MJ & Landau D *Colombian Constitutional Law: Leading Cases* 1 ed (2017) 341.

³⁹⁷ Issacharoff S *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015) 45.

³⁹⁸ Dixon R and Landau D 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 *University of California, Davis Law Review* 1354.

³⁹⁹ Cepeda-Espinosa MJ & Landau D (2017) 341.

⁴⁰⁰ Cepeda-Espinosa MJ & Landau D (2017) 341.

During Uribe's second tenure in office, he gained support, and there was an ever-growing demand for his leadership role, making him enjoy the Congress's overwhelming support.⁴⁰¹ The Congress suggested another referendum to amend the constitution to make it possible for the incumbent to seek re-election for a third term in office. An overwhelming number of citizens voted in favor of the referendum, and Congress later approved a referendum allowing Uribe to run for a third term as president.⁴⁰² However, Colombia's Constitutional Court deemed the proposed amendment unconstitutional because it undermined democracy itself, thereby jeopardising the whole country's constitutional structure.⁴⁰³ The Constitutional Court emphasised that allowing three consecutive terms in presidential office would replace the existing principle of the separation of powers by creating an unduly strong and unchecked president. For example, it was likely that a president with 12 consecutive years in office would be able to exercise a dominant influence on the composition of the Congress of the country.⁴⁰⁴ The Court further emphasised that allowing presidents for the third term is to be associated with executive dominance; in other words, with the distorted form of government that is recognised by the constitution of Colombia. It held inter alia that allowance of a third consecutive term would constitute a substitution of the constitution and thus an unconstitutional constitutional amendment.⁴⁰⁵ The Court thus prevented Uribe's attempt to amend the constitution to run for a third term. Uribe complied with the decision and was replaced by Juan Manuel Santos at the end of his second term in 2010.⁴⁰⁶

In the African continent, the Courts in Benin, Central African Republic, Uganda, and Kenya have also engaged the unconstitutional constitutional amendment doctrine to restrict the proposals for replacing the head of government term limits. The utility of the unconstitutional constitutional doctrine has been evident in these jurisdictions where judges blocked changes to increase and repeal the number of year-per-term limits. The most notable aspect of the Benin case is the Constitutional Court's formulation of an unconstitutional constitutional theory on

⁴⁰¹Roznai Y & Brandes HT (2019) 9.

⁴⁰²Bernal C (2013) 346.

⁴⁰³ Bernal C (2013) 346.

⁴⁰⁴ Issacharoff S (2015) 45.

⁴⁰⁵ Landau D, Roznai Y & Dixon R 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' In: Baturo A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) 13.

⁴⁰⁶ Rosalind Dixon & Landau D (2015) 608.

constitutional amendment that reach beyond the constitution's wording.⁴⁰⁷ The Constitutional Court ruled that amendments to term limits would be unconstitutional as they would undermine the 'national consensus' that formed the basis of adopting the 1991 Constitution of Benin. The Constitution did not make term limits unamendable even through the prescribed amendment procedure in the constitution. More interestingly, in 2011, a referendum was utilised to endorse reforms to the constitution of Benin's presidential term limits, including abolishing the term limit for the president and raising the qualifying age.⁴⁰⁸ The Constitutional Court of Benin declared that the head of government term limits forms part of the constitution's fundamental principles, which are intrinsically an essential part of the country. The Constitutional Court emphasised that, even if the constitution does not indicate explicitly, they implicitly form part of the fundamental pillars of the Constitution of Benin 1991. The Court invoked in its argument the preamble of the constitution to draw that the term limits of the head of government invertible property of the constitution. It held inter alia that term limits form the structural pillar of the constitution of the country and emphasised the historical injustices that were characterised by tranny, which in turn resulted in the breach of human rights, autocratic government, and abuse of power.⁴⁰⁹ Resultantly, the Constitutional Court concluded that the restriction on the number of terms a president can serve a mandate is an intrinsic part of the Constitution and cannot be amended by Parliament. The Constitutional Court successfully deemed the referendum unconstitutional.⁴¹⁰

More recently, in the Central African Republic, the constitution explicitly prohibits the amendment of presidential term limits. The Constitutional Court of the Central African Republic similarly relied on the conception of national consensus to reject any plans to amend the constitution in a manner that would have enabled the extension of legislative and

⁴⁰⁷ Sijoria S *Unconstitutional Constitutional Amendment: Limiting Amendment Power in India, Colombia, and Benin* (unpublished LLM thesis, Central European University, 2021) 49.

⁴⁰⁸ Sijoria S *Unconstitutional Constitutional Amendment: Limiting Amendment Power in India, Colombia, and Benin* (unpublished LLM thesis, Central European University, 2021) 49.

⁴⁰⁹ Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term Limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 44.

⁴¹⁰ Dixon R & Ginsburg T & Abebe AK 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 47.

presidential terms of the mandate.⁴¹¹The court applied the national consensus principle to preclude attempts to erosion of the presidential term limits. In September 2022, the Constitutional Court of the Central African Republic ruled President Touadéra's efforts to change term limits through a commission for constitutional reform.⁴¹² The court employed the unconstitutional constitutional doctrine and argued that these attempts were unconstitutional. The Court warned Touadéra that this action constituted abusive constitutionalism. The Constitutional Court ruled that the two-term limit on the presidency is an essential part of the constitution that an act of Congress cannot change. The Central African Republic is just one of many African countries where the doctrine of unconstitutional constitutional amendments has been tasked with policing the head of government term limits.⁴¹³

More recently, in Kenya the question of limits on constitutional amendment assumed center stage in 2021, when former President Uhuru Kenyatta sought to conclude a deal with long-time rival Raila Odinga that would significantly restructure the political system of Kenya.⁴¹⁴ Known as the Building Bridges Initiative, the proposal was nominally targeted at improving governance and preventing the post-election violence that had plagued Kenya since the introduction of multi-party democracy early in this century. It included proposals to move to a power-sharing semi-presidential system, more parliamentary seats, and expansion of central appointments. Critics argued that it would threaten judicial independence, undermine accountability, prevent the meaningful possibility of political opposition, and generally cartelise the political system.⁴¹⁵ The critics relied on this to challenge the proposed amendments

⁴¹¹Vohito S 'COVID-19 and Unamendable Limits on Duration of Presidential and Legislative Terms in the Central African Republic' available at <https://constitutionnet.org/news/covid-19-and-unamendable-limits-duration-presidential-and-legislative-terms-central-african.com> (accessed 08 June 2023).

⁴¹² Dixon R & Ginsburg T & Abebe AK, 'Amendments and Evasion of Term limits in Africa' in Abebe AK, Dixon R & T Ginsburg (ed) *Comparative Constitutional in Africa* (ed) (2022) 51.

⁴¹³Vohito S 'Courts vs Incumbents: Guaranteeing Alternation of Power in the Central African Republic', available at <https://constitutionnet.org/news/courts-vs-incumbents-central-african-republic> (accessed 07 October 2022).

⁴¹⁴ Gautam B 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya (March 16, 2023)' available at <https://ssrn.com/abstract=4390358> (accessed 21 May 2023).

⁴¹⁵ Abebe AK 'The Constitutional Regulation Of The Power Of Courts To Review Constitutional Amendments' available in <https://www.idea.int/sites/default/files/publications/chapters/annual-review-of-constitution-building-2022/1-the-constitutional-regulation-of-the-power-of-courts.com> (accessed 07 June 2023).

as inconsistent with the constitution. The matter was heard in the High Court of Kenya in May 2021. A five-judge bench of the High Court of Kenya struck down the proposed BBI initiative on procedural grounds, arguing that the president did not have the authority to introduce amendments under the 2010 Constitution.⁴¹⁶ The five-judge bench imported the ‘basic structure doctrine into the Kenyan jurisdiction indirectly as it did not mention it in its judgment. The BBI members appealed the decision. The matter was heard in the Court of Appeals of Kenya. The Court of Appeals upheld the ruling of the High Court of Kenya ruling in August 2021. However, in March 2022, the Supreme Court of Kenya reversed the decisions of the two courts and ruled that the basic structure doctrine is inapplicable in Kenya.⁴¹⁷ The court nevertheless upheld the invalidation of the proposed amendments on procedural grounds by the other two courts. It further held that the decision that the president cannot initiate constitutional amendments through the popular initiative and that some amendments did not comply with the public participation requirement was invalid.⁴¹⁸ Regardless of the result of this specific case, the saga of the BBI indicates a greater willingness of courts to enforce the system of tiered amendment creatively and to protect the democratic constitutional ‘minimum core’.⁴¹⁹ Perhaps what is unique about the judgments of the High Court and Court of Appeal is that they did not indicate that amendments were impossible.⁴²⁰ Instead, they outlined cumbersome procedures beyond those prescribed in the constitution before such fundamental constitutional changes could occur. The BBI case suggests the significance of the unconstitutional constitutional doctrine on the amendment power on constitutional changes on the presidential term limits.⁴²¹

In Africa, Uganda provides another illustration of the unconstitutional amendments doctrine’s applicability to protect the head of government term limits. The preamble of the 1995 Ugandan

⁴¹⁶ Gautam B ‘The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya (March 16, 2023)’ available <https://ssrn.com/abstract=4390358> (accessed 21 May 2023).

⁴¹⁷ Gautam B ‘The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya (March 16, 2023)’ available <https://ssrn.com/abstract=4390358> (accessed 21 May 2023).

⁴¹⁸ Gautam B ‘The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya (March 16, 2023)’ available <https://ssrn.com/abstract=4390358> (accessed 21 May 2023).

⁴¹⁹ Dixon L, Rosalind, and Landau D *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* 1ed (2021) New York: Oxford University Press 67.

⁴²⁰ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

⁴²¹ Gautam B ‘The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya (March 16, 2023)’ available <https://ssrn.com/abstract=4390358> (accessed 21 May 2023).

Constitution endeavors to impose restrictions on presidential authority and tyranny, among other objectives. The preamble of the constitution makes references to the historical challenges faced by the nation, recognizes the struggles of the populace against authoritarianism and subjugation, and commits to constructing a more promising future founded upon the values of democracy. The Constitution of 1995, alongside the principles of separation of powers and checks and balances, introduced a crucial measure to prevent the emergence of an overly powerful executive branch. The eligibility criteria for individuals seeking the presidential post include an age restriction, specifically limiting candidates to a maximum age of 75 years.

In the year 2018, two proposed changes were presented before the Ugandan Constitutional Court. The initial proposal sought to modify the restriction on the maximum age of 75 years for an individual seeking candidacy for the presidential position. The proposed amendment aimed to include a provision that would render Museveni, the incumbent who was 73 years old at the time, ineligible for re-election upon the expiration of his current term in 2021, based on the prescribed age restriction. The primary objective of the second amendment was to grant Members of Parliament the authority to prolong their term of office from five years to seven years.

The Constitutional Court of Uganda rendered a significant ruling in July 2018, whereby it adopted and integrated the ‘basic structure doctrine’ from Indian jurisprudence. The court held that the powers of the parliament to change the constitution are subject to limitations. The Constitutional Court, consisting of five members, rendered a finding with a four-to-one majority, affirming the decision to eliminate provisions inside a constitutional amendment that imposed restrictions on the age eligibility for presidential candidates.⁴²² Nevertheless, the unanimous consensus among the judges was that the provision inside the amendment, which seeks to prolong the tenure of Members of Parliament from five to seven years, is in violation of the constitution and hence null and void.⁴²³ The justices expressed that the action displayed self-centeredness and contradicted the fundamental tenets of effective governance.⁴²⁴ The Court successfully intervened to mitigate the potential adverse impact of constitutional modifications on the democratic order. This demonstrates a limited application of the theory, as the constitutional Court has upheld a constitutional amendment that eliminates the age

⁴²² Roznai Y & Brandes HT (2019) 9.

⁴²³ Roznai Y & Brandes HT (2019) 9.

⁴²⁴ Roznai Y & Brandes HT (2019) 9.

restriction for the nation's leader, so enabling President Yoweri Museveni, who has held office for an extended period, to participate in future elections. The ruling of the Court was crucial in enabling Museveni, who was 73 years old at the time, to remain eligible for re-election beyond his current term's expiration in 2021. Following the decision of the constitutional court, President Museveni was granted the opportunity to participate in the 2021 re-election campaign, ultimately emerging victorious and thereby extending his rule for a sixth term, which spans a period of 35 years.

In the cases discussed above, the chapter delves lessons on implementing the unconstitutional constitutional doctrine. In Colombia, Benin, the Central African Republic, Uganda, and Kenya, the doctrine of unconstitutional constitutional amendments have effectively restrained the uncontrolled powers of a parliamentary majority that has sought to repeal and abolish the Constitution's head of government term limits.⁴²⁵ The doctrine has safeguarded the constitutional orders by deeming unconstitutional the abolition of term limits and presidential re-election attempts, safeguarding the democracy within the nations.⁴²⁶ Adopting the doctrine as an effective institutional tool for safeguarding constitutional order when the pressures of would-be autocrats are severe was proven effective. Even when the constitutional guards are ill-equipped to grapple with the exigencies of abusive constitutionalism, the doctrine has proven an efficient tool for halting the destruction of democracy.⁴²⁷

In fledgling democracies like the African continent, to mitigate the impacts of authoritarian leaders, the doctrine is an efficient constitutional response to threats of abusive constitutionalism. Due to the reciprocal nature of democracy, citizens must rule and be governed in turn, a state cannot have an incumbent for indefinite mandates terms in office. This could only be accomplished by imposing substantial tenure limitations on presidential term limits which can be fostered by including the doctrine of unconstitutional constitutional

⁴²⁵ Roznai Y & Brandes HT (2019) 9.

⁴²⁶ Siegle J 'The Erosion of Term Limits in Africa Reflects Worrying Trend' available <https://africacenter.org/spotlight/erosion-term-limits-africa-reflects-worrying-trend/> at (accessed 25 September 2022).

⁴²⁷ Louw-Vaudran L 'Term-Limit Changes The Biggest Threat To Democracy In Africa?' available at <https://issafrica.org/iss-today/term-limit-changes-the-biggest-threat-to-democracy-in-africa/> (28 September 2022).

amendments in the country's constitutional framework. For instance, as discussed above, the Colombian Constitutional Court's ruling that the amendment for a third presidential term was unconstitutional was crucial in removing the incumbent and fostering political change.⁴²⁸ The doctrine ensures judicial enforcement of the protection of the head of government term limits, making it an attractive prospective device for fragile democracies to obtain sustainability of constitutional democracy. The doctrine provides an alternative paradigm for averting a significant deterioration of term limits by preventing strong or strong-man presidents from indefinitely maintaining power.

3.9 Conclusion

The chapter **views** the doctrine of the unconstitutional constitutional amendments as a speed bump that acts as an institutional structure to control abusive constitutionalism by protecting the replacement of the original constitutional principles recognised as the essential component of the constitutional order of the country. There is certainly some evidence based on the comparative case studies discussed on how courts in some jurisdictions are willing to utilise the unconstitutional constitutional doctrine to step up to prevent power grabs. The basic structure doctrine and the enforcement of the elements of the basic structure doctrine in the form of eternity clauses is a crucial tool in this regard to curb attempts to erode democracy. The unconstitutional doctrine can be incorporated as a constitutional response entrenched in the constructional framework to curb the erosion of the term limits. The chapter has shown that the unconstitutional constitutional doctrine has been an effective constitutional response in countries that have adopted it against the high influx of attempts for autocrats to hold on to power indefinitely. It serves as a support mechanism to the traditional constitutional safeguards. In a society afflicted by democratic backsliding, which aims to erode term limits, the doctrine offers a potential method for constructing a state that defends the constitutional order.

⁴²⁸Roznai Y & Brandes TH 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine' (2020) 14 *Law & Ethics of Human Rights* 48.



CHAPTER FOUR: CONCLUSIONS & RECOMMENDATIONS

4.1 Introduction

The main aim of this study was to assess the efficiency of the unconstitutional constitutional amendment doctrine as an institutional safeguard against threats to constitutional democratic governance in Africa. The doctrine's efficiency in amplifying African constitutions to prevent constitutional amendments from abolishing the Head of government term limits in Africa, where incumbents use the prescribed constitutional procedures set in the constitution and dominant party majorities in parliament.

This chapter summarises the whole study, explaining the problem of the head of government term limits erosion in Africa, providing possible solutions to the problem, and recommending how this solution can be implemented in the African continent that is clouded **by head of government who cling into power** through unconstitutional constitutional amendments.

4.2 Conclusions

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To understand how democratic backsliding takes place in Africa, which is deep-rooted and almost defines democracy in several African countries, and how it affects a liberal democracy, the study established the brief history of term limits and the trends of erosion of term limits in Africa. The study analysed the main research questions that would lead to solving this problem of erosion of the term limits of the head of government to embrace democracy in Africa namely: **First Term** limits development in Africa and the trends of term limit erosions. Second, assessing efficiency and the applicability of the adoption of the unconstitutional constitutional doctrine to safeguard term limits would help consolidate its liberal democracy, thereby solving this problem of term limit erosion. This question was used to serve as guidance to test the unconstitutional constitutional doctrine as a solution to help fade away the erosion of the term limits of the head of government.

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4.2.1 Term limit development and compliance in African

This study started by establishing how a shift from dictatorship to the adoption of term limits and multiparty politics during the 1990s wave of democratization was viewed as a ray of hope in African towards democratisation. The **Head of State** term limits were implemented in a peculiar African political environment beset by authoritarian legacies, in which the head of government wields absolute powers. The presidential term limits served a curative and intervening role in Africa's history of autocracy, allowing democratic nations to exist meaningfully to democratic commitments adopted at the inception of democracy. It later demystified how Africa is still lagging when it comes to respecting democratic principles and values. Undeniably, most African countries have adopted the term limits to protect democracy and good governance. However, statistics reflected that many African countries are still far from attaining this objective of liberal democracy due to heads of governments who amend constitutions at the end of their terms to overstay the prescribed tenure. Term limits have been exposed to several aberrations, including extensions, suspensions, and in some cases, absolute contempt via unconstitutional amendments to the constitution. The unrestricted capacity of the parliament to modify the constitution poses concerns of risk, that results in term extension and suspension.

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This study demonstrates that although several African states have adopted the term limits, they are failing to enforce compliance, as leaders engage in unconstitutional means to erode the term limits which are important for the survival of a democracy. The erosion of the term limits

hinders the democratisation process in Africa, leading to a state of political stagnation. Discussed in detail in Chapter Two, the author elaborated on the introduction of the term limits from the ancient times taking note of their significance on the consolidation of democracy. First, the author examined how term limits have been introduced, implemented, and removed in other African countries. It elaborated on the link between presidential term limits erosion and the decline of democracy. Also, the history of long-serving presidents on the African continent demonstrates how it primarily led to the necessity to implement presidential term limits. The chapter analysing patterns in the erosion of presidential term limits across the African continent and their effects on democracy.

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4.2.2 The Unconstitutional Constitutional Amendments Doctrine and term limits in Africa.

The last part of the study considered the efficiency of the unconstitutional constitutional amendments doctrine to safeguard the term limits, considering powerful heads of state who engage in unconstitutional means to stay in power. In Chapter Three, the author elaborated on the efficiency of the unconstitutional constitutional amendments doctrine through its potential to curb the erosion of term limits to fade away the interruption of democracy. To escape the volatility of constitutional democracy or the return to big-man governance, it is important to counteract the term limit extensions and suspensions by adopting institutional designs to serve as a speedhump to the adverse impact. In this thesis, the doctrine of unconstitutional constitutional amendments as an institutional arrangement, highlighted by judicial examinations of the constitutionality of an amendment, is presented as a suitable constitutional remedy to mitigate the extension or suspension of term limits. The comparative lessons on case studies in India, Colombia, Benin, Kenya, and Uganda, emphasises the ability of courts to enforce the doctrine as a crucial instrument to safeguard term limits against extensions and suspensions by incumbents.

Several academics challenged the doctrine as an encroachment of the parliamentary sovereignty by the courts, therefore depriving the general public of the chance to amend the constitution in response to changing democratic needs. The argument is backed by the fact that actual sovereign rights lie primarily with the citizens and that parliament reflects the sovereign's collaborative desire to amend the constitution. However, the author holds that as a

result of its Africa's historical past of big man tactics, the continent carries the danger of the population's desire for a better living resulting in their consenting via referendums to a change in the present constitutional system. Through the strategies of would-be authoritarian leaders, there is a possibility that the democratic essence of the state may be replaced by an authoritarian rule. Ultimately, the significance of the unconstitutional constitutional amendments doctrine lies in aiding the court to protect the Constitution and its essential elements. Rather than viewing the doctrine as a transfer from voted Politicians to unelected court judges, it is an advancement of separation of powers to protect the democratic institutions from one branch of government.

4.3 Recommendations

The study makes the following recommendations. First, it is imperative for the African nations to shun away from the prolongation, abolishment and extension of terms term limits. The preservation of presidential term limits in Africa from regression will rely on several factors. Strong and independent judiciaries are necessary, the judiciary shall unchain themselves from executive authority. The judiciaries, as independent branches of governments, need to have the ability to use their discretion and adhere strictly to professional standards. The judiciaries shall achieve this by interpreting the constitutional provisions without undue influence from heads of government. This enables them to enforce term limits by preventing any attempts to erode, abolish, or extend these limits when leaders try to extend their time in the office.

Second, the presence of independent courts with the ability to regulate and limit the misuse of power by the executive branch is a crucial component that can assist Africa fade away term limit erosion. Ensuring government accountability involves refusing an incumbent's efforts to prolong their time in office. In order to achieve this objective, it is advisable for African judiciaries to learn from countries like Colombia, Benin, the Central African Republic, and Uganda. These countries have successfully curbed the unchecked authority of a parliamentary majority that has attempted to revoke and eliminate the term limits for the head of government as stated in the Constitution. Some of these countries have successfully curbed government impunity and resisted demands to prolong their terms. Judicial issues have arisen from attempts to undermine term limits and restrictions, requiring courts to decide whether presidential extension attempts or amendments to term limits for heads of state are permissible. The courts effectively thwarted the endeavors.

Third, An African continent clouded by heads of government who use democratic procedures to achieve power to cement their political positions for more extended periods than the constitution allows. The author of this paper recommends that the present political landscape in Africa requires the countries to adopt the unconstitutional constitutional amendments doctrine as an institutional mechanism to safeguard against the erosion of term limits. As asserted previously, it is not appropriate to limit judges from any role in interpreting the Constitution since this does not uphold the principle of separation of powers. The interpretation of the constitution indicates that the courts must have some authority to adjudicate constitutional alterations to elucidate the legality of any proposed constitutional reforms.

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The adoption of the unconstitutional constitutional amendments doctrine requires countries to be conscious that the possibility of using the doctrine to strike amendments does not mean all actions against the amendments brought to the courts will be successful. Accordingly, the courts shall not use a blanket approach when approaching constitutional amendments but rather analyse the history of a State and the aspirations in the preamble of the constitution. The courts should conduct a case-by-case analysis and detailed evaluation of an amendment supported by convincing reasoning and transitional comparative justifications. This would establish a high threshold for determining defective constitutional reforms that attempt to destroy the constitutional identity.

Another recommendation is that many African judicial systems must learn from their counterparts, such as the Colombian, Indian, Benin, Uganda, and Niger Constitutional Courts, which have so far been able to successfully curb unlimited government powers and dismiss efforts to prolong the tenure of incumbents, despite many appeals to do so. The court's application of the unconstitutional constitutional amendments doctrine to reject the proposed amendments was a facet of the doctrine of unconstitutional amendments to the Constitution. To enhance the effectiveness of the unconstitutional constitutional amendments doctrine, African governments must comply with the standard submissions:

- The courts should have the authority to review the Constitution, including the authority to nullify unconstitutional amendments of term limits. Therefore, the courts should have the ultimate authority to interpret the Constitution, including judging the validity of proposed amendments.

- Courts and judges must be able to effectively utilise their judgment and rigorous professional competence as autonomous branches of government to impose term limits by detaching themselves from presidential authority. This, in turn, would strengthen the separation of powers and prevent incumbents from distorting term limits while analysing proposed changes to safeguard all democratic ideals for the country.
- The state must expressly define the term limits as a foundational principle of democracy that courts would view as fundamental when applying the doctrine. Any modification that changes or deviates from any of these the term limits shall be considered as unconstitutional and struck off. Establishing term limits as a basic structure of the constitution allows courts to use the doctrine with standard criteria for constructing persuasive arguments for those who question the doctrine's legality in a specific case. This, in turn, increases judicial accountability for the application of the doctrine.
- When a court is certain that a proposal would result in a constitutional replacement, it must apply the doctrine. This indicates that courts should only intervene in exceptional situations. The court must analyse the effect of a specific amendment on democratic principles by considering the amendment's operation as a whole. This will cover present political events and complexities, as well as any prior or concurrent amendments that can destroy democracy.
- The study recommends applying a comparative, transnational approach to constitutional law in which judges evaluate the key principles and their interpretation with those of other countries. This suggests that, while using the doctrine to assess its core principles and to determine whether a proposed change is a replacement, judges should benchmark with other nations. A court implementing the notion must thus be informed by comparable multinational comparison. This will offer courts clear instructions on how to enforce amenability and exercise limited judicial authority, as asserted by critics of the theory.

Bibliography

Books

- Albert R *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (2019) Oxford: Oxford University Press
- G Africa unchanged: *The blueprint for Africa's future* (2005) Palgrave Macmillan.
- Bratton M & van de Walle N *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (1997) Cambridge: Cambridge University Press.
- Cheibub JA *Presidentialism, Parliamentarism, and Democracy* (2007) Cambridge University Press.
- Elkins Z, Ginsburg T, & Melton J *The Endurance of National Constitutions* (2009) Cambridge: Cambridge University Press.
- Granville A *Working a Democratic Constitution: A history of the Indian Experience* 1 ed (2022) New Delhi, Oxford University Press.
- Hyden G *African Politics in Comparative Perspective* (2005) Cambridge: Cambridge University Press.
- Krishnaswamy S *Democracy and constitutionalism in India: a study of the basic structure doctrine* 1ed (2010) New Delhi: Oxford University Press.
- Mangala JR *The Politics of Challenging Presidential Term Limits in Africa* (2020) Cham: Springer International Publishing AG.
- Cepeda-Espinosa MJ & Landau D *Colombian Constitutional Law: Leading Cases* 1 ed (2017) Oxford University Press.
- Raaflaub KA, Ober J & Wallace RW *Origins of democracy in ancient Greece* (2007) University of California Press Berkeley Los Angeles London.
- Roznai Y *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 1 ed (2017) Oxford University Press.
- Sajó A & Uitz R *The constitution of freedom: an introduction to legal constitutionalism* 1ed (2017) Oxford: Oxford University Press.

Chapters in Book

Cain B 'Term Limits: Not the Answer to What Ails Politics' in Crane E & Pilon R (ed) *The politics and law of term limits* (1994) CATO Institution.

Murphy W 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Levinson S (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) Princeton University Press.

Dixon R and Landau D 'Democracy and the Constitutional Minimum Core' in Ginsburg T And Hug A (ed) *Assessing Constitutional Performance* (2016) Cambridge University Press & Assessment: London.

Fombad C & Inegbedion NA 'Presidential term limits and their impact on constitutionalism in Africa' in Fombad C & Murray C (ed) *Fostering constitutionalism in Africa* (2010) Pretoria. Pretoria University Law Press.

Gyimah-Boadi E 'Political parties, elections and patronage: Random thoughts on neo-patrimonialism and African democratization' in Basedau M, Erdmann G & Mehler A (eds) *Votes, money and violence: Political parties and elections in sub-Saharan Africa* (2007) Nordiska Afrikainstitutet.

Landau D & Roznai Y 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine' in Batur A & Elgie R (eds) *The Politics of Presidential Term Limits* (2019) Oxford University Press, Oxford.

Landau D 'Democratic Erosion and Constitution-Making Moments: The Role of Transnational Legal Norms' in Shaffer G, Ginsburg T & Halliday T (eds) *Constitution-Making and Transnational Legal Order* (2019) Florida State University College of Law.

Mangala JR 'Presidential term limits, the never-ending debate' In Mangala JR (ed) *The Politics of Challenging Presidential Term Limits in Africa* (2020) Cham: Palgrave Macmillan.

Mann T 'Congressional term limits: A bad idea whose time should never come' in Crane E & Pilon R (ed) *The politics and law of term limits* (1994) Cato Institute.

Roznai Y 'The Uses and Misuses of Constitutional Unamendability' in Xenophon Contiades

and Alkmene Fotiadou (ed) *The Routledge Handbook of Comparative Constitutional Change* (2019) Routledge.

Journal Articles

Abebe AK 'Taming regressive constitutional amendments: The African Court as a continental (super) Constitutional Court' (2019) 17 *International Journal of Constitutional Law* 89 117.

Ahron B 'Unconstitutional Constitutional Amendment' (2011) 4 *Israel Law Review* 321 341.

Akech M 'Constraining Government Power in Africa' (2011) 22 *Journal of Democracy* 96 106.

Albert R 'Amending constitutional amendment rules' (2015) 13 *International Journal of Constitutional Law* 655 685.

Albert R 'Constitutional Amendment and Dismemberment' (2018) 43 *The Yale Journal of International Law* 1 84.

Albert R 'The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada' (2016) 41 *Queens Law Journal* 1 48.

Baker B 'Outstaying One's Welcome: The Presidential Third Term Debate in Africa' (2002) 8 *Contemporary Politics* 285 301.

Bamfo N 'Term Limit and Political Incumbency in Africa: Implications of Staying in Power Too Long with References to the Cases of Kenya, Malawi, and Zambia' (2005) 4 *African and Asian Studies* 327 356.

Basheka B & Auriacombe CJ 'Abusive Constitutionalism in Africa A Threat to Efficient and Effective Public Administration Systems?' (2019) 11 *African Journal of Public Affairs* 103 127.

Baturo A 'The Stakes of Losing Office: Term Limits and Democracy' (2010) 4 *British Journal of Political Science* 635 662.

Bermeo N 'On Democratic Backsliding' (2016) 27 *Journal of Democracy* 5 19.

Bernal C 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 339 357.

Bhasin T & Gandhi J 'Timing and targeting of state repression in authoritarian elections' (2013) 32 *Electoral Studies* 620 631.

Carolan E 'Book review: Constitutional Amendments: Making, Breaking, and Changing Constitutions' (2020) 18 *International Journal of Constitutional Law* 659 661.

Cassani A 'Autocratisation by Term Limit Manipulation in Sub-Saharan Africa' (2021) 55 *Africa Spectrum* 228 250.

Cheeseman N 'African Elections as Vehicles for Change' (2010) 21 *Journal of Democracy* 139 153.

Chigowe LT 'One Step Forward, Two Steps Backwards: The Threat of 'Third Termism' on Democracy Rule of Law and Governance in Africa' (2020) 34 *Spec Juris* 13 24.

Choudhry S 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment: A reply to Rosalind Dixon and David Landau' (2017) 15 *International Journal of Constitutional Law* 826 832.

Colon-Rios J 'Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America' (2013) 44 *Victoria University of Wellington law review* 521 534.

Colón-Ríos J 'Introduction: The Forms and Limits of Constitutional Amendments' (2017) 13 *International Journal of Constitutional Law* 521 534.

Colon-Rios JI 'Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America' (2017) 7 *Victoria University of Wellington Legal Research Papers* 1 15.

Corey W 'Breaking the Cycle of Big Man Rule in Africa' (2010) 2 *Anthós* 1 9.

Dixon R & Landau 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13 *International Journal of Constitutional Law* 606 638.

Dixon R & Landau D 'Tiered Constitutional Design' (2018) 86 *George Washington Law Review* 438 512.

Dixon R and Landau D 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 *University of California, Davis Law Review* 1313 1387.

Dixon R and Landau D 'Transnational constitutionalism and a limited doctrine of unconstitutional amendment: A rejoinder to Sujit Choudhry' (2017) 15 *International Journal of Constitutional Law* 833 838.

Dixon, R. & Landau D 'Constitutional End Games: Making Presidential Term Limits Stick' (2020) 71 *Hastings Law Journal* 359 418.

Durotoye A 'Resurgent Backsliding and Democracy in Africa' (2016) 16 *International Journal of African and Asian Studies* 39 46.

Enonchong SL 'Unconstitutional constitutional amendment or constitutional dismemberment? A reappraisal of the presidential term limit amendment in Cameroon' (2022) *Global Constitutionalism* 1 23.

Elisabet AH 'Parliaments in Africa: Representative Institutions in the Land of the Big Man' (2011) 17 *The Journal of Legislative Studies* 68 99.

Fombad C 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa.' (2007) 55 *The American Journal of Comparative Law* 1 47.

Ginsburg T & Elkins Z & Melton J 'Do Executive Term Limits Cause Constitutional Crises?' (2012) *Comparative Constitutional Design* 350 380.

Ginsburg T, Melton J, & Elkins Z 'On the evasion of executive term limits' (2011) 52 *William & Mary Law Review* 1807 1872.

Grauvogel J & Heyl C 'The Study of Term Limits in Sub-Saharan Africa: Lessons on Democratisation and Autocratisation' (2021) 55 *Africa Spectrum* 215 227.

Grote R 'The Role of Institutional Design in Preventing Constitutional Decline: The Radically Different Approaches in Germany and France' (2020) 6 *Constitutional Studies* 107 132.

Halmai G 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19 *Constellations* 182 203.

Heyl C & Llanos M 'Presidential Term Limits in Africa and Latin America: Contested but Resilient' (2020) *GIGA Focus Global* 1 12.

Issacharoff S 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 1 49.

Jacobsohn GJ 'An Unconstitutional Constitution? A Comparative Perspective.' (2006) 4 *International journal of constitutional law* 460 487.

Kiwuwa, DE 'Democracy and the politics of power alternation in Africa' (2013) 19 *Contemporary Politics* 62-278. Klačnja M & Titunik R 'The incumbency curse: weak parties, term limits, and unfulfilled accountability' (2017) 111 *American Political Science Review* 129 148.

Landau D & Dixon R 'Constraining Constitutional Change' (2015) 4 *Wake Forest Law Review* 859 890.

Landau D 'Rescuing the Unconstitutional Constitutional Amendment Doctrine: A Reply to Richard Albert' (2018) *Yale Journal of International Law* 1 21.

Landau D 'Abusive constitutionalism' (2013) 47 *U.C. Davis Law Review* 189 260.

Landau D 'Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine' (2018) 12 *Law and Ethics of Human Rights* 225 249.

LeBas A 'Term Limits and Beyond: Africa's Democratic Hurdles' (2016) 115 *Current History* 169 174.

Levitsky S, Ziblatt D & Hugo RT 'How Democracies Die,' (2020) 2 *Foro Internacional* 897 904.

Lewis P 'Political transition and the dilemma of civil society in Africa' (2018) 137 158.

Lima J 'Unconstitutional constitutional amendments: the limits of amending powers' (2018) *Jurisprudence* 1 21.

Lindberg S & Moehler D 'Narrowing the Legitimacy Gap: Turnovers as a Cause of Democratic Consolidation' (2009) 71 *The Journal of Politics* 1448 1466.

Lynch G & Crawford G 'Democratization in Africa 1990–2010: An Assessment' (2011) 18 *Democratization* 275 310.

Maltz G 'The Case for Presidential Term Limits' (2007) 18 *Journal of Democracy* 128 142.

Mattes R & Bratton M 'Learning about Democracy in Africa: Awareness, Performance, and Experience' (2007) 51 *American Journal of Political Science* 192 217.

Mbaku JM 'Constitutional Coups as a Threat to Democratic Governance in Africa' (2018) 2 *International Comparative, Policy & Ethics Law Review* 77 182.

McKie K 'Presidential Term Limit Contravention: Abolish, Extend, Fail, or Respect?' (2019) 52 *Comparative Political Studies* 1500 1534.

McKie K 'The Politics of Institutional Choice Across Sub-Saharan Africa: Presidential Term Limits.' (2017) 52 *Studies in comparative international development* 436 456.

Murray C and Wiebusch M 'Presidential Term Limits and the African Union' (2019) 63 *Journal of African Law* 131 160.

Ngoc BS 'Globalization of Constitutional Identity' (2017) 26 *Washington International Law Journal* 439 470.

Nyangulu D 'Big Men and Performances of Sovereignty in Contemporary African Novels' (2018) 49 *Research in African Literatures* 101 115.

Obasanjo I 'Curing Africa's Big-Man Syndrome: Individual versus Population Approach?' (2013) *Foreign Policy Journal* 34 67.

Oita E & Nhlengethwa TT 'The Attrition of Democratic Gains in Africa: An Appraisal' (2016) 16 *Research on humanities and social sciences* 67 76.

Okurut E 'Eliminating presidential term limits in Africa: The new form of dictatorship' (2018) 26 *University of Botswana Law Journal* 1 25.

Omotola JS 'Third-term politics and the de-institutionalisation of power in Africa' (2011) 3 *Africa Review* 123 139.

Osei A, Akinochi H & Mwombela S 'Presidential Term Limits and Regime Types: When Do Leaders Respect Constitutional Norms?' (2021) 55 *Africa Spectrum* 251 271.

Parry L, Tauyekel S, Tempesta E & Tres P 'Presidential Term Limits in Africa' (2021) *Comparative Politics & Development* 1 41.

Polzin M 'Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law.' (2016) 14 *International journal of constitutional law* 411 438.

Posner D & Young D 'The Institutionalization of Political Power in Africa' (2007) 18 *Journal of Democracy* 126 140.

Prempeh HK 'Africa's 'constitutionalism revival': False start or new dawn?' (2007) 5 *International Journal of Constitutional Law* 13 59.

Prempeh HK 'Presidents Untamed' (2008) 19 *Journal of Democracy* 109 123.

Prempeh HK 'Progress and retreat in Africa: Presidents untamed' (2008) 19 *Journal of Democracy* 109 123.

Przeworski A 'Acquiring the Habit of Changing Governments Through Elections' (2014) 48 *Comparative Political Studies* 104 129.

Rakner L 'Democratic Rollback in Africa' (2019) *Oxford Research Encyclopedia of Politics* 1 19.

Reyntjens F 'Institutional Engineering, Management of Ethnicity, and Democratic Failure in Burundi' (2016) *Africa Spectrum* 65 78.

Reyntjens F 'Respecting and circumventing presidential term limits in sub-Saharan Africa: A comparative survey' (2020) *African Affairs* 275 295.

Reyntjens F 'The Struggle Over Term Limits in Africa: A New Look at the Evidence' (2016) 27 *Journal of Democracy* 61 68.

Richard A 'Constitutional Amendments and Dismemberments' (2018) 43 *The Yale Journal of International Law* 1 84.

Roznai Y & Brandes HT 'Democratic Erosion, Populist Constitutionalism and The Unconstitutional Constitutional Amendments Doctrine' (2019) *SSRN Electronic Journal* 1 27.

Roznai Y & Brandes TH 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine' (2020) 14 *Law & Ethics of Human Rights* 19 48.

Roznai Y 'The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments' (2013) 62 *International and Comparative Law Quarterly* 557 - 597.

Roznai Y 'Unamendability and The Genetic Code of The Constitution' (2015) 27 *European review of public law* 775 825.

- Roznai Y 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' (2013) 61 *The American journal of comparative law* 651 691.
- Roznai Y 'Constitutional Amendability and Unamendability in South-East Asia' (2019) 14 *Journal of Comparative Law* 1 49.
- Roznai Y 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 *The American Journal of Comparative Law* 657 719.
- Roznai Y 'Unconstitutional Constitutional Change by Courts' (2017) 51 *New England Law Review* 555 577.
- Samar VJ 'Can a Constitutional Amendment Be Unconstitutional?' (2009) 33 *Oklahoma City Law Review* 668 748.
- Scheppele KL 'Constitutional coups and judicial review: How Transnational Institutions can strengthen peak courts at times of crisis (with special reference to Hungary)' (2014) 23 *Transnational Law & Contemporary Problems* 51 118.
- Scheppele, KL 'Autocratic Legalism' (2018) 85 *UC. Law Review* 530 570.
- Siegle J & Cook C 'Presidential Term Limits Key to Democratic Progress and Security in Africa' (2021) 65 *Orbis* 467 482.
- Tangri R & Mwenda AM 'President Museveni and the politics of presidential tenure in Uganda' (2010) 28 *Journal of Contemporary African Studies* 31 49.
- Teja IA 'The 'Big Men' of Africa: Origins, Tactics, and Implications of Rule by Mugabe and Museveni' (2018) 4 *Liberated Arts* 1 7.
- Tull DM & Simons C 'The Institutionalisation of Power Revisited: Presidential Term Limits in Africa' (2017) 52 *Africa Spectrum* 79 102.
- Vally NT 'Permanent Emergency Welfare Regimes in Sub-Saharan Africa: The exclusive origins of dictatorship and democracy' (2014) 113 *African Affairs* 615 616.
- Van Cranenburgh O 'Big Men' Rule: Presidential Power, Regime Type and Democracy in 30 African Countries' (2008) 15 *Democratization* 952 973.
- Van de Walle N 'Presidentialism and Clientelism in Africa's Emerging Party Systems' (2003) 41 *Journal of Modern African Studies* 297 321.
- Vencovsky D 'Presidential Term Limits in Africa' (2007) 2 *Conflict Trends* 15 21.

Versteeg M, Horley T, Meng A, Guim M and Guirguis M 'The Law and Politics of Presidential Term Limit Evasion' (2020) 120 *Columbia Law Review* 173 248.

Wiebusch M & Murray C 'Presidential Term Limits and the African Union' (2019) 63 *Journal of African Law* 131 160.

Yap PJ 'The conundrum of unconstitutional constitutional amendments' (2015) 4 *Global Constitutionalism* 114 136.

Yeh S 'Ending corruption in Africa through United Nations inspections' (2011) 87 *International Affairs* 629 650.

Case Laws

Bangladesh

Abdul Mannan Khan v. Government of Bangladesh 64 DLR (AD) 169.

India

Anwar Hossain Chowdhury v. Bangladesh 1989.

Golaknath v State of Punjab AIR 1967 SC 1643.

Kesavananda Bharati v State of Kerala AIR 1973 SC 1461.

Minerva Mills Ltd v Union of India AIR 1980 SC 1789.

Shankari Prasad v India AIR 1951 SC 458.

Singh v Rajasthan AIR 1965 SC 845.

Legislation

Algeria Constitution (2020).

Angola Constitution (2010).

Azerbaijan Constitution (1995).

Bahrain constitution (1973).

Commented [A55]: The thesis has a significant African focus but there is no single case from any of the African countries discussed in the thesis

Burkina Faso Constitution (1991),

Brazil Constitution (1988).

Cambodia Constitution (1993).

Central African Republic Constitution (2004).

Chad Constitution (1996)

The Dominican Republic Constitution (1881).

El Salvador Constitution (1983).

Guatemala Constitution (1985).

Guinea Constitution (2010).

Honduras Constitution (1982).

Indonesia constitution (1945).

Japan Constitution (1946).

Lao Constitution (1947).

Mauritania Constitution (1991).

Mozambique Constitution (2004).

Niger Constitution (2010).

Paraguay Constitution (1992).

Senegal Constitution (2001).

Thailand Constitution (1997).

Thailand Constitution (2007).

Rwanda Constitution (2003).



UNIVERSITY *of the*
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Turkey Constitution (1982).

Theses

Armstrong B *Ne touché pas ma constitution: Pressures and presidential term limits* (Unpublished Honors Thesis, North West University, 2001).

Dulani BM *Personal Rule and Presidential Term Limits in Africa* (Unpublished PhD thesis, Michigan State University, 2011).

Gelfeld B *Preventing Deviations from Presidential Term Limits in Low – and Middle - Income Democracies* (unpublished Doctoral Degree in Public Policy thesis, Pardee RAND Graduate School, 2018).

Roznai Y *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science, 2014).

Saoyo TG *Prospects and challenges of enforcing presidential term limits in Africa through regional instruments* (LLM thesis, University of Pretoria, 2012).

Shawa LB *Exploring Anti-Democratic Practices in University Policy-Steerage, Management and Governance in Malawi: A Critical Theory Perspective* (unpublished Ph.D thesis, Victoria University of Wellington, 2011).

Newspapers

Altman A 'A Brief History of Term Limits' TIME 03 October 2008.

Internet sources

Roznai, Y 'The Basic Structure Doctrine arrives in Kenya: Winds of Change for Constitutionalism in Africa? *VerfBlog*,' available at <https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/> (accessed 29 October 2022).

Crespo DS 'Presidential Term Limits and Democratic Development in Sub-Saharan Africa Occasional Paper 2018 Navarra Center for International Development' available at https://www.academia.edu/39562135/Presidential_Term_Limits_and_Democratic_Development_in_Sub_Saharan_Africa(accessed 22 July 2022).

Eze K 'The Efficacy of Presidential Term Limits in Africa Mandela Institute for Development Studies Discussion Paper 3-4' available at <https://www/minds-africa.org/wp-content/uploads/2018/08/2b.-MINDS-2016-YouthDialogue-Discussion-Paper-Term-Limits-Kevin-Eze.pdf> (accessed 22-07-2022).

Namakula SC 'The Efficacy of Presidential Term Limits in Africa.' *MINDS Annual African Youth Dialogue 3-4 August 2016 Discussion Paper* available at: [*The efficacy of presidential term limits in Africa\(researchgate.net\)*](#) (accessed on 01 September 2022).

Zamfir I 'Democracy in Africa, Power Alternation and Presidential Term Limits. European Parliament Briefing' available at [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2016\)580880](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2016)580880) (accessed 22 July 2022).

Siegle J 'The Erosion of Term Limits in Africa Reflects Worrying Trend' available at <https://africacenter.org/spotlight/erosion-term-limits-africa-reflects-worrying-trend/> (accessed 25 September 2022).

Louw-Vaudran L 'Term-Limit Changes The Biggest Threat To Democracy In Africa?' available at <https://issafrica.org/iss-today/term-limit-changes-the-biggest-threat-to-democracy-in-africa> (28 September 2022).

Roznai Y 'The Basic Structure Doctrine arrives in Kenya: Winds of Change for Constitutionalism in Africa? VerfBlog,' available at <https://verfassungsblog.de/the-basic-structure-doctrine-arrives-in-kenya/> (accessed 29 October 2022).