Monetised Politics and the Entrenchment of Political Elites

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Note on the papers

These papers were written for and presented at EISA's 20th Anniversary symposium which took place on 20 and 21 October 2016. The theme of the symposium was: ***Current Democratic Realities in Africa: Where Are We Headed beyond the Vote?*** The symposium focused on the continent's democratic triumphs - those elements pulling States closer to democratic consolidation - while also acknowledging the democratic shortfalls - pushing African States backwards. In reviewing progress and challenges confronting the continent, the symposium provided a platform for democracy promotion stakeholders to examine current democratic realities in Africa and where the continent is headed on the current wave of democracy. The symposium covered a range of topics and provided a platform for democracy-promotion stakeholders to review the progress and challenges recorded at national and regional levels. The annual event also served as a lesson sharing and learning opportunity for democracy-promotion stakeholders as they deliberated on the development of shared culture of best democratic practices. The symposium proceedings are available at http://eisa.org.za/pdf/symp2016cp.pdf

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As African states move towards democratic consolidation, significant challenges continue to threaten core principles of democratic governance in the continent. Chief amongst these challenges are the entrenchment of incumbency by those in power, the misuse of public funds for personal gain and the furthering of party interests. Indeed, with an increase in the commercialisation of politics, the stakes have become ever higher for parties and individuals in their bid to hold onto power for longer. Recent trends across the continent reflect an increased number of incumbents extending their presidential limits, as in Rwanda and Uganda. The erosion of fairness and transparency in the electoral process has enabled these incumbents to return to power. This can be explained in part by a lack of proper oversight of campaign finances. Whilst benefitting the ruling elite, these factors have done little for the rule of law and indeed demonstrate a weak commitment to the democratic values enshrined in key regional and sub-regional normative frameworks, such as the African Charter on Democracy, Elections and Governance (ACDEG). The three occasional papers in this series seek to assess this growing trend towards the commercialisation of politics and the entrenchment of political elites.

In an introduction to the topic, Wahiu's paper focuses on incumbent public theft and the commercialisation of politics which has increasingly become the 'new normal' in emerging African democracies. Through the examples of Kenya's Anglo Leasing scandal and the South African arms deal debacle, the reader is offered a glimpse into how and why such practices of public thievery have been enabled. Some of the issues touched on in Wahiu's paper include the tensions between development-orientated policies and the diversion of public funds through deals done in the name of such development. Not only does he touch on the subject of development and its link to the commercialisation of politics, but he also offers an insight into the role of the rule of law and the political culture of such governments and societies. His paper speaks to the failure of legal restraints in the face of incumbency, questioning how and by whom public monies within a democratic state should and can be managed to most effectively deliver development alongside the creation of a strong political culture of accountability.

Whilst Wahiu's focus is on Africa, Lappin draws from his experience in Europe to discuss the issue of campaign finance and its regulation. Despite its European focus, this discussion provides clear lessons and experience relevant to the African context. Anglo Leasing, the same Kenyan scandal Wahiu examines, has been implicated in raising funds for both party and general elections. What this example highlights is the interconnectedness and importance of campaign finance regulation and the management of public monies in connection with open competitive democratic policies. Lappin provides a look into some of the practices and challenges of regulating campaign finance from the perspective of electoral observers. What is evident from his paper is not only the serious technical challenge posed by campaign finance regulation, but also the difficulty of ensuring both accountability and freedom of speech. The need to ensure that these key democratic principles are upheld is obvious; but the way in which this can be done within the electoral processes is not always easy.

These first two papers point to the commercialisation of politics and the difficulties of prohibiting public theft and unfair campaign financing; the last paper in this series addresses the emerging trend of entrenched incumbency in Africa. Examples include third term presidential bids, engineered constitutional reforms and passing power from relative to relative. What these examples in Khadiagala's paper demonstrate is a weak commitment to the rule of law, and a preference for taking advantage of the lucrative nature of public office. However, beyond providing examples, Khadiagala identifies contributing factors to this phenomenon, answering questions as to how this trend has been enabled in as many as sixteen countries across Africa. The challenge that remains is in what ways these trends may be halted and even reversed, in order for democratic states to truly thrive and for the zero-sum nature of Africa's authoritarian past to be overcome.

What is evident is that these three issues of commercialising power, campaign corruption, and the retention of political power by incumbents, are all part of a larger picture, one that points to the erosion of democratic principles and institutions. These papers aim to provide a critical exploration of and reflection on these issues, as well as recommendations on how to address these pervasive tendencies of corruption and anti-democratic action. Drawing from both African and European examples, these papers speak to the issues of accountability, transparency and the rule of law in relation to electoral issues and, more generally, the governance of democratic society.

Incumbent Public Theft in New African Democracies: Anomaly or the New Norm?

By
Winluck Wahiu

Introduction

All forms of government are in varying degrees prone to abuse by incumbents who may use public resources predominantly to benefit themselves and their inner circles. However, democracy, unlike despotic rule, is supposed to offer the public greater influence in the distribution and use of public resources, as well as the right and opportunity to ask questions about such distribution and use (Dahl 1989, pp. 112-118).[1] And in theory, voters in free periodic elections have the power to reward or punish incumbents and to vote in new representatives of diverse interests who will better oversee the use of public resources. That is why, as Ndulo and others note, African political reformers have vigorously pursued sometimes painful democratic oversight reforms in the past decades, in the hope that market democracies will rationalise the incumbent abuse of public resources (Ndulo 2006).

The problem is that elected incumbents in many new or emergent African democracies have left much evidence of public theft. Democracy may deter the astonishingly rapacious kleptocracy seen in Teodoro Obiang's Equatorial Guinea (foreignpolicy.com/Teodorin's World), but it too seems to condone scandalous schemes of public theft. In Kenya and South Africa, two of Africa's better known emergent democracies, the challenge of sustainable democracy must now also be reviewed. This is in light of two major corruption scandals, namely Anglo Leasing in Kenya and the arms deal in South Africa. The former brazenly redefined elected incumbency in Kenya as the time to 'eat'; the latter became the metaphor for the loss of innocence of South Africa's democracy and the fruit that poisoned the ANC. It is noteworthy that to date no court of law has declared either of the schemes illegal. Besides their ambiguous legal status, the schemes share objectives, procedures and outcomes. Together these illuminate the dilemma of elective incumbency at a time when the state in Africa has become almost exclusively concerned with economic development. These are instances of public theft by incumbents, understood as the diversion of public resources to benefit regime insiders. Thus the question arises as to whether these two schemes embody anomalies to be eliminated by experimenting with more institutional reforms. Alternatively, they may indicate the normalisation of a national wealth maximisation strategy for a new breed of elected incumbent-capitalists. If this is the new normal, what does it entail for builders of sustainable democracy?

[1] Dahl argues that the criterion of final exclusive public control of the agenda by the demos is essential to any theory of democracy.

The South African Arms Deal

Fortunately, the December 1999 South African Defence Package, now known as the arms deal, is well documented and material texts may be found in several sources (see documents collected by the Virtual Press Office at http://www.armsdeal-vpo.co.za/)

The arms deal comprised three substantive transactions to acquire foreign military hardware and accessories. Embedded in these contracts were various derivative or secondary contracts for the benefit of domestic investment and labour. One set of substantive contracts was executed with BAE systems and a UK-Swedish consortium for the purchase of military aircraft (24 Hawks and 28 Saab Gripen jets). The purchase price at the time was given as R15.7 billion. BAE systems paid £115m to various advisors to help clinch the deal, funnelling the payments through a company (Red Diamond Trading Ltd) which had been set up in the Virgin Islands, a tax haven. Some of this commission was subsequently paid to Fana Hlongwe, an advisor to the late Joe Modise, then Minister for Defence. A second set of substantive contracts was signed with two German consortia, ThyssenKrupp and Ferrostaal, for the acquisition of four navy patrol Corvettes and three submarines respectively, worth R9.65 billion. Various commissions were allegedly paid to key personnel in the military, lobbyists associated with Thabo Mbeki, then Deputy President of the Republic, and Joe Modise. The third set of contracts were signed with Thales, a French consortium, together with its South African affiliate ADS, for the supply of accessories for four German-built navy corvettes, for R2.6 billion. Correspondence on the Thales contract later revealed a backtrack involvement of Shabir Shaik, a business partner of Jacob Zuma, the current President of the Republic, who received commissions to facilitate the deal. In 2005 Shaik was imprisoned for 15 years for corruption after a trial during which Zuma's involvement was not at issue. A separate trial against Zuma was dropped in 2001.

As the fallout from suspicion of fraud and bribery gained momentum, SCOPA (Parliament's Standing Committee on Public Accounts) issued a report in 2000 recommending independent forensic investigations into the arms deal. Despite public promises to act, the report was met with official censure resulting in the resignation of ANC parliamentarian and chair of SCOPA, Andrew Feinstein. Feinstein subsequently published a whistle-blower account questioning the procurement procedures and viability assessments used by the Armaments Corporation of South Africa (ARMSCOR) in support of the arms deal. Accusations continued to mount against the inner circles of the presidency and the ruling ANC. In 2003, Tony Yongeni - who at the time of the arms deal was chairman of the Parliamentary Defence Committee and Chief Whip of the ANC - was convicted of fraud and jailed. He was later amnestied. In October 2011, President Jacob Zuma established a commission of inquiry into the arms deal, popularly known as the Seriti Commission.[2] After four turbulent years, the Seriti Commission delivered its report in March 2016, essentially backing the formal validity of the arms deal.[3]

[2] The Commission of inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Packages (SDPP) was announced on 24 October 2011 with Judge Seriti as chair. See http://armscomm.org.za/

[3] The Commission findings were heavily criticised. See for instance the special report on http://mg.co.za/report/the-arms-deal

Kenya's Anglo Leasing Scheme

Most of the information about this scheme in the public domain is attributed to whistle-blowers, particularly John Githongo's account.[4] In essence, Anglo Leasing and Finance Co. Ltd., was one of several corporate entities involved in contracts for the acquisition of security-related hardware and accessories conforming to a specific lease-purchase formula. Anglo Leasing became the nomenclature for this contract type. The Kenyan government would agree to purchase heavily overpriced equipment or services with a contracting partner who was single sourced, thus evading procurement legislation.[5] Simultaneously, the government would purchase an irrevocable lease loan from the contracting party, or a third party who in reality was interrelated with the contracting party, in order to finance the primary contract. Parliamentary approval required for ordinary government loans was partly or wholly sidestepped on grounds of national security. The government then paid out commitment fees and regular instalments, with interest, to honour its credit obligations while anticipating delivery of the contractual equipment or service. In some instances, the government continued to service the lease loan in spite of the contracting party defaulting on delivery of equipment or accessories. Between 2002 and 2004, Githongo was able to identify at least 18 Anglo Leasing-type contracts whose value was about 16% of the government's gross expenditure for the financial year 2003/2004 (Wrong 2010).

Mwai Kibaki's administration inherited the Anglo Leasing scandal from the Moi regime which it had replaced in a historic victory in the 2002 general elections. In spite of his pledge to fight corruption, Kibaki tacitly condoned a resource mobilisation strategy. This saw his key ministers take charge of Anglo Leasing contracts within a year of his taking office. This started with irregular changes to a procurement for tamper-proof passports formally administered by a department supervised by the Vice President. As Parliament would be informed in March 2004, the original contract quoted at US$8.3m should have been awarded to a French credit card supplier, Charles Oberthur. Instead, the contract was awarded to single-sourced Anglo Leasing and Finance Company, purportedly registered in the UK, at five times the price. The plan was that they would then sub-contract the French firm. Anglo Leasing's agent Sagaar Associates, identified as a firm in Liverpool, UK, was registered by a daughter of Chamanlal Kamani, reputedly an agent of the former Moi regime.[6] Payments related to Anglo Leasing were later traced, under mutual legal assistance requests from Kenya, to accounts held by banks in the UK, Switzerland and Latvia, some of which were associated with the Kamani family (Fayo 2014). Githongo's statement named several other agents and consultants who appeared to be essential facilitators, possibly even masterminds, of Anglo Leasing.

Anglo Leasing was investigated in vain by the parliamentary Accounts Committee, the Kenya Police, the Kenya Anti-Corruption Commission and the independent Auditor-General. Martha Karua, then minister of justice, informed parliament that Anglo Leasing operatives in government included the vice president, cabinet ministers and thirteen former permanent (principal) secretaries in the civil

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4 Githongo resigned from his post of Permanent Secretary in the Office of the President in charge of Governance and Ethics in 2005 after leaking his report and submission letter to president Kibaki dated November 2005, which may be downloaded at http://documents.mx/documents/the-anglo-leasing-scandal-githongo-dossier-kenya.html and at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf

5 Michela Wrong (2010) uncovers an overpriced contract for helicopters at USD9m per unit when simple internet searches showed contemporaneous acquisitions of the same models by Asian states at USD3.6m each.

6 On Saagar Associates, see http://news.bbc.co.uk/2/hi/africa/6992737.stm Chamanlal Kamani and his son Deepak Kamani were jointly charged in 2015 with masterminding Anglo Leasing contracts and defrauding the government contrary to the Economic Crimes and Anti-Corruption Act.

service (Africa Research Bulletin 2006). It is clear that a syndicate existed to bypass procurement legislation and parliamentary approval for loans, both ostensibly on grounds of national security. While prosecutions for economic crimes have been pending since March 2015 against a small number of former civil servants, the current administration continued to honour Anglo Leasing-related credit obligations accrued from 2002 (Daily Nation 15 May 2014). On the other hand, the Central Bank of Kenya has previously admitted receiving reimbursements from the Kamanis and other undisclosed agents, in lieu of penalties for contractual non-performance.

The Problem of Public Theft by Elected Incumbents

Politics around the world struggles with the control of benefits from public resources. What does vary considerably between states and economic sectors is the legal powers of politicians and public officials to deal with public resources. Since incumbent control of public resources provides the means to drive social policy preferences, it is indivisible from the democratic objective. When elected incumbents abuse their power over public resources, the issues that arise tend to be addressed by public law from the perspective of a principal-agent conflict of interest. Solutions often tend to experiment with additional fetters on the agent, i.e. the incumbent as the servant of the people.

Incumbent abuse of public resources takes numerous forms, the more egregious of which tend to be unlawful. Abuses such as kleptocracy or the use of public resources to rig elections or destroy the political opposition tend to invite wholesale opprobrium, with some quarters demanding regime change. Fortunately, after decades of reform, the problems of glaring accountability deficits in terms of institutional design and governmental legitimacy are no longer the main concern in Kenya and South Africa. Rather, these states face second-order problems of public-private sector relations as they struggle to build an inclusive culture based on the rule of law and equity in public expenditure. Here, the term public theft is assigned to both Anglo Leasing and the arms deals because incumbents spent public monies for private benefits. This was done through contracts that were characterised by questionable motives without being directly unlawful.

If the multiple motives behind public theft by incumbents are graded on a sliding scale, crude self-enrichment - the kind Nigeria's former president Goodluck Jonathan defined as 'common stealing' from government (africacheck.org/reports) - might lie at one end. At the other end could be self-enrichment from government contracts that retain some legitimate objective. The more incumbent actions slide toward the crude self-enrichment end of the scale, the more this public theft calls for criminal sanctions as a basic issue of the rule of law. Anglo Leasing and the arms deal are not characteristic of crude theft. The incumbents did not simply grab a public asset and privatise it. Instead they diverted public monies to private actors in deals in which they had an interest, ignoring alternatives with fewer opportunity costs but also fewer negative consequences on the national economy and democratic trust.

The arms deal and Anglo Leasing scandals are evidence that newly elected presidential incumbents, who could credibly claim tremendous democratic popular support, can very quickly succumb to practices that many believe constitute public theft. These sophisticated affairs happened and persisted in spite of democratic checks. If these two cases are seen as anomalies, then they could

simply be left with a nod in favour of more democratic reforms to strengthen institutional checks, normalise compliance and eliminate the problem.

But what if the deals instead signal the normalisation of public theft by elected incumbents in new African democracies? The question leads to a meta-dialogue on sustainable democracy. It could be approached by asking: what is entailed in the national wealth-maximising strategies of Africa's elected incumbents? The arms deal and Anglo Leasing cases should be located in a context where the state's main concern is development. I argue that these deals stand for the normalisation of wealth-maximisation strategies built around the incumbency of the presidency, even as the political culture shifts from obsolete identity-based patronage, replacing it with a rule of law superimposed on embedded inequality. The normalisation angle permits us to question assumptions about what is meant by the democratic control of public resources in Africa's leading democracies. I analyse the normalisation of public theft by revisiting Anglo Leasing and the arms deal from the perspectives of three cross-cutting themes, notably political culture, the rule of law, and market-based development. This is in order to draw some tentative conclusions about the emerging challenges facing the proponents of sustainable democracy in Africa.

Political culture

In her gripping book on the South African Truth and Reconciliation Commission, Antje Krog (2009) expresses the hope that South Africans will move from a culture of honour and shame to a culture of accountability and guilt. In a culture of shame, she observes, the politician's aim is to mobilise people on the basis of the honour of the group. A movement to a culture of guilt would permit a politician to accept responsibility for wrongdoing, for example violating the rights of others, without the wrong at the same time being attributed to his or her group.

A culture of shame could presuppose that the reputation of individual leaders should guarantee good behaviour, particularly in relation to how elected incumbents would handle public resources. Personal reputation was indeed at stake with both deals. When Githongo quoted the Chinese proverb to Kibaki about fish rotting from the head, he was convinced the president would not condone official actions that harmed his own credibility (Githongo p. 25) According to his biographer, Mbeki's dream of an African renaissance needed the cooperation of the military, in addition to black intellectuals, black entrepreneurs and neighbourhood leaders (Gevisser 2009). On the arms deal, Gevisser is at pains to reveal Mbeki's concern that black Africans needed to be seen as competent to handle international deals of such magnitude, and to strengthen South African leadership in a continent where Africans would solve African problems. Gevisser explores the ANC's realisation that South Africa's impressive military jets were henceforth 'ours' was a factor in decisions to buy arms that were probably unnecessary. Githongo similarly reveals coded remarks about not derailing 'our thing', which incidentally he heard from insiders who believed him to be one of their own.[7] At face value, this bifurcation leads to a familiar theme of identity politics.

[7] Michela Wrong reveals an interview with a journalist who described Githongo as a betrayer, a 'coconut' selling out his group for foreign personal admiration.

It would seem that systemic political theft is not far removed from South Africa's racial and Kenya's tribal politics. There is some circumstantial evidence for the charge of public theft in a culture of shame, notably of individuals in the inner circles of incumbency. They were directly stained by accusations in the arms deal and Anglo Leasing scams, yet still continued to maintain successful political and public careers. This was despite the fact that their actions also harmed the broadly shared economic interests of their voters and supporters. For instance, Jacob Zuma overcame related allegations against him to become president. Similarly, Mwai Kibaki was narrowly re-elected for a second term in 2008 and many Anglo Leasing figures did well in elections in 2008 and 2012. An Attorney-General, whose legal opinions supported payments to non-existent entities, was elected in 2012 to Kenya's upper chamber of Parliament. So was a former minister of justice who admitted in confidence that Anglo Leasing was 'us'. Voting for individuals suspected of public theft may have been an expression of group solidarity successfully mobilised by politicians manipulating feelings of collective shame.

At the same time, political culture fails to explain why intelligent, elected incumbents with some concern for political reputation would condone public theft among their close circles. Neither Kibaki nor Mbeki and company could have pulled off the Anglo Leasing and arms deal respectively, had they not been in office. They did not attain nor could ever have attained these positions only, or primarily, because of the support of 'their' tribal or racial group. Rather than showing evidence of a way of mobilising the racial or tribal group, these two transactions centre on the role of syndicates that straddle public and private sectors at both national and international levels. It could be argued that Kibaki and Mbeki and their circles, being somewhat new in office, would need to have a quick grasp of the appropriate public resources to target. They would also have needed convincing means to access large amounts of capital quickly to attract the necessary cooperation of international non-state actors, especially international banks and arms syndicates. Most of that kind of knowledge and access was in fact provided by well-placed lobbyists, internationally connected agents and established key insiders within the public (and military) service. Crucially, these latter enablers could only strategise the schemes. Their success was due to the willingness of the new incumbents to join and service syndicates that span the domestic public and commercial sectors, especially banking, and are linked to an opaque international financing system.

Kibaki needed trusted lieutenants to govern, in part because of his relaxed personal leadership style, but more realistically, because he had sustained serious setbacks to his health during his presidential campaign.[8] Kibaki too had a vision of economic growth, less grandly articulated and dogmatic than Mbeki's 'African renaissance', and Kenya's economy was a shambles when he took over. To invigorate it, he needed a supportive post-Moi military, engaged bankers and lots of money, or capital, in the system. Kibaki's public appeals to citizens tended to communicate a prospectus for government bonds, envisioning the public as potential creditors to government. What Kibaki, and Mbeki to some extent, did not need was the political leverage of mass-based political movements and party umbrellas. Those demands to make all factions happy would only result in incoherent policies at cross- purposes. Accordingly, Kibaki completely ignored his political party while only a so-called liberal faction within the ANC gained any serious traction with Mbeki. I think when cabinet minister Kiraitu confidentially identified Anglo Leasing as 'us', he was probably alluding,

[7] Kibaki had been involved in a traffic accident during the presidential campaigns which left him wheel-chair bound when he was sworn in.

not to the political party or even the ethnic group, but to the syndicate of enablers they had willingly joined. The likelihood that more than a few insiders had the knowledge and access needed to understand the opportunities behind Anglo Leasing and the arms deal is slim indeed. And the power of incumbents to distribute assets to domestic favourites also depended on enabling foreign or international private actors.

Restating Krog, democratic competition would not dampen the incumbent's appetite for public theft inside a culture of shame, since the incumbents surmise that their voter group would support them in solidarity. If so, then a movement to a culture of guilt appears to fix the problem of manufactured solidarity. On the other hand, the organisational capacity deployed behind the Anglo Leasing and arms deals transactions, together with the opacity and complexity of these transactions, suggests that even the transformation into a culture of guilt would not deal with the problem of public theft as such. That distinct problem could only be countered if another independent and knowledgeable organisation existed with the capacity to hold the incumbents to account. This may be what is reflected by the acclaimed efforts to build the rule of law.

The rule of law

In its basic formulation, the rule of law cultivates government that is predictable, transparent and rational (Annan 2004). What makes this possible is that the government (incumbents) and the governed are made equally answerable to the same general law, independently adjudicated. Machiavelli advised that incumbents who have the means of repression at their disposal, should accept the rule of law instead of unconstitutional methods of government. This is by calculating that the returns from making their behaviour conform to predictability (the rule of law) are greater than those from unrestrained and arbitrary acts. Hence, incumbents accept the rule of law for prudential reasons. Machiavelli also advised the incumbent to be more responsive to those with the political leverage to influence the exercise of power. He observed that loyalty and political support are excited by undeserved gifts and that loyalty is not dependent on the distribution of just rewards, because these are felt to have been deserved in the first place.

For those belonging to the sort of interest groups or syndicates mentioned above, that enable an incumbent to implement particular programmes, the incumbent's behaviour may be predictable and rational. As Holmes observed in Russia in the 1990s, the law can become highly predictable for privileged interests and maddeningly erratic for ordinary people and outsiders. If public theft is an anomaly, then interest groups should be subjected to the same laws as everyone else. The rule of law would gain wide traction as one of the devices to normalise inclusive government. Where public theft by incumbents is considered normal, legislation for particular interest groups would outstrip legislation of general application. Increasingly, judicial adjudication would also protect special interests over public equality and ownership. The result would be a legal system that fails to serve all citizens and groups equally. Holmes drives the point home thus: 'a political authority that submits to constitutional restraints to obtain voluntary social cooperation has no incentive to treat all groups equally, because it needs the cooperation of some groups more than the cooperation of others'. For public theft to triumph, there is no need for many visionaries. The important detail is in the methods. It is highly probable that those groups whose political leverage

was vital to Kibaki and Mbeki, those with international capital and those providing access to it, met with predictable and rational incumbents, even as ordinary citizens lamented their distant opacity.

Kenya and South Africa both signed the UN Convention against Corruption on 9 December 2003.[9] Thereafter, both states enacted legislation which criminalises some of the acts seen in the arms deal and Anglo Leasing scandals.[10] The problem is not so much that the South African and Kenyan anti-corruption legislation post-dates the arms deals and a number of the contracts involved in Anglo Leasing (1997-2003), but whether it could prevent those scams in the future and provide effective redress. When such legislation is enacted by incumbents who may also be the immediate beneficiaries of public theft, then they are either being cynical or are genuinely strengthening the rule of law as a remedial reform. If the latter, then arguably this legislation should provide a firm barrier between incumbents who would have an interest in promoting transfers of public resources to private actors in underhanded deals, and the apparatus needed to effect those deals. It should provide a disruptive effect on the organisational capacity for the public theft, characterised by the arms deal and Anglo Leasing, by injecting legal certainty, transparency and accountability into deals involving public resources. And it should provide an avenue for ordinary citizens and their associations to use legal means to protect their public interest in public resources.

Currently, the anti-corruption legal frameworks depend entirely on the investigatory and prosecutorial will and ability of public officials. These officials are themselves appointed by and are an extension of elected incumbents. Legislation foresees hardly any role for ordinary citizens to organise effectively against public theft. Instead it tries to co-opt citizen anti-corruption initiatives through a whistle-blower duty. If efforts to punish the culprits remain fruitless, those backing the legislation argue it is because the political and legal machinery required to ensure the success of retributive and deterrent efforts remains incomplete, dilatory or under duress. Such arguments point to an ever-increasing slew of institutional reforms to combat corruption.

In the scenario where public theft is the new norm, anti-corruption legislation not only exists, it is even complemented by legislation on access to information and mutual legal assistance. But this legislation is not allowed to disrupt the organisational capacity behind incumbents as active agents in public theft; it is almost impossible, for instance, to use it to lift the lid on banking or military secrecy. This futility of legal rules and institutions shows only one dimension of public theft as the new norm. This is because it is not the lack of legal certainty, proscriptive rules and individual rights independently adjudicated that explains something like the arms deal or Anglo Leasing. The fact that a few secondary circle insiders may be criminally prosecuted shows that this legislation may even be part of a rule of law façade in which public theft reflects parallel sets of laws. Moreover, while private economic interests increasingly adopt the language of legislation, special interest legislation caters for only a few. This results in smaller circles of those who can reliably protect their rights or interests by legal means, and in less economically pluralist societies. Both legislatures and the courts then emerge as the domains of special interest legislation.

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[9] The convention was adopted by General Assembly Resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005.

[10] See the Prevention and Combating of Corrupt Activities Act, No.12 of 2004, particularly ss3, 12-19;

Machiavelli foresaw that successive incumbents would be interested in self-restraint under the rule of law to maintain a particular system, because such a system caters for most of their core interests. In fact, Kibaki and Mbeki probably calculated on the additional assurance that political leverage would remain asymmetrical and concentrated, with their organised interests projected into the future. At heart, the deals in Anglo Leasing and the arms deal thrived on systems for the extended transfer of public resources to private actors, which is now strongly established in both Kenya and South Africa. These resulted in unofficial motives intertwined with the justified ends nonetheless permitted by anti-corruption laws. If well-placed individuals benefit from self-enrichment in tenders with justified ends, e.g. building homes, the courts could justify these gains, even ill-gotten ones, in the public interest of consolidating property rights. There seems to have been an incentive for the regimes of Kibaki and Mbeki to enact legislation to combat corruption and strengthen the rule of law, even if the legal certainty at first rewarded only insiders. This would have anticipated broadening it out downstream when their gains were already irreversible. Such prudent reasons demonstrate that scams such as the arms deal and Anglo Leasing cannot be comprehended purely as law enforcement questions.

One crucial fact has to be that no court of law has so far declared either scheme to be illegal or invalid. Some litigation questioned particular transactions; but the underlying principle behind these schemes has never been really questioned. Even if their motives were impure, the absence of judicial invalidation of the relevant contracts also means that former incumbents would be entitled to compensation, were future incumbents to seek to dispossess them of their self-enrichment. To avoid parliamentary and judicial scrutiny, the incumbents concerned were careful to adduce the reason of state arguments. These entail skirting public scrutiny and need additional attention. They undoubtedly add some weight to the view that institutional checks, including freedom of information laws, can never fully embrace the reach of executive branch prerogative powers in the zones of international commerce and national security.

South African incumbents bent the rules to favour more expensive acquisitions from corporate entities of apartheid-era state sponsors of the ANC. But it is the elusive existence of the entities involved in the Kenyan case that clearly underline the outright public fraud there. Under pressure, South African incumbents allowed a quasi-judicial inquiry into the affair which has succeeded in propping up the formal validity of the arms deal. Meanwhile, their Kenyan counterparts continue to obfuscate legal and quasi-judicial avenues of investigations. This significant difference underlines the fact that South Africa has better developed legal machinery than Kenya.

Yet in spite of this difference, it could be argued that the tone of emphasis on the rule of law is the same in both cases – it is weighted in favour of preventive and procedural rules and less on substantive outcomes. If public theft is to be made an anomaly, the substantive outcome for rule of law reforms should also be calculated in terms of the associations of citizens that can organise legally with capacity to pursue incumbents accused of public theft via fair trials. If government and government agencies monopolise the effective capacity to do this, then the rule of law may be part of the façade maintained by parallel systems endemic to public theft as the new normal. Richly diverse special interest legislation may indicate that citizens' associations are also successful in using legislation to secure their own interests through political mobilisation. This may be the purpose of broadening the number of participants in political competition.

Political competition and market-based development

Voters as rational actors are not expected to knowingly enter into a pact with the incumbents whom they elect in order to expand a democracy of the poor, by impoverishing greater numbers. Hence, another important premise of sustainable democracy is that the initiatives of incumbents are seen to raise standards of living. Where the state has become more explicitly concerned with development, as in Kenya and South Africa, a central role of incumbents has been the building of new markets and the expansion of existing ones.

It should be noted at the outset that the room for manoeuvre in developmental terms is increasingly defined by international rules, some of which set conditions for participation in international trade. Kenya and South Africa both acceded to the free trade promoting WTO on its establishment date, 1 January 1995, thereby increasing the global integration of their economies. From a WTO perspective, the disparity between the Kenyan and South African economies is arresting in itself. Not only has South Africa outranked Kenya in volume of trade in merchandise and services, but a side glance at innovation reveals that Kenya could claim only one resident registered patent by 2013, against South Africa's 474.[11] This disparity however hardly translated into the pursuit of radically different development approaches between Kibaki and Mbeki, both of whose policies initially reflected a neoliberal slant. Besides the WTO system, Kenya and South Africa each concluded multiple bilateral and multilateral investment treaties in order to secure the voluntary cooperation of foreign capital in domestic development. In general, incumbents are under domestic pressure to deliver development. Ironically, at the same time their international commitments invariably diminish their control under a global economic framework that has its own favourites (Salomon 2012, pp. 271-292).

The architecture of South Africa's 1996 Constitution, which was borrowed with modifications by the 2010 Constitution of Kenya, laid out a new institutional framework for democratic oversight over public finances. It also assigned three interdependent spheres of government functions which could be exclusive or concurrent. In this scheme, the national government makes policy, provides regulatory oversight and is exclusively responsible for justice, defence and foreign affairs. Concurrently with the regional governments, it shares responsibility for education, health, housing and social services, with revenue collected nationally and transferred with and without conditions to the provinces, based on a cabinet decision. Incumbents in this system have dual functions related to development: firstly to catalyse economic growth; and secondly, to ensure reasonably equitable economic development in the different parts of the state and population. In Kenya and South Africa, on account of historical patterns, the second role of distribution gained more attention at the constitutional level. This included commitments for equalisation and interregional equity, as well as targeted assistance for marginalised or historically disadvantaged groups. Accordingly, Mbeki and Kibaki paid attention to both economic policy and the roll-out of two kinds of welfare: universal welfare schemes in primary education, and residual welfare covering categories of people deemed in need of affirmative measures. The South African intellectual Moeletsi Mbeki (Mbeki 2009) and Kenyan economist David

[11] In 2014, out of 164 countries, Kenya ranked 104 as an exporter of merchandise (80 for imports) and South Africa was placed at 40 (33 for imports). For trade in services, Kenya was at position 100 for imports (80 for exports) and South Africa was ranked 45th (44 for exported services). See http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=ZA and http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=KE

Ndii are among those who have argued that the confines of the latter included income poor as well as beneficiaries of clientelist networks.

While still deputy president and then quite early in his first term as president, Thabo Mbeki oversaw the reform of South Africa's public finance management. The fiscal legislation, technical formulas, intergovernmental transfer mechanisms and multi-year mid-term budgeting framework that align public policy with public expenditure were put in place between 1997 and 2000. This is the period praised by an OECD study as the crucial vector to 'an overall system of democratic budget oversight' (Folscher & Cole 2006). Kibaki similarly completed the reinvention of public finance and administration, even though he was reluctant to limit central control until he was pushed to endorse constitutional reform at the end of his second term. Public finance reforms also introduced elements of a culture of guilt into public finances. Hence, under the South African Public Financial Management Act, 2000, individuals were designated as accounting officers in constitutional institutions, public entities and governmental departments. They could be criminally sanctioned for non-compliance offences. Kibaki signed off on Kenya's mirror Public Finance Management Act No 412 in 2010. It is interesting that both Kibaki and Mbeki oversaw this consolidation of technical prowess and political oversight in public finances in an effort to curtail the political backdoor influence of public expenditure through budget games. And while Mbeki declined to bail out provincial governments in the red, Kibaki warned non-performing state-owned enterprises that his government would abdicate its traditional practice of bailouts. Their reforms paved the way for, among other things, public-private partnerships for the financing of large infrastructure projects, while cutting back reliance on donor aid. This is why the Anglo Leasing and arms deal transactions must also be seen as avenues for Kibaki and Mbeki, respectively, to show international stakeholders that they were serious about disciplined fiscal management, notoriously perceived as absent or indeed decadent in Africa.

In light of the need for international cooperation and domestic market building, the arms deal and Anglo Leasing scandals provide evidence of public theft as the new norm rather than the hoped-for anomaly. Ironically the two schemes were justified as available methods whereby incumbents could harness the development effort. For instance, the arms deal was crafted to include employment guarantees subsidised by three primary contracts. Some 65 000 new jobs were promised in addition to other secondary contracts envisaged for the direct benefit of domestic capital. The Seriti Commission discovered that this economic payoff was honoured, thus contradicting other observations that some of the international players ended up paying compensation instead of honouring the local labour and material obligations. However, the important detail is that the local value-adding elements had been deliberately promoted as an essential link to the description of the arms deal as an elaborate investment scheme. Part of its justification therefore, even if only a minor one, was the domestic market-building offset. By contrast, what is publicly disclosed from Githongo's 2005 report is that the Anglo Leasing model of public theft was justified as an initiative to amass a war chest to finance the next presidential election campaigns. It is more realistic to think that this public theft was intended to provide incumbents with additional capital for new private ventures. Firstly, the regime manipulated its first contract in 2003, the first year of its five-year term. Secondly, Anglo Leasing tracked what the Kenyan economist David Ndii saw in Kibaki-era mega-infrastructure projects, namely, the difficulty of ascertaining where 'elite cronyism ended and a more strategic focus begun.' (Ndii 2016).

Various calculations were used to paint Anglo Leasing and the arms deal as so wasteful that no educated incumbent would seriously believe they made economic sense. Their opponents argued that the affairs were not optimal for what may be objectively dressed as public benefit, either short-term or long-term or both. These assessments seem to be rooted in notions of political competition, turning as they do on the role of incumbents as representatives of the public interest in economic decision-making. Without going into their merits, the assessments no doubt exaggerate the ease with which incumbents in states with embedded inequality can determine the objective public interest. Similarly, it is not clear why, having made their calculations as to what is politically valued, they should subsume subjective political value to other perceptions of public interest, nor why very intelligent incumbents like Kibaki and Mbeki would prioritise economic schemes that lacked objective economic sense.Kibaki and Mbeki, on whom these schemes hinged, did not merely grab and privatise a public asset for themselves or their cronies. Instead, these two presidents acquired the skill and will to allow inner circles to wrest opportunistic costs from certain kinds of government contracts whose necessity is not entirely dismissible. After all, a well-defended South Africa is arguably an essential development pillar, and tamper-proof passports would facilitate commercial travel by Kenyans. Suggestions that these deals were less than optimal or prudent in economic terms, do not adequately address the fundamental mystery of why incumbents were willing to enrich themselves and their cronies in the pursuit of fairly legitimate development objectives. Both Kibaki and Mbeki, being masters of method, offer us rather complex schemes. While smelling rotten, these schemes largely avoid the overt fraud and criminal self-advantage that would lay them open to charges under anti-corruption criminal legislation. As argued above, these schemes succeeded because of the symbiosis between incumbents and public theft syndicates.

If public theft is the new norm and Anglo Leasing and arms deal schemes are condoned as domestic market-building initiatives, the implications for political competition are straightforward. The outcome of open elections will not matter if newly elected incumbents are willing to join and service public theft syndicates. Democracy will only make it easier for powerful syndicates to select their choice from pliable candidates. One risk is that different candidates only represent competing syndicates with their own schemes of public theft. On the other hand, those candidates or incumbents who express their opposition to public theft will have to emerge from party systems that are not controlled by powerful syndicates that span both public and private sectors. To succeed both at elections and in government, such individuals will need to build an organisational capacity that does what James Madison, in his Federalist Papers, described as opposing power with power.

Conclusion

Kenya and South Africa reveal the extent to which public-private partnership investment models have given rise to syndicates or networks of insiders. These benefit from access to knowledge that is restricted to very few government officials and politicians. Incumbents who agree to service these networks need not steal public resources or even acquire a public material resource and privatise it. They merely have to direct public monies toward legitimate objectives that are also lucrative in terms of opportunity costs. The systems thus created are reusable over time. Anglo Leasing, for example, provided a dependable stream of income from 1997 through to 2012. Military and security-related deals hidden from open scrutiny certainly represent an attractive field for incumbents. However, the operation remains dependent on the authority and willingness of incumbents to collude with

government accountants, dependable financiers and well-placed political lobbyists. Specialised and fast-moving knowledge is at the centre of sophisticated public theft, yet it is organisational capacity that will shake the trees and make the fruit fall, as Balzac put it. There is an incumbent-syndicate symbiosis at play in the field of services, especially banking and so-called science-based services. In order to be effective, champions of sustainable democracy need to know enough about the operations of syndicates, which even now are pulling off hidden schemes of public theft in the interests of government.

Mbeki's biographer has offered a crucial glimpse inside a dream deferred that is unfortunately still lacking in Kibaki's context. The tight fiscal management in South Africa had produced a budget surplus by 2003 just as it was beginning to dawn on Mbeki that 'trickledown economics did not work in the South African context and the only solution to poverty was state investment' (Gevisser pp. 310-311). Mbeki also became embittered by the way the private sector failed to respond to his government's business-friendly policies with investment. 'We had done everything by the book and where was the money? Why was there not the promised increase in foreign investment? If we were going to we needed to do it for ourselves.' (Gevisser p.312) Perhaps foreign investment was and is not forthcoming due to stagnation in the traditional sources of foreign investment. At the end of the day, the state in Africa is left holding the ball. If public theft by incumbents does create new domestic markets, should it matter, for the purposes of sustainable democracy, where investment money is coming from (public theft) or where it is going (market building)?

If public theft is simply a problem of corrupt self-enrichment, law enforcement solutions would be adequate provided the state genuinely upholds the rule of law. But successful public theft should make the champions of sustainable democracy pause to question assumptions about the nature of the rule of law and its favourites, and how to go about making it more inclusive. Incumbents who harbour the intention to increase economic gains in absolute terms may still contribute strenuously to strengthening the rule of law and public institutions. This is true even if their schemes for public theft do not spread gains evenly, or possibly harm some social segments.

Certainly the imperative for Africa's new democracies is not only to produce economic growth and spur new industries, it is also to deal with the equitable distribution and redistribution of economic benefits. Normalising public theft leaves us with the problem of development inequality. Solutions for residual welfare to minimise the negative impact on the most vulnerable are only partial. Thinking of this entitlement as a human rights issue, as in South Africa's famous Grootboom case, still reinforces the residual welfare approach. We are speaking here too about normalising development inequality in Africa's new democracies. This may be the bitter pill that advocates of sustainable democracy have to swallow.

The problem of government in Africa used to be that the administrative allocation of resources was not a key driving force in the economy because politics were mostly non-competitive. The principle of democratic rotation has, however, caught on in Kenya and South Africa. In fact, Kibaki and Mbeki were both singular beneficiaries of new rules of political competition. Yet presidential incumbents are a lucrative target for capture by informal power networks. This is made crystal clear by the observations on the relationship between President Zuma and the Gupta family contained

in the report on 'State of Capture' produced by South Africa's Public Protector in 2016. Directing public resources to private hands in the name of development has been debated over the years and vigorously criticised (Bond 2006). The question arises as to what wealth maximising strategy an incumbent president should adopt in either Kenya or South Africa.

If public theft is the anomaly, we should see incumbents place a premium on inclusive development. This should include a broad sharing of benefits which are equitable and embedded in durable systems and processes that emerge over time. The question to be asked is whether this is happening in Kenya and South Africa. Public theft that acts as an express highway to wealth for a small number of people with covert connections to the presidency may indicate a problem emanating from the constitutional design of this office.

Finally, public theft as the new normal is not a declaration of defeat. On the contrary, perceiving the problem as one of normalisation is useful to highlight the exceptions which subvert the desired norm. I have tried to do this by comparing two major scandals involving public monies. My observation is that public theft reveals areas for ongoing struggles. These span the importance of political culture, the rule of law superimposed over embedded inequality, and the idea that democracy must deliver development or die. There is also much evidence that Kenya and South Africa have created new reform impulses as a result of these two scandals, thus revealing an understated silver lining.

The real danger from public theft is that incumbents subvert the rule of law to shore up their gains, and that they cease to care whether the broader economy functions for those outside the inner circles. Incumbents may worry about the problem of maximising wealth. It seems to me that the major problem for champions of sustainable democracy is scaling up organisational capacity by those who seek to protect the public interest as they understand it. This includes making the previously unconnected more legally and politically assertive in expanding the base for pluralist economics and politics.

References

Africa Check. 2014. Available at: https://africacheck.org/reports/is-president-jonathan-right-to-claim-most-corruption-is-just-common-stealing/

Africa Research Bulletin, Economic, Financial and Technical Series. 2006. January 16th–February 15th.

Annan, Kofi. 2004. *Report on the Rule of Law and Transitional Justice in conflict and post-conflict societies*. New York: United Nations.

Bond, Patrick. 2006. *Looting Africa: The Economics of Exploitation*, Zed Books

Dahl, R.A. 2008. *Democracy and its critics*. New Haven, Yale University Press.

Daily Nation. 2014. '*Revealed: Scandal of Shs2.7b deal*', 21 April.

Fayo, G. 2014. '*Kamani fights Switzerland plea for Anglo Leasing files*'. Business Daily Africa July 2014. Available at www.businessdailyafrica.com

Feinstein, Andrew. 2010. *After the Party: Corruption, the ANC and South Africa's Uncertain Future*. London: Verso.
Folscher A. & Cole N. 2007. 'South Africa: Transition to Democracy Offers Opportunity for Whole System Reform', OECD Journal on Budgeting, vol. 6, no. 2.

Gevisser, Mark. 2009. *Thabo Mbeki: The Dream Deferred*. Johannesburg: Jonathan Ball.

Stephen Holmes, Stephen. (n.d.) *How to think about the rule of law*. (unpublished paper on file with author).

Krog, Antjie. 2009. *Country of My Skull*. Johannesburg: Random House Struik.

Mbeki, Moeletsi .2009. *Architects of Poverty: Why Africa's Capitalism needs Changing*, Johannesburg, Pan Macmillan

Ndii, D. 2016. *Daily Nation*, 13 August.

Ndulo, M. (ed.). 2006. *Democratic Reform in Africa: The Impact on Governance and Poverty Alleviation*. *Athens*: Ohio University Press.

Silverstein, K. 2011. *Teodorin's World*, in Foreign Policy, 21 February, 2011 available at http://foreignpolicy.com/2011/02/21/teodorins-world/

Salomon, M. 2012. 'Winners and others: Accounting for international law's favourites' in *The Cambridge Companion to Human Rights*. Cambridge: Cambridge University Press, pp. 271-292.

Virtual Press Office. Available at: http://www.armsdeal-vpo.co.za/

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Upholding Democratic Ideals and the Challenge of Regulating Campaign Finance: Case Study of Austria[1]

By

Richard Lappin

Introduction

The issues surrounding campaign finance have a significant impact on the quality of elections, a fact that is no longer in dispute. Without adequate financing, candidates and parties have little chance of campaigning effectively or conveying their messages to voters. At the same time, state authorities and citizens have a legitimate interest in ensuring that the campaign finance system is equitable, transparent, and limits the potential for corruption. So campaign finance regulations must balance two needs: on the one hand, the need to respect freedom of expression; and on the other, the need to ensure a fair electoral process.

To achieve this balance, countries have addressed the regulation of campaign finance in different ways. How they have chosen to go about it depends on their specific circumstances and also on their approaches to the role of public and private funding in political life. In many countries, campaign finance regulations are evolving to meet new challenges. Among these challenges are growing demands for more transparency and for more accountability. And while technical aspects of campaign finance systems may vary from one country to another, core principles of transparency and accountability are of importance to all.

As campaign finance has attracted increased attention from voters, from regulators and from electoral contestants, it has also become a key component of assessments by international election observers. This article looks firstly at the challenges in regulating campaign finance through the lens of the most prominent international organisation observing elections in Europe, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR). The remainder of the article includes four sections: the first provides an overview of the relevant standards for assessing campaign finance in the OSCE region. The second outlines ODIHR's approach for observing campaign finance; and the third summarises some of the major trends observed in regulating campaign finance across the OSCE region. The fourth section provides a case study of Austria and its recent efforts to regulate campaign finance more comprehensively. The article then offers a brief conclusion and some ideas on how campaign finance regulation may be improved in the future.

[1] This article was written in November 2016 since when there have been a few technical changes to campaign finance law in Austria.

International Obligations, OSCE Commitments and other Standards

The obligation to hold genuine elections that reflect the free expression of the will of the people is well established, as reflected in Article 21 of the Universal Declaration of Human Rights (UDHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR). This obligation has been frequently and explicitly committed to by the 57 participating states of the OSCE, an intergovernmental body working for stability, prosperity and democracy across Europe, the Caucuses, Central Asia and North America. In the 1990 OSCE Copenhagen Document, for example, all OSCE participating states agreed that 'the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and the legitimacy of all government'.

Importantly, a number of OSCE documents promote participating states' adherence to universal – as well as to some regional – human rights instruments. For example, the 1975 Helsinki Final Act commits states to 'act in conformity with the UDHR' and to 'fulfil their obligations set forth in the international declarations and agreements in the field, including inter alia the International Covenants on Human Rights, by which they may be bound'. The 1983 Madrid Document explicitly called 'on those participating States, which have not yet done so, to consider the possibility of acceding to the covenants'. Later OSCE documents reiterate the importance of acceding to international human rights treaties, related optional protocols and the 1950 European Convention on Human Rights (ECHR).[2]

It is on these grounds that campaign finance, like all aspects of an electoral process, should be assessed against international obligations, OSCE commitments and other standards for democratic elections. This provides an agreed framework, to which states have voluntarily committed themselves, as the foundation for assessments. This is important for all aspects, but especially ones such as campaign finance which are not only emerging topics but also tend to attract strong political, and even moral, responses and reactions

Yet universal instruments regulating campaign finance are limited, coming almost entirely through the 2003 UN Convention against Corruption (UNCAC), with a clear call to states 'to enhance transparency in the funding of candidatures for elected public office'. Unlike other UN treaties, UNCAC lacks a competent treaty-monitoring body to monitor compliance, to issue authoritative interpretations and to receive complaints. Nonetheless, the key principle of campaign finance transparency has been transposed into some regional and sub-regional instruments, including the African Union Convention on Preventing and Combating Corruption and the Inter American Democratic Charter, as well as national legislation within the OSCE region. All OSCE participating states are party to UNCAC.

Also at the universal level is the 1996 General Comment No. 25 of the UN Human Rights Committee. This provides authoritative interpretation of Article 25 of the ICCPR and in so doing it touches on

[2] See also paragraph 13.2 of the 1989 OSCE Vienna Document on acceding to international human rights treaties in general, and paragraph 15 on the Convention for the Elimination of All Forms of Discrimination against Women, as well as paragraph 40.2 of the 1991 OSCE Moscow Document on the same convention. Paragraph 5.20 and 5.21 of the 1990 Copenhagen Document refers to acceding to human rights treaties generally, including the ECHR. Paragraph 32, Chapter VI, of the 1992 OSCE Helsinki Document refers to accession to the International Convention on the Elimination of All Forms of Racial Discrimination.

a number of issues pertinent to elections, including campaign finance. In particular, it provides for a spending limit 'where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by disproportionate expenditure on behalf of any candidate or party'. The condition of when a spending limit might be applied is important and represents something of a high threshold.

Lastly, at the universal level, the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), all provide obligations on states to consider implementing special measures when certain social groups are underrepresented. Some level of public campaign financing may contribute to this goal.

Source	Text
UN Convention Against Corruption *Article 7 (3)*	'Each State Party shall also consider taking appropriate legislative and administrative measures... to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.'
UN Human Rights Committee General Comment 25 *Paragraph 19*	'Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.'
CEDAW, ICERD and CRPD	All provide for special measures to encourage more balanced participation of these groups (women, national minorities, persons with disabilities). Some level of public campaign financing may contribute to this goal.

Figure 1: Campaign finance and international instruments

OSCE commitments are far-ranging when it comes to the conduct of electoral processes, but none explicitly address campaign finance. Nonetheless, the principles of equal treatment in campaigning are referenced in the 1990 OSCE Copenhagen Document, and both are part of the framework for an effective campaign finance system. Paragraphs 7.7 and 7.6 require OSCE participating states to 'permit political campaigning to be conducted in a free and fair atmosphere', with 'legal guarantees that allow [candidates and parties] to compete on a basis of equal treatment before the law and by the authorities'. Paragraph 5.4 provides related protection against the abuse of state resources by providing for 'a clear separation between the state and political parties; in particular, political parties will not be merged with the state'.

The Council of Europe, whose 47 member states are all OSCE participating states, has also been instrumental in identifying campaign finance as a key issue and in setting standards for effective regulation. Most notably Recommendation 2003(4) of the Council of Europe's Committee of Ministers states that '... governments of member states [should] adopt, in their national legal systems, rules against corruption in the funding of political parties and electoral campaigns.' It also calls for consideration of reasonable contribution and expenditure limits, strict regulation of donations from legal entities and foreign sources, independent monitoring and supervision of campaign financing, and effective sanctions for transgressions.

There is also an increasing number of documents that set out a range of good practices, including the Council of Europe's Venice Commission Code of Good Practice on Electoral Matters, as well as the OSCE/ODIHR and Venice Commission Joint Guidelines on Preventing and Responding to the Misuse of Administrative Resources and, separately, on Political Party Regulation. A number of states have joined the Council of Europe's Group of States against Corruption (GRECO), which has assessed states' legislation and practice towards political finance, including campaign finance.[3] The combined GRECO reports provide a valuable resource of challenges and good practice in campaign finance.

Lastly, the important role of the European Court of Human Rights (ECtHR) should be acknowledged. The ECtHR is tasked with ensuring the observance of the ECHR and in recent years has addressed a wide range of election-related cases, including on campaign finance. This has touched upon the sensitive issue of balancing the right of freedom of expression against the need to ensure a fair electoral process. The ECtHR has consistently placed considerable weight on the state's need to protect the electoral process and democratic debate when assessing campaign finance regulatory objectives. For example, in 1998 the ECtHR considered a case against the United Kingdom on whether a £5 limit on third-party campaign expenditures violated the right of freedom of expression under Article 10 of the ECHR. The Court ultimately concluded that the limit was set too low, but recognized the state's legitimate aim in restricting such expenditures.[4]

Source	Text
Recommendation Rec (2003)4 of the CoE Council of Ministers	'... governments of members states [should] adopt, in their national legal systems, rules against corruption in the funding of political parties and electoral campaigns.' Also to consider: - Reasonable contribution and expenditure limits, with strict regulation of donations from legal entities and foreign sources. - Independent monitoring and supervision, including effective sanctions
1990 OSCE Copenhagen Document, *Paragraphs 7.7, 7.6 and 5.4*	'permit political campaigning to be conducted in a free and fair atmosphere' with 'legal guarantees that allow [candidates and parties] to compete on a basis of equal treatment before the law and by the authorities.' '... a clear separation between the State and political parties; in particular, political parties will not be merged with the State.'
Other	- 2002 Venice Commission Code of Good Practice in Electoral Matters - 2010 Venice Commission and ODIHR Guidelines on Political Party Regulation - GRECO Reports - ECtHR judgments; domestic courts

Figure 2: Campaign finance and regional instruments

[3] See: http://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp.
[4] See Bowman v. United Kingdom, judgment, ECtHR (1998)

The OSCE/ODIHR's Approach to Observing Campaign Finance

The OSCE/ODIHR is one of the world's principal regional human rights bodies, conducting election observation and follow-up activities across all 57 OSCE participating states. Since 1996 ODIHR has observed more than 320 elections, which equates to some 16 missions a year involving some 3,500 observers.

Within the OSCE/ODIHR's activities, there has been a growing emphasis on campaign finance. For some time now, the OSCE/ODIHR has been deploying increased numbers of campaign finance experts within its observation activities, providing dedicated sections on campaign finance within its observation reports, and including in those reports more recommendations on how to improve campaign finance. For the five years between 2011 and 2016, the OSCE/ODIHR made a total of some 190 recommendations to improve campaign finance regulation across the 71 elections observed within this period. That translates to an average of some two and a half recommendations per mission, or one in ten of all recommendations being related to campaign finance.

Importantly, campaign finance has become an intrinsic part of the OSCE/ODIHR's work in all aspects of the electoral cycle. This includes dedicated reporting during Needs Assessment Missions, which determine the areas of interest for a possible election observation activity, as well as attention during follow-up activities, be it in legal reviews or technical advice to electoral stakeholders.[5]

In light of this greater focus on campaign finance, both within participating states and in its own activities, the OSCE/ODIHR published its Handbook for the Observation of Campaign Finance in 2015. The handbook, the first of its kind in the OSCE region, aims to establish a more systematic and comprehensive approach to observing this important part of the electoral process. The handbook combines explanations of technical aspects related to campaign finance with practical advice for election observers on how to approach the topic.

The OSCE/ODIHR observes campaign finance in a manner similar to how it observes other electoral components. Observers look at the legal framework and the procedures related to campaign finance and assess their implementation against international obligations, OSCE commitments and other standards. In particular, five thematic components of campaign finance are assessed: (1) the legal framework; (2) contributions and expenditures; (3) reporting and disclosure; (4) oversight and monitoring; and (5) sanctions and appeals. Attention is also given to how campaign finance affects the participation of groups that are often under-represented in political life, including women, national minorities and persons with disabilities. On this basis, the OSCE/ODIHR then provides recommendations on how campaign finance legislation and practice can be improved within a given country.

Core team analysts based in the capital of a country, long-term observers (LTOs) deployed to regions, and short-term observers (STOs) deployed for election day, can all play a role in gathering

[5] For more information see the OSCE/ODIHR Handbook on the Follow-up of Electoral Recommendations: http://www.osce.org/odihr/elections/244941.

information for assessing campaign finance. In a situation where particular finance-related issues arise, the OSCE/ODIHR may deploy a dedicated Campaign Finance Analyst to provide a comprehensive analysis of the process. Observers review laws and regulations and meet with relevant officials to determine how they undertake and fulfil their remit. They also meet with electoral contestants and civil society to discuss their level of confidence and understanding of the system. The views of political parties and candidates often provide a good indication of whether the laws are appropriate to the circumstances of a given state, while civil society may provide an alternative and more impartial view of regulations and the oversight bodies.

International election observation enjoys many benefits. These typically include resources (to undertake comprehensive reviews of law and to observe their implementation), access (to key stakeholders within the country), publicity (of findings and recommendations), and providing a gateway to electoral reform and dialogue (through recommendations and international pressure to implement them). However, there are some challenges that ought to be noted. First is the precise role and mandate of observers. The OSCE/ODIHR looks specifically at campaign finance and not broader issues of political corruption. Similarly, observers are not in a position to conduct an audit or determine the level of accuracy of campaign finance reporting. Moreover, all assessments and recommendations must always be based on international obligations, OSCE commitments and other standards, rather than an individual view of how money in general should be regulated in political life.

A second challenge relates to the duration an election observation activity is deployed. The full range of campaign finance activities often do not coincide with the period of an observation activity. Some procedures are conducted well in advance while other key components often occur several months after the observation period has ended. A particular concern is that final campaign finance reports are often submitted several months after election day, at a point when the OSCE/ODIHR mission has usually withdrawn. Nevertheless, core team members, as well as LTOs and STOs, can still collect sufficient information during the mission to make a well-informed assessment.

A third challenge is that campaign finance represents just one of several areas of focus on an observation mission, alongside the likes of the election administration, voter registration, media monitoring, and complaints and appeals. Report space is always precious and limited and there is a need to be concise and to balance the assessment of campaign finance against other important components within the electoral process.

Trends in Regulating Campaign Finance in the OSCE Region

In 2013, the OSCE/ODIHR undertook a Review of Electoral Legislation and Practice in OSCE participating states. The Review, which synthesised the OSCE/ODIHR observation findings and conclusions from the preceding three years, found a wide variety in the approaches to regulating campaign finance across the OSCE region. It also stated that 'the most common problems in law

and practice related to a lack of reporting and disclosure, insufficiently mandated oversight bodies, and a lack of timely deadlines for monitoring and reporting on campaign finance'.[6]

These trends are confirmed and elaborated when analysing the OSCE/ODIHR's some 190 recommendations on campaign finance during the five years between 2011 and 2015. Indeed, the focus of required reform is clear, with over one third of recommendations related to measures to enhance reporting and disclosure, and a quarter related to measures to strengthen oversight bodies. This section analyses these recommendations according to the five thematic areas identified in the OSCE/ODIHR's Handbook for the Observation of Campaign Finance, namely: (1) the legal framework; (2) contributions and expenditures; (3) reporting and disclosure; (4) oversight and monitoring; and (5) sanctions and appeals.

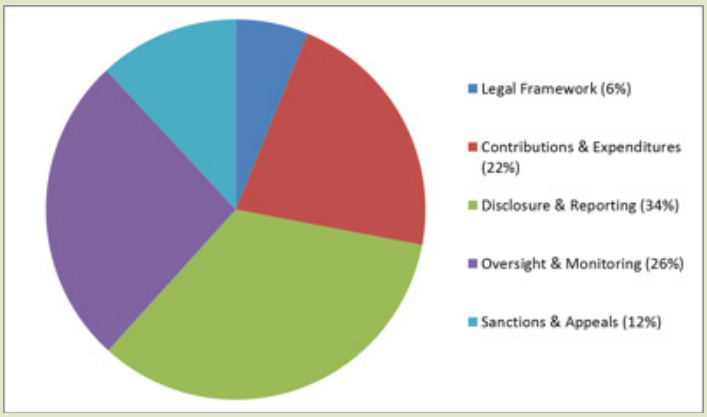

Figure 3: OSCE/ODIHR campaign finance recommendations, 2011-2015

The relatively low number of recommendations on comprehensive legal reform indicates that most states have at least a rudimentary campaign finance system provided in law. States have implemented legislation in different ways; some have dedicated campaign finance laws, others have incorporated rules into their political financing law or their electoral code. The precise type of law is less important than the clarity and comprehensiveness of the law. It should also be noted that more regulations do not necessarily equal a stronger legal framework. The system may become overly burdensome for parties or too difficult to enforce. As such, it may be preferable to promote transparency as a first step, rather than trying to ensure all procedures are finely detailed. Nonetheless, around 90% of campaign finance recommendations would still require amendments to law or regulations.

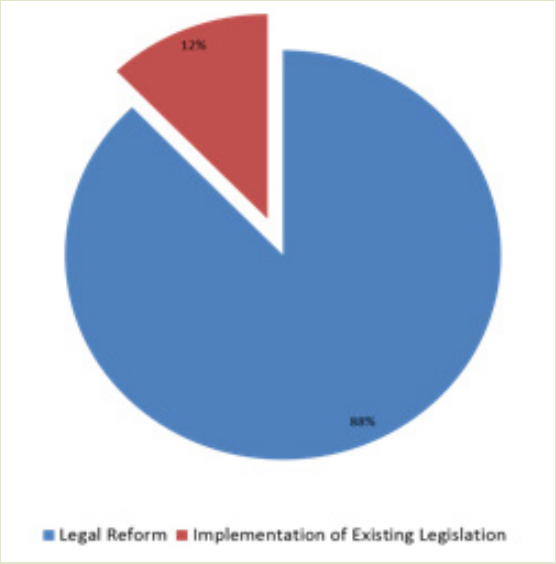

Figure 4: OSCE/ODIHR campaign finance recommendations requiring legal reform

[6] See: http://www.osce.org/odihr/elections/107073.

More comprehensive legislation has primarily led to detailed regulation of contribution and spending limits, hence the relatively low level of recommendations in this area. Within the OSCE region, it is notable that the majority of states have decided to formalise some form of public financing within their new laws. When public financing is in place, OSCE/ODIHR recommendations have primarily focussed on establishing a clear and proportionate criteria for distribution to all electoral contestants, including under-represented groups and independent candidates. The OSCE/ODIHR has recommended a spending limit in only a few cases, where it observed excessive spending by a contestant to such an extent that it limited the ability of voters to make an informed choice.[7] With regards to both contribution and spending limits, where these are fixed at absolute amounts the OSCE/ODIHR has often recommended that they be indexed for inflation, so as to remain relevant and fair.

However, while basic legislation may be largely in place it appears that more needs to be done in refining and implementing requirements. In terms of reporting and disclosure, this ties into essential principles of transparency and accountability. The OSCE/ODIHR has made recommendations in a wide range of states on the need for frequent and detailed reports, including the need for interim reports prior to election day, and considering dedicated bank accounts for campaign finance to make for more effective oversight. The OSCE/ODIHR has also recommended that such requirements apply to all those involved in campaigning, including so-called third parties. In several countries, the OSCE/ODIHR has recommended considering templates for reporting, to enable timely and meaningful comparison between contestants.

In terms of oversight, the high number of recommendations points to a need for the effective implementation of regulations. The OSCE/ODIHR has often recommended that the oversight body be strengthened, either in terms of its mandate and responsibilities or by providing it with adequate capacity, such as staff, equipment and training. The OSCE/ODIHR has, at times, also recommended that the oversight body have an independent composition and that they undertake their activities in a timely manner.

Although the OSCE/ODIHR has provided relatively few recommendations on sanctions for campaign finance violations, it is conceivable that this is an area where recommendations may increase in the future. With the current emphasis on tightening reporting requirements and strengthening oversight bodies, attention may shift to the proactive encouragement of compliance in the future and, failing that, sanctions. Where recommendations on sanctions have been made, the OSCE/ODIHR has called for them to be dissuasive and proportional.

Other trends are also receiving increased attention across all OSCE countries. These include new forms of electoral campaigning, including campaign activities by non-candidates ('independent expenditures' or 'third party advertising'), online and social media campaigns, campaigning in foreign countries, and hidden political advertisements. It is likely that these will be the subject of increased recommendations in the future.

Significantly, the OSCE/ODIHR has also taken steps to assess campaign finance rules in respect of their impact on under-represented groups. The OSCE/ODIHR reports highlight a number of measures

[7] See, for example, the OSCE/ODIHR Final Report on 2012 Parliamentary Elections in Ukraine: http://www.osce.org/odihr/93631.

implemented in states to enhance the participation of women, national minorities and persons with disabilities. For example, in Albania and France public financing is conditional on complying with gender quotas for candidate lists, with a penalty of partial or full withholding of public financing. In Hungary and other countries, there is a lower threshold for national minority parties to qualify for public funding. In the United Kingdom and other countries, there is public subsidy for campaign materials provided in accessible formats for persons with disabilities, such as large print or audio materials.

Case Study of Austria

Country Profile

Austria is very much at the heart of the OSCE, with the organisation headquarters in its capital Vienna. Austria is a long-standing democracy located in Central Europe, with a population of 8.7 million. It is a federal state comprising nine autonomous states (Länder). The country has a high standard of living and in 2015 was ranked 23 globally in the UN Human Development Index.[8] Austria has been a member of the United Nations since 1955, the European Union since 1995, the Council of Europe since 1956, and is a participating state of the OSCE.

Legislative power is vested in the bicameral parliament composed of the 183-member National Council (Nationalrat), directly elected for five-year terms, and the 61-member Federal Council (Bundesrat), indirectly elected by state legislatures. The president is head of state and, although formally holding significant powers,[9] is largely expected to follow the recommendations of the government and to act in a consultative manner.

Parliamentary elections are regulated primarily by the Constitution and the Parliamentary Elections Law (PEL), as well as several other laws.[10] The National Council is elected through a proportional system, with preferential voting. Under this system, the country is divided into 9 constituencies that correspond to the federal states, which are in turn divided into 39 regional constituencies. Each regional constituency is allotted a number of seats on the basis of its population as determined at the last census, ranging from 1 to 8.

The last parliamentary elections were held in 2013 and resulted in six parties being elected to the Nationalrat: the Social Democratic Party (SPO) with 52 seats, the Peoples Party (OVP) with 47 seats, the Freedom Party (FPO) with 40 seats, the Greens with 24 seats, Team Stronach with 11 seats, and the New Austria and Liberal Forum (NEOS) with 9 seats. Some 30% of members of the Nationalrat (MPs) are women, including its president, as are 4 out of 14 federal government ministers.

The OSCE/ODIHR previously deployed election assessment activities to Austria for the 2013 parliamentary elections and the 2010 presidential election, which included an analysis of campaign finance legislation and practice.[11] GRECO has undertaken assessments of campaign financing as part of its evaluation of political corruption and funding of political parties.[12] Austria is a state party to UNCAC.

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8 See: http://hdr.undp.org/en/composite/HDI.

9 Among other responsibilities, the president appoints the federal chancellor and ministers, has the right to dissolve the parliament, and is the commander-in-chief of the armed forces.

10 Other relevant laws are the 1953 Constitutional Court Act, the 1947 Prohibition Act, the 1973 Act on the Electoral Register, the 1974 Penal Code, the 2012 Political Parties Act, and the 2012 Federal Act on Financing of Political Parties.

11 See all previous OSCE/ODIHR election-related reports on Austria at: http://www.osce.org/odihr/elections/austria.

12 See: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3_en.asp.

Campaign Finance

Political party and campaign finance is regulated by the 2012 Federal Act on Financing of Political Parties (FPPA) and the subsequently aligned PEL. The law was the first to comprehensively and systematically regulate campaign finance in Austria and was adopted with broad consensus. At the time of its adoption, many electoral stakeholders in Austria welcomed the FPPA as a positive first step in regulating campaign finance and enhancing the transparency and accountability of the system, including disclosure of donors for the first time. The law, however, does contain some gaps, particularly in respect of rules governing loans and donations from third parties, and uncertainty as to how contribution and spending limits should apply to repeat elections. The OSCE/ODIHR has previously recommended to the Austrian authorities, as it has done consistently throughout the OSCE region, that donations from third parties be regulated and that some form of disclosure of campaign financing by third parties be required.

While the law provides for public and private campaign financing, it lends itself to a system heavily reliant on public financing. Political parties receive significant annual public federal subsidies totalling some EUR 30 million.[13] Political parties and candidates may also receive donations, monetary and in-kind, from citizens or legal entities. There is no limit on the amount that can be donated, although certain types of donation are prohibited. These include anonymous donations exceeding EUR 1,000, foreign and cash donations over EUR 2,500, as well as any donations from public bodies or state-affiliated entities. While contributions in kind are treated similarly to monetary donations as per restrictions and disclosure requirements, loans are not required to be disclosed nor are they subject to any limit in amount or source.[14] This creates a possibility for abuse by the granting of a loan that might later remain unpaid or discharged without payment. The OSCE/ODIHR recommended that, in line with good practice, the receipt of loans for campaign activities should be regulated and disclosed.

Total campaign expenses should not exceed EUR 7 million. This limit applies to all types of elections within the country. The OSCE/ODIHR had previously reported that its interlocutors have queried whether this fixed limit is too high for presidential elections but too low for parliamentary elections. For the former, concerns were raised that this would lead to an uneven playing field for the candidates; for the latter, it was opined that the actual costs of a full and effective campaign at the national level far exceeds this limit, encouraging circumvention of the law. Moreover, this limit applies to any election of a general representative body, and thus may result in having no effective expenditure limit for regional and local elections.[15]

According to the law, candidates and supporting groups (parties or initiative groups) are required to submit reports on their campaign income to the Court of Audit no later than three months after election day, while donations above EUR 50,000 have to be publicly disclosed at least one week before election day. Political parties supporting candidates are also required to submit a separate report on their campaign-related expenditures by 30 September in the year following an election, as part of their annual statement of accounts. In this report, all donations exceeding EUR 3,500

[13] See: https://www.bka.gv.at/Docs/2016/2/23/Parteiengesetz_2005_2015.pdf. Each political party with at least 5 members in the National Council receives EUR 218,000 annually. In addition, each parliamentary party receives EUR 4.6 per each vote obtained in the last parliamentary elections. Non-parliamentary parties which obtained more than 1 per cent of the votes in the last parliamentary elections receive EUR 2.5 per each vote.

[14] Paragraph 171 of the 2010 OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation recommends consistent rules on transparency of loans.

[15] See paragraph 4 of the FPPA.

annually must be reported, broken down by donor. As part of a campaign code of conduct in the 2016 presidential election, some candidates further committed themselves to disclosing donations above EUR 3,500 before election day. They also agreed to provide a final campaign finance report no later than two weeks after election day as a means to enhance transparency. There are no self-reporting mechanisms initiated by political parties, but there are some civil society initiatives to monitor this field, including the Austrian Chapter of Transparency International and the privately financed transparency platform, 'My Deputies'.[16]

The OSCE/ODIHR has reported a concern among interlocutors in Austria about the timeliness of the required reporting on campaign finance. The OSCE/ODIHR noted that the lack of timely disclosure is not in line with international standards and good practice regarding campaign finance transparency.[17] It recommended that consideration be given to amending the FPPA to provide more timely disclosure of income and expenditure during the campaign. In particular, it recommended that consideration be given to introducing a pre-election interim report to inform voters of the financing of electoral campaigns, so that voters can take that information into account when deciding who to vote for.

The Court of Audit has limited authority to review the reports, although it may require a further independent audit if it considers a report to contain incorrect or inaccurate information. However, there is no authority in the Court to compel a party to submit the report or to sanction a party that does not file such a report. The Court of Audit's findings are forwarded to an Independent Political Parties Transparency Panel (IPPTP), situated within the Federal Chancellery, which is mandated to impose monetary penalties and fines in case of violations. Decisions of the IPPTP can be appealed to the Federal Administrative Court, with the Constitutional Court acting as final instance.

There are some sanctions envisaged in the law, including those for violating the spending limit.[18] However, in general there is a lack of clarity and comprehensiveness in defining infringements of the law and establishing corresponding sanctions. The OSCE/ODIHR previously recommended that the law be amended to provide an exhaustive list of irregularities and to ensure that applicable sanctions be proportional, effective, and dissuasive. It also recommended that the Court of Audit and IPPTP be given the power to request further documents and testimonies from parties in order to ensure a full review of any possible infringement.

Overall, the OSCE/ODIHR has reported that most electoral stakeholders in Austria consider the FPPA to have established a comprehensive framework for promoting transparent campaign financing and that it addresses some initial recommendations made by GRECO.[19] However, it has been widely acknowledged that more could be done to tighten the law and to address prior OSCE/ODIHR and current GRECO recommendations. This is particularly in respect of rules governing loans and donations from third parties, introducing more timely reporting on campaign financing,

[16] See, respectively, http://www.ti-austria.at and http://www.meineabgeordneten.at.

[17] Article 7.3 of the 2003 UNCAC requires states to 'consider taking appropriate legislative and administrative measures [...] to enhance transparency in the funding of candidatures for elected public office'. Paragraph 200 of the 2010 OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation recommends that 'reports on campaign financing should be turned into the proper authorities within a period of no more than 30 days after the elections'.

[18] A party exceeding the limitation by up to 25% is penalized in an amount of up to 10% of the excess amount and if the excess is greater than 25% of the limitation, the penalty is 20% of the second excess amount.

[19] See the 2011 GRECO Evaluation Report on Austria on the Transparency of Party Funding and the 2015 GRECO Compliance Report on Austria.

strengthening the investigative powers of the Court of Audit and IPPTP, and ensuring an effective and proportionate sanctioning regime.

Conclusion

Regulating campaign finance is complex. The challenge is not only technical, but also requires a careful balancing of freedom of expression and the need to ensure a fair electoral process. The OSCE/ODIHR has acknowledged this, as well as to the need to apply international and regional standards to specific country contexts. In Austria, as throughout much of the OSCE region, discernible and credible progress has been made in providing core regulation of campaign finance, including continued efforts to enhance transparency through reporting requirements. However, it is clear that more ought to be done in promoting accountability through effective oversight and enforcement of campaign finance rules. This includes ensuring that regulatory bodies have effective legal mandates, trained staff, and adequate human and financial resources to undertake their duties. In all countries, democratic principles should be at the forefront of campaign finance reform. This includes the overarching need to ensure fair political competition and to promote transparency and public confidence in the electoral process.

While strengthening the power of sanctions for campaign finance violations is one valuable mechanism in this regard, an additional, more constructive and inclusive means would be for oversight bodies to provide greater advice and guidance at an early stage so as to avoid violations. Considerable strides have been made in regulating campaign finance in the OSCE region. However, it is clear that the issue will remain a key challenge for both state authorities and election observers alike in their shared efforts to promote public confidence in genuine and democratic elections.

About the Author

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Prior to joining ODIHR, Richard worked on elections and democracy assistance projects with the UN, EU and Carter Center and has administered elections in the United Kingdom. Richard holds a PhD on post-conflict democracy assistance from the University of Leuven and a LLM in international human rights law from the University of Oxford.

Emerging Trends of Entrenched Incumbency in Africa

By
Gilbert M. Khadiagala

'African leaders who hang on to power indefinitely by gaming elections and suppressing criticism and opposition are sowing the seeds of violence and instability.'

Kofi Annan, Bahr Dir, April 2015

'When a leader tries to change the rules in the middle of the game just to stay in office, it risks instability and strife, as we've seen in Burundi. And it's often just a first step down a perilous path. But if a leader thinks they're the only person who can hold their nation together, if that's true then that leader has failed to truly build their country.'

Barack Obama, Addis Ababa, July 28, 2015

'The problem of Africa in general, and Uganda in particular, is not the people but leaders who want to overstay in power . . . no African head of state should stay in power longer than 10 years.

Yoweri Museveni, 1986

'The lack of strong institutions is the reason why you have a strong man. So strong men are not going to build up strong institutions, strong men are going to build weak institutions in order to remain in power.'

Thierry Vircoulon, International Crisis Group

Introduction

Entrenched presidential incumbency, or the extension of presidential tenures against established constitutional structures and norms, has emerged as a core feature in the reversal of constitutionalism which has been carefully crafted since the onset of democratisation and electoral competition in Africa in the 1990s. These reversals denote the yearnings for past practices where institutions did not matter and where strong individuals could ride roughshod over institutions. In the era of constitution-making that marked Africa's transition to democratic rule, the key objective was to enshrine durable frameworks that would underpin political pluralism and competition. African countries adopted presidential term limits as vital parts of the constitutional rules that accompanied the transition from personal rule to democracy. For the most part, the majority of African leaders defended constitutional term limits as guarantees against the indeterminate tenure of individuals. To underscore the growing significance that term limits have for democratisation, the African Union

(AU) has incorporated some of these key provisions in the normative frameworks erected since the late 1990s. Despite limits to presidential terms, since the early 2000s about 16 states have proscribed term limits by invoking a host of explanations, with varying levels of success. However, in some countries a wide range of constituencies have contested the removal of presidential term limits, signifying the strength of opposition groups and civic actors.

This paper surveys the debates on presidential term limits in Africa in recent years by mapping out major themes and trajectories. It contends that the abrogation of norms around presidential term limits reflects the disrespect for constitutional rules in Africa, an outcome of the legacies of authoritarianism that marked the previous decades of African politics. Efforts to extend the tenures of presidents is a frequent phenomenon in the decline of constitutional rules. However, countries which successfully repealed presidential term limits are those in which democratic values and principles remain contested and where democratic consolidation has yet to occur. Furthermore, democratic reversals are prevalent where the transitions from military to civilian institutions have been slow and sporadic. In contrast, countries in which incumbent leaders have failed to remove term limits are characterised by the steady consolidation of democratic norms and the evolution of strong countervailing actors and institutions. Since entrenched presidential incumbencies denote the persistence of authoritarian patterns that have long dominated African politics, the antidotes to these trends need to be renewed efforts to deepen democratic institutions and voices nationally, regionally, and continentally. This would entail more energy in building national and regional constituencies for pluralism within the rubric of common values.

In section one, the paper focuses on the notion of term limits within Africa's Third Wave democratisation debates. In section two, it examines the countries that have lifted presidential term limits, while section three focuses on unsuccessful cases. The conclusion draws on the implication of this analysis for prognoses about democratisation in Africa.

Term Limits and Democratisation in Africa

In the half a century since Africa's return to competitive politics, term limits have featured prominently as part of wider constitutional debates on the rotation of power, intergenerational change in leadership, and the rejuvenation of political participation. In most of the constitution-making processes since the early 1990s, term limits were posited as essential elements in democratic consolidation that would provide peaceful constitutional power transfers (Dulani, 2011).[1] Given the authoritarianism that dominated the postcolonial period, enshrining constitutional term limits was often prescribed as a means to guarantee the de-monopolisation of politics. With the evolution of multiple political parties, term limits offered more opportunities for a wide range of actors to accede to the apex of power and thus increase political confidence in the electoral processes. Furthermore, since Africa's civil conflicts had been attributed, in part, to the lack of succession in power, proponents of term limits perceived them as a means to reduce violent power contestations.

Of about 48 new constitutions enacted in Africa in the 1990s, 33 provided for term limits for the office of the president. Although most of these constitutions prescribed two presidential terms

[1] For wide-ranging analyses of presidential term limits during the transition from authoritarianism see Dulani, 201;Vencovsky, 2007; Posner & Young, (undated); and Posner & Young, 2007.

varying from between four to seven years, the five-year two-term limit dominated across Africa. As Namakula has noted (2016, p.6):

The remedial function of term limits arguably placed them at the center of democratization in Africa. Entrenched within the Constitution as the supreme law governing a country, the limits formed part of a broader spectrum of principles encouraging participation of citizenry in governance; notable among these were decentralization of power, regular electoral processes, and the emancipation of women. The new constitutional frameworks offered a glimmer of hope of expanding the political platform, facilitating reform, and ensuring the timely and peaceful turnover of executive leadership in Africa.

Evolving as constitutional norms, term limits reflect the popular search for political certainty and predictability. There was also recognition that limiting presidential terms often contributed to broad political stability in states where political competition tended to devolve into zero-sum games. As a result, they were the most definitive characteristic of Africa's transitions from autocratic rule in the mid-1990s. In dominant party systems such as Tanzania, South Africa, and Mozambique, term limits led to leadership turnovers that strengthened participation and generational change. In deeply divided political systems such as Nigeria, term limits engendered a geographical rotation of presidential power that, in turn, contributed to a balanced distribution of power and resources (Beatty, 2014).

Although a number of African countries retained unlimited presidential terms, in the era of democratic reforms the broad trend was for constitutional provisions that constrained the duration of leaders. In both presidential and parliamentary systems, restrictions on incumbency reduced the tendency toward executive manipulation of state resources and thus enhanced accountability and transparency. In addition, since unlimited terms were frequently associated with impunity, corruption and patronage, proponents of term limits saw them as the best defense against generalised abuses of power.[2]

Within the growing normative change in Africa, the AU Constitutive Act of 2002 recognised the significance of the alternation of power in democratic renewal. Prior to the AU Constitutive Act, the Organization of African Unity (OAU) had established the protocol on Unconstitutional Change of Government (Lomé Protocol) in 1998 (revised in 2000) which sought to deter military coups and promote constitutionalism (Souare, 2009). Since its proclamation, the Lomé Protocol has been the key to the evolution of norms around democracy and good governance. In Articles 3 and 4 of the AU Constitutive Act, African countries have committed to participatory democracy, constitutionalism, and the rule to prevent insecurity, instability, and violent conflicts in Africa. These values were reaffirmed in the OAU/AU Declaration on the Principles Governing Democratic Elections.

An equally vital instrument in African democratisation is the African Charter on Democracy, Elections and Governance (ACDEG) which the AU adopted in 2007 and which came into force in 2012. The ACDEG seeks to 'entrench in the continent a political culture of power based on the holding of

[2] See: MmegiOnline, 2015; Ntomba, 2015; Louw-Vaudran, 2016; Corcoran, 2016; Wilmot, 2015; and Woldemariam, 2016. Term limits have also a global dimension: see Guliyev, 2009.

regular, free, fair, and transparent elections conducted by competent, independent, and impartial electoral bodies'. Similarly, Article 23, chapter 8 of the ACDEG states that: 'Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government, constitutes unconstitutional changes of government to which sanctions apply.'(See African Union, 2007; also Omotola, 2014 and Matlosa, 2014)

Annual Afrobarometer surveys reveal that norms around term limits have gained momentum across Africa. In six rounds of surveys conducted between 1999 and 2015, Afrobarometer found that in 34 countries, three-quarters of the citizens consistently favoured limiting presidential terms to two. In addition, the surveys revealed that support for term limits has been high even in countries that do not have them. The 2015 Afrobarometer report noted:

With very few exceptions, large majorities of Africans support the idea of imposing a two-term limit on the exercise of presidential power. This is true even in those countries that have never had term limits and those that have removed them in the past 15 years. Continuing efforts to dispense with term limits thus reveal a major disconnect between African leaders and African citizens on this issue, underlining the lingering legacy of big-man on the continent and highlighting the fragility of African democracy.
(Dulani, 2016, pp. 1-12)

In Uganda, which abolished presidential term limits in 2005, a local survey revealed that 77% of the population wants presidential term limits restored (Kafeero, 2014). This has spurred a push by civil society and opposition groups for electoral reforms, especially the restoration of presidential term limits.

Despite the popularity of presidential term limits, procedural constitutional manipulations have persisted in some African countries as old and new strongmen have failed to respect constitutional limitations on their power. But as Posner and Young have argued (2016, p.8), while the respect for presidential term limits has been uneven since the 1990s, the majority of leaders have adhered to the growing constitutional norm:

[Of] the thirty-six heads of state that faced a two-term limit between 1990 and 2015, twenty accepted the limit and voluntarily retired while sixteen either ignored the provision or attempted to amend the constitution to permit the continuation of their rule. Of these sixteen, eleven were successful and five were rebuffed in their efforts. The record therefore indicates that the majority of African leaders respected the constitutional limits on their tenure.

Abolishing Term Limits: Trends and Patterns

Since the mid-2000s, popular explanations for the removal of constitutional term limits have invoked political stability, mandates to complete development objectives, respect for people's choices, and national sovereignty. In addition, the modalities of constitutional changes share some familiar traits, notably constitutional amendments through parliaments, referendums, and the use of the judiciary to provide a veneer of constitutionalism and legitimacy to the changes (Durotoye, 2016;

Kavuma, 2016; Opalo, 2015; Simmons, 2016). All these approaches are frequently accompanied by pervasive co-optation, corruption, repression, and intimidation of political opponents; standard tools that authoritarian regimes deploy to change constitutions. Despite these similarities, there are some distinctive patterns that reflect the confidence of the authoritarian regimes, the solidity of opposition forces, and the political cleavages existing in these countries. For this reason, I distinguish between two varieties of constitutional changes to get rid of term limits: the Namibian and the Ugandan models that speak to differences in the motives of the actors, the constellation of opposition political actors, and the long-term outcomes of these changes.

In 1999, Namibia's President Samuel Nujoma altered the Constitution to run for a third term. This was the first constitutional amendment to the Namibian Constitution. Although the Constitution has a two-term limit to the presidency, Nujoma argued that in the first election, he had not been elected directly by the voters, but through a Constituent Assembly established as part of the transition to independence. Despite some opposition within the ruling South West African People's Organization (SWAPO), there was little opposition outside the party. As Melber has noted (2006, p. 104):

Given the emergent consensus spanning major parts of the party and wider Namibian society that Nujoma should remain on as president, his third term was never publicly divisive. In addition, the formal procedures did not require any dubious procedures opening an arena for contestation: based upon its two-thirds majority, Swapo was entitled and able to pass the necessary constitutional amendment without offending any legal principles. Nor was the issue of a third term a major dispute in the public sphere, which would have otherwise provoked serious tests of acceptability.

Having served a third term, Nujoma left power in 2004 and his successors have maintained the constitutional provision of the two-term presidential limit, signifying the strength of the Namibian Constitution. Nujoma could thus invoke his liberation credentials to obtain a third term, leaving his less-exalted successors to keep the Constitution intact.

In contrast, in 2005 Uganda's President Museveni established the precedent for what has become the most dominant model for repealing term limits. Against widespread opposition from the public, political parties, and within the ruling National Resistance Movement (NRM), Museveni used draconian methods to change Article 105(2) of the Uganda Constitution that limited incumbents to two elected terms. Initially, he attempted to bypass parliament in favour of a popular referendum. But facing opposition, President Museveni used outright bribery to sway NRM members of parliament to vote for the constitutional amendment (Tangri, 2006 pp. 175-196). Throughout the campaign to abolish term limits, President Museveni used a number of justifications for the move; as Barkan observed (2005, p. 14):

Museveni himself has constantly justified the move on various grounds - that he is still young and vigorous, that there is unfinished work to be done, and that any successor will likely 'mess up' Uganda and 'not listen to me' were he to retire and follow the model of African elder statesmen set by Julius Nyerere and Nelson Mandel. Stated simply, President Museveni now regards himself and his presidency as indispensable for Uganda's future well-being.

In addition to bribery and intimidation, the vote to circumvent presidential term limits was combined with the provision to re-introduce multiparty democracy, making it difficult for opposition parties to vote against it. Thus although this bargain appeased the opposition, it did not contribute to the consolidation of Uganda's democracy. Since the repeal, President Museveni has been re-elected five times in elections that have been marred by violent intimidation of opponents.

Museveni's repeal model has been replicated across Africa, notably in Cameroon, Chad, Congo Brazzaville, Djibouti, Gabon, Rwanda, and Togo. In Cameroon, the 1996 constitution introduced term limits; but President Paul Biya, who had been in power since 1982, influenced the legislature in 2008 to repeal Article 6(2) of the Constitution that did away with term limits. The security forces violently repressed the riots that followed the change. In the lead-up to the 2018 elections, allies of the governing Cameroon People's Democratic Movement (CPDM) have started to call on Biya to seek another presidential mandate (LeBas, 2016; Ndi, 2016). In Djibouti, President Omar Guelleh used parliament in 2010 to obtain a third mandate; this was after he had been elected unopposed in 2005. In 2003 the former President of Togo Gnassingbe Eyadema successfully abolished term limits through the legislature after winning a parliamentary majority in an election that was boycotted by major opposition parties. This was despite giving an undertaking to France's president in 2002 that he would leave power at the end of his constitutionally-approved second term. His son, Faure Gnassingbe, rose to power in 2005 armed with a constitution that has no term limits (Joyce, 2016). A similar legislative move in Gabon in 2003 enabled President Omar Bongo to stay in office before he was succeeded by his son Ali Bongo in October 2009.

In Chad, Guinea, Congo Brazzaville, and Rwanda, presidents have abolished term limits through a combination of parliamentary action and national referenda. Unlike purely parliamentary amendments, popular votes provide incumbent presidents with considerable leeway to influence the outcome through outright rigging, while also laying claims to national popularity. For instance, in 2005 President Idris Deby of Chad held a referendum to abolish Article 61 (2) of the constitution that restricted him to two successive terms. During the referendum, the electoral commission announced that the total number of registered voters amounted to 5.6 million, even though the actual voting population was estimated to be about 4 million (Voice of America, 2005). Prior to winning the third five-year term in 2006, Deby promised to rescind the change to the term limits, claiming that: 'The principles of presidential term limits in the constitution must be reintroduced . . . Today nothing requires us to remain in a system where changing leaders becomes difficult . . . In 2005 the constitutional reform was conducted in a context where the life of the nation was in danger' (Ndi, 2016). But Deby has so far reneged on this promise.

Similarly, in 2001 President Lansana Conte of Guinea held a referendum to prolong his mandate and extend the presidential term from five to seven years, amid strong opposition from the legislature and civil society (Samb, 2001; BBC, 2001). In Congo Brazzaville, President Dennis Sassou Nguesso organised a referendum in October 2015 to lift presidential term limits and allow candidates over the age of 70 to run. Civic and political actors organised demonstrations in major cities, but Nguesso used the security forces to quell these protests (Yarwood, 2016).

In Rwanda, President Paul Kagame had the option of emulating the Namibian model by highlighting his development credentials to obtain a third term, but instead he opted for the more predictable Uganda model. Rwanda's road to changing their constitution was through a circuitous route, partly because of the strict constitutional provisions against abolishing term limits and also Kagame's prevarications. In the first instance, the regime launched a national petition to force Parliament to amend the Constitution to allow a third term. Thus after nearly four million Rwandans signed this petition (with no real opposition representation), Parliament voted 99% in favour of the constitutional changes. After a long silence regarding this matter, Kagame announced in a 2015 New Year's day address that he would seek a third presidential term. Subsequently, in December 2015 Rwandans voted by a majority of 98% in favour of amending the Constitution. The amendment cut the presidential term from seven years to five and maintained the two-term limit. But it also stipulates that the new rules will not come into effect until 2024 and that Kagame can run for a third seven-year term in 2017 and then stand for two further five-year terms. This provision potentially allows Kagame to extend his rule up to 2034, nearly three-and-a-half decades after he officially came to power (see The Guardian, 2015; Gettleman, 2015a; Vogt, 2015).

Burundi and the DRC have not officially changed their constitutions to abolish term limits, but they have launched stealth steps in this direction against the backdrop of violent protestations from opposition groups. In defiance of both the Arusha Agreement of August 2000 and the 2005 Constitution that prohibit a third term, President Pierre Nkurunziza announced plans to run again in the 2015 elections. This decision sparked violent protests and reprisals from the military and security forces, leading to more than 500 deaths, thousands of people becoming refugees in neighboring countries, and fears of the return to civil war (Kron, 2015; Gettleman, 2015b; Santora, 2015). To legitimise the decision, President Nkurunziza won a narrow judgment from the Constitutional Court after the Parliament rejected the change. The legal victory enabled Nkurunziza to win re-election in July 2015. Soon afterwards, the government appointed a constitutional review committee to probe the elimination of terms limits; the commission recommended the abolition of the two-term limits through a national referendum (Havyarimana, 2016).

In the DRC, the route to extending the presidential mandate has involved a combination of legal recourse, delays in preparation for elections, and negotiations with opposition parties for a transitional dispensation. From early 2016, the opposition accused President Joseph Kabila of intent to delay the November 2016 elections and extend his rule. To counter this move, the Constitutional Court – responding to a request from 260 pro-Kabila parliamentarians – ruled in May 2016 that that the incumbent would remain in office until elections are held, in effect beyond November 2016. This decision set in motion a series of measures that have been called 'electoral glissement' meant to delay the elections and extend Kabila's term (Human Rights Watch, 2017; Caldwell, 2016). They entailed technical processes that made it impossible for elections to take place in accordance with the electoral deadlines; for instance, amid riots and resistance, Kabila proposed that a national census be held before the elections. On the eve of the anticipated elections, Kabila accepted the mediation of the Catholic Church to reach a settlement on an interim government that would prepare a future election. Although the Congolese Catholic Church (CENCO) mediated an agreement on a transitional government in December 2016, setting up its institutions has stalled, enabling Kabila to continue in power indefinitely (Stearns, 2017; Clowes, 2016).

In the wider scheme of African democratisation since the 1990s, the successes in bypassing term limits have been almost predictable because they have occurred in countries that share similar characteristics. First, the manipulation of constitutions reflects the lack of consolidation of democratic values, particularly the lack of restraints on executive power and failures to widen civil and political rights; most of these cases are motivated largely for individualistic and idiosyncratic than national purposes. Second, the majority of these countries emerged from civil wars whereby triumphant political movements became ruling parties that have never countenanced alternative political voices, civil liberties, or meaningful liberalisation. In this regard, the legacies of militarism and securitisation continue to dominate political practices; furthermore, democratisation through elections has continued to be only a veneer for authoritarian practices that underlie these regimes. Third, countries that have abrogated term limits have also witnessed the transition toward dynastic regimes where presidential succession is primarily a family affair, captured in Gabon, Togo, and potentially in Uganda. All these three factors emphasise that thwarting term limits hinges on the ability of African presidents to exert control over ruling parties and the security and military establishments. As one observes argues (Cheeseman, 2016):

Presidents are far more likely to try and secure third terms in dominant-party states in which the ruling party secures over 60 per cent seats in the legislature, such as Namibia and Rwanda, and when they have tight control over the army and police, as in Djibouti and Uganda. Under these conditions, it is often possible to both change the constitution through the legislature and silence any opposition to this strategy. Seven presidents, most of them long-serving leaders of their countries, secured constitutional amendments that allowed them to stand for a third term in office, and all seven won subsequent re-elections.

Some scholars have claimed that it is a positive sign that African authoritarian regimes have resorted to constitutional procedures in abolishing term limits instead of the past practices of executive fiat. LeBas, for instance (2016, p.171), applauds the fact that 'entrenched autocrats comply with constitutional procedures when extending their terms in office, even if they are just going through the motions. One could even argue that this is what the beginning of constitutionalism looks like.' Similarly, in their assessment of the predominance of the Museveni approach, Posner and Young write (pp. 8-9):

[Viewed] alongside the history of how African presidents perpetuated their rule in earlier eras, the striking fact is that Museveni went to the trouble to lobby parliamentarians (and engage in outright bribery) for a vote to change the constitution in a context where he faced considerable opposition. This pattern of securing the desired outcome by working through the existing set of formal institutions rather than around them was repeated in Cameroon, Djibouti. . . As in Uganda, the means by which these legislative and popular votes were won were often shady. But the leaders clearly felt that simply ignoring the constitution was not an option - and this is a critically important change from the historical pattern.

These analyses verge on dignifying the authoritarian modalities that have characterised constitutional changes in Africa in recent years.[3] Moreover, they belittle the relentless efforts of civic and

[3] See the trenchant critique of these perspectives by Omotola (2016, p. 127), who argues that they provide: 'dangerous and misleading conclusions, which not only help to disguise the third-term agenda as a form of constitutional change of government, but also reify it as a plus factor in African politics'.

opposition actors, at considerable risks to their lives, to challenge the wanton abuse of constitutions by leaders inspired more by selfish motives than broad national interests. Besides, the examples of successful term extensions reveal that term limits are not insignificant political events because they are frequently the start toward the slippery slope of life presidencies and political dynasties. Since entrenched presidential incumbencies represent continuities in authoritarian patterns that prevail in these countries, analysts should not dignify them with labels of constitutionalism and democracy; instead, they deserve their rightful and more accurate depictions as authoritarian regimes.

Failures to Abolish Term Limits: Experiences and Lessons Learnt

Countries in which incumbent leaders have failed to change constitutions to eliminate term limits are characterised by the steady consolidation of democratic norms. These consist in particular of legislative restraints on executive power and the evolution of strong countervailing actors and institutions. Violent street protests, illustrating the power of organised and determined civil society, have also featured prominently in restricting constitutional changes. Thus there are two main routes to failure. First, where there is fragmentation in the ruling party that is accompanied by the president's loss of control of party levers; this often dissuades the president from running roughshod over the prescribed term limits. Second, sustained mass pressures from below, reminiscent of the protests of the 1990s and the Arab Spring, are critical to preventing presidential predation. These failures provide lessons in how to strengthen democratic governance and fortify term limits.

Party fragmentation has been witnessed in Malawi, Zambia, Nigeria, and Benin, helping to curb the extension of presidential terms. In Malawi in 2002-2003, a faction of elites within the United Democratic Front (UDF) sought to amend the Constitution to allow President Bakili Muluzi to stand for a third term. As VonDoepp observes (2005, p.190), in addition to seeking the presidential term extension, 'their program entailed more general efforts to increase the power of the executive and minimize the ability of political opponents to challenge the governing regime'. As part of this bid, a member of parliament tabled the Open Terms Bill to rescind presidential term limits in July 2002, but it was defeated by three votes. Although the government resubmitted the same bill in January 2003, the combined pressures from the ruling party, parliament, and civil society, forced President Muluzi to relinquish power (VonDoepp 2005, pp. 193-4). In Zambia, when President Fredrick Chiluba's term was coming to an end in 2001, some members of his party claimed that he needed a third term to complete his unfinished development mandate. At a party convention in April 2001 Chiluba's supporters amended the Constitution to allow a third term, and expelled dissidents from the party. Subsequently, however, Parliament initiated impeachment proceedings against Chiluba, a move that led him to renounce the decision to seek a third term (Simmon 2005, p.205).

As with President Chiluba, supporters of President Olusegun Obasanjo in Nigeria campaigned in 2005 and 2006 for the extension of his term in office. This was ostensibly because he needed more time to complete his development initiatives, but opposition came from within his own party, including Vice-President Atiku Abubakar. In the course of the campaign, opponents of the third term were subjected to death threats, blackmail, and bribery (New York Times, 2006). Despite these bids,

Nigeria's Senate resoundingly defeated the constitutional amendment, forcing Obasanjo to retire in 2007. In Benin, on the eve of the expiry of his term in 2006, long-serving leader President Mathieu Kerekou offered members of small political parties substantial bribes to support a third term in what one opposition observer described as a 'money making revision of the constitution' (Idrissou-Toure, 2004). Civic actors mobilising against the revisions and appealed to Beninese legislators to 'freely and courageously reject the constitutional change, even if it means rejecting their own self-enrichment'(ibid.). This campaign paid off when Parliament rejected the amendment, forcing Kerekou to relinquish power. His successor, President Boni Yayi, also toyed with the idea of running for a third term after the end of his two tenures in 2016. But when the opposition parties won the legislative elections in April 2015, he backed down because he could not garner sufficient votes in parliament to change the constitution (News24, 2015).

The vigilance of civil society actors, opposition forces and the media has been pivotal to preventing constitutional changes in Senegal, Niger, and Burkina Faso. Through protests, riots, and resistance, they have checked the third term ambitions of their leaders. In some of these cases the military has played a critical role as the mid-wife of constitutionalism following the ouster of presidents who tried to push for a third term. For instance President Mamadou Tandja of Niger announced a referendum that would amend the Constitution to extend his tenure at the end of his second term in December 2009. When the Constitutional Court ruled against this bid, Tandja disbanded it and went ahead with the referendum. Although he won the referendum, Tandja underestimated the strength of the opposition and regional and international pressures. Following strikes and popular protests, the military, calling themselves the Supreme Council for the Restoration of Democracy, took power and held elections to restore democracy in 2011 (Sturman, 2009; Baudais & Chauzal, 2011).

In Senegal, mass protests were galvanised by President Abdoulaye Wade's use of the Constitutional Court to allow him to run for a third term in 2012. Wade was first elected in 2000; after he was re-elected in 2007, he promised to abide by the Constitution and stick to the two-term limit. This made him ineligible to stand for election in the 2012 poll. Wade, however, changed his mind and sought a third term, claiming that the constitutional that imposed two-term limit passed in 2001 did not apply to his first term. Even though the Constitutional Court ruled that he could stand again, protests against the ruling took to the streets. These were organised under the auspices of the June 23 Movement (M23), a coalition of activists and political groups (The Guardian, 2012; Jahateh, 2012). In the February 2012 elections, Wade was resoundingly defeated by Macky Sall.

A similar fate befell Burkina Faso's President Blaise Campaoré in his unsuccessful attempt to extend his 27-year reign. In 2000, Burkina Faso amended the 1991 constitution to impose a limit of two five-year consecutive terms on the presidency. In the 2005 elections, however, Campaoré's supporters argued that because he was in office when the amendments were effected, they did not apply to him. Hence, he was qualified to run for re-election. In the 2005 and 2001 elections, Campaoré defeated a divided opposition. In 2014, confident of his position and underrating his opponents, Campaoré then tried to abolish term limits altogether so that he could stay in office indefinitely. But this move triggered street protests that resulted in a successful coup that forced him to flee the country in October 2014 (Mbaku, 2014; Cassani, 2015). After a short interval the military leaders

held elections that returned the country to constitutional rule. A year later, Burkina Faso lawmakers voted overwhelmingly in favour of setting a two five-year mandate for presidents (eNCA, 2015).

Just as protest movements and civic activism have played prominent roles in securing the inclusion of term limits in African constitutions, these movements are necessary to prevent the contravention of term limits, an essential element in the consolidation of democratic institutions and values (Yarwood, 2016). In cases where the executives and parliaments conspire to change constitutions willy-nilly, it is important for countervailing actors and institutions to protect African constitutions from elite predation. In addition, since scrapping term limits ultimately erodes the basic principles of democracy such as accountability, transparency and responsiveness, the popular defense of constitutions serves to deepen these principles. If there were more cases of Burkina Faso, Senegal, and Niger where popular pressures forced democratic governance, African countries would make appreciable progress in dealing with the spectre of constitutional changes that delay the departure of leaders from power.

In efforts to bring fresh thinking to debates about term limits, some countries have taken bold and surprising steps to reverse the spates of constitutional changes. In May 2016, the Parliament in Seychelles unanimously voted to reduce the terms of future presidents and vice presidents from three five-year terms, to a maximum of two five-year terms. In making the announcement, President James Michel indicated that the 'amendment will give a chance to younger politicians to have the chance to wait 10 years instead of 15, to take over the reins of power, and contribute to the development of this country' (Winsor, 2016). Similarly, in March 2016, Senegalese voters reduced the presidential term from seven to five years, fulfilling President Sall's campaign promise. Although the Senegalese Parliament had reduced the term from seven to five in 2007, a year later it re-instituted the seven-year term (Thurston, 2016; Baker, 2016). In the same vein, in February 2016 Algeria's Parliament adopted a package of constitutional reforms, including the reintroduction of a two-term limit on the presidency which had been lifted in 2008 to allow President Abdelaziz Bouteflika to run for a third time (Al Jazeera, 2016).

Conclusion

Alongside the reintroduction of multiparty systems, term limits have been indispensable to Africa's political reforms since the early 1990s. They are, therefore, indistinguishable from the broader struggles and contestations for constitutional rule to overcome the legacies of strong men, the cult of personality, and widespread abuses of institutions. As in the past, however, debates on curbing presidential tenures reflect the unevenness of democratisation in Africa, the quality of elite bargains, continuities of old regime mentalities, and the leverage and limits of African citizens to effect change. These factors have contributed to either the success or failure of constitutional changes to reverse term limits. While the processes of constitutional fiddling and tinkering have retarded the deepening of participatory, representative, and accountable institutions in some countries, there is considerable optimism that the majority of countries will continue to respect and defend provisions on presidential tenures.

Spirited steps to solidify the democratic gains of the 1990s and 2000s need solid and creative national consensus around constitutionalism and the rule of law. The constitutions that underwrite

pluralism and participation in Africa are still young, but they can be protected only in the context of broad state-society pacts about the rules of the political game. Although constitutions are not set in stone, consensus about their non-negotiable components, such as the inviolability of term limits, are vital in strengthening these constitutions. In addition, national initiatives around constitutionalism and constitutional design need to proceed alongside sharpening the prescriptive strictures in continental and regional institutions. Continental norms such as the Lomé Protocol, ACDEG, and the AU's Shared Values have been important in building collective approaches to democratisation. But they are ambiguous in some respects and they confront problems of inadequate and selective implementation. These instruments need sharper language around the proscription of extended tenures.

Similarly, while the regional economic communities (RECs) are better placed to lead in norm-building and collective learning, they lack consistent leadership around democratic norms. Two examples illustrate this problem. First, an ECOWAS summit in Accra in May 2015 tried to establish a regional norm of two-term presidential limits, but Togo and The Gambia scuttled this decision (Mail and Guardian, 21 May 2015). How does a regional bloc consisting of so many countries permit the veto from two small state spoilers? This smacks of abdication of leadership by Nigeria, Ghana, and Senegal. However, after the momentous political transformations in The Gambia in January 2017 that led to the fall of President Yahya Jammeh, ECOWAS may revisit this decision. Togo is also under intense pressure from opposition parties and civil society to join the now universal ECOWAS norm of term limits. Second, the EAC was unable to make a credible pronouncement on Burundi in 2015 because Uganda and Rwanda have abandoned the practice of presidential term limits. Though it tried to intervene in Burundi, the EAC lacked the prescriptive power to influence Nkurunziza's decision. Thus strengthening national institutional restraints needs to be accompanied by the regionalisation of such norms and practices.

References

Aglionby, J. & Fick, M. (2015). 'Africa Third Term: Who Stays, Who Goes', *Financial Times*, October 15.

African Union. (2007). *African Charter on Democracy, Elections, and Governance*. Addis Ababa: AU.

'Algeria Adopts Landmark Reforms'. (2016). *Al Jazeera*, February 7.

Baudais, V. & Chauzal, G. (2011). 'The 2010 Coup d'état in Niger: A Praetorian Regulation of Politics?'. *African Affairs*, 110(439), pp. 295-204.

Baker, B. (2016). 'Senegal to Vote on Term Limits as President to Continue Rule', *Bloomberg News*, February 17.

Barkan, J.D. (2005). 'An African "Success" Past its Prime', in Woodrow Wilson *African Program, Challenges and Change in Uganda*. Washington DC: Woodrow Wilson International Centre for Scholars, June 2005.

'Benin Votes in Key Test for President Boni Yayi'. (2015). *News24*, April 26.

Carter, B. (2016). 'The Struggle over Term Limits in Africa: How International Pressure can Help'. *Journal of Democracy*, 27(3) p. 37.

Cassani, A. (2015). 'The 2015 presidential election in Burkina Faso: A revenge of term-limit politics in Africa?'. *Italian Institute for International Political Studies*, November 26. Available at: http://www.ispionline.it/en/pubblicazione/2015-presidential-election-burkina-faso-revenge-term-limit-politics-africa-14273

'Chad Referendum Ends Presidential Term Limit amid Fraud Allegations'. (2005). *Voice of America*, June 8.

Cheeseman, N. (n.d.). 'Africa: Presidential Term Limits and the Third Term Tragedy'. http://presidential-power.com/?p=4874.

Corcoran, B. (2016). 'African Leaders Roll back Presidential Term Limits'. *The Irish Times*, January 4.

Craig, J. (2015). 'Term Limits in Africa: Will President-For-Life Become a Thing of the Past?'. *Voice of America*, October 16.

Dulani, B.M. (2011). *Personal Rule and Presidential Term Limits in Africa*. PhD. Michigan State University.

_____. (2015).'African Publics Strongly Support Term Limits, Resist Leaders' Efforts to Extend Their Tenure'. *Afrobarometer Dispatch*, 30.

Durotoye A. (2016). 'Resurgent Backsliding and Democracy in Africa'. *International Journal of African and Asian Studies*, 18, pp. 39-46.

Gettleman, J. (2015a). 'Rwanda Votes on Extending Term of President Kagame'. *The New York Times*, October 18.

_____. (2015b). 'With Burundi's President Sticking to Power, Violence is on the Rise'. *The New York Times*, December 2.

Guliyev, F. (2009). 'End of Term Limits: Monarchical Presidencies on the Rise'. *Harvard International Review*, February 28.

Havyarimana, M. (2016). 'Burundi Moots Removal of Term Limits'. *The East African*, August 27.

Idrissou-Toure, A. (2004). 'Presidents with Too Much Staying Power'. *Mail and Guardian*, June 11.

Jahateh, L. (2012). 'Controversy of Aboulaye Wade's Presidential Bid'. *Al Jazeera*, January 28.

Joyce, E. (2016). 'Why Should Africa Listen to the Hypocritical Criticism of its Three-Term Leaders? *The Guardian*, March 29.

Kafeero, S. (2014). '77 per cent wants Term Limits Restored'. *Daily Monitor*, May 25.

Kavuma, R.M. (2016). 'Why Africa's Strongmen Win Presidential Term Limits Struggle'. *The Citizen*, April 9.

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

Long, N. (2015). 'Opposition in Congo Brazzaville Rejects Referendum'. *Voice of America*, October 15.

Louw-Vaudran, L. (2016). 'Africa: Term-Limit Changes the Biggest Threat to Democracy in Africa?'. *ISS Today*, September 14.

Kafeero, S. (2014), '77 per cent wants Term Limits Restored'. *Daily Monitor*, May 25.

Kron, J. (2015). 'Political Violence Exacting Toll in Burundi'. *The New York Times*, December 12.

Matlosa, K. (2014). 'Pan-Africanism, the African Peer Review Mechanism, and the African Charter on Democracy, Elections, and Governance'. *SAIIA, African Governance and APRM Programme*, Occasional Paper no. 190.

Mbaku, J.M. (2014). 'Burkina Faso Protests Extending Presidential Term Limits'. *Africa in Focus*, October 30.

Melber, H. (2006). '"Presidential Indispensability" in Namibia: Moving out of Office and Staying in Power', in R. Southall & H. Melber, eds., *Legacies of Power: Leadership Change and Former Presidents in African Politics*. Pretoria: HSRC Press.

Mwiti, L. (2016). 'Interview with Kofi Annan at Tana Forum: Armed Conflict Now a Smaller Risk in Africans than Traffic Accidents'. *Mail and Guardian*, April 20.

Museveni, Y. (1986). *What is the Problem with Africa*? Kampala: Longman.

Namakula, C.S. (2016). 'The Efficacy of Presidential Term Limits in Africa', Dar es Salaam, Tanzania, Mandela Institute for Development Studies (Minds), Discussion Paper.

Ndi, E. (2016). 'Chad and Cameroon Could Reintroduce Presidential Term Limits'. *African Review*, February 11.

_____. (2016a). 'Is Cameroon's Long-Serving Biya Eyeing a New Term?'. *African Review*, March 8.

Ntomba, R. (2015). 'Africa's Presidents: Should they Stay or Go now?'. *New African*, June 12.

_____. (2014). 'The African Union and the Promotion of Democratic Values in Africa: An Electoral Perspective' *SAIIA, African Governance and APRM Programme*, Occasional Paper no. 185.

OAU/AU. (2002). *Declaration on the Principles Governing Democratic Elections in Africa*. Addis Ababa: OAU/AU, AHG/Decl. 1(28).

Obama, B. (2015). 'Remarks by President Obama to the People of Africa'. Mandela Hall, The African Union Headquarters, Addis Ababa, Ethiopia, July 28.

Omotola, J.S. (2016). 'Third Term Politics and the De-Institutionalisation of Power in Africa'. *African Review*, 3(2) pp. 123-139.

Opalo, K. (2015). 'Term Limits and Democratic Consolidation in Africa: Lessons from Burundi'. *Constitutionnet*, July 30.

Posner, D.N, and Young, D.Y. (n.d.). 'Term Limits and the Transfer of Power'. in N. Cheeseman, ed., Politics in Africa: *The Importance of Institutions*. New York: Cambridge University Press.

_____. (2007). 'The institutionalization of political power in Africa'. *Journal of Democracy*, 18(3) pp. 126-140.

'President of Nigeria Loses Bid for a Third Term'. (2006). *The New York Times*, May 16.

'Presidential Term Limits in Africa: The Real Story'. (2015). *MmegiOnline*, July 31.

Riedl, R.B. (2014). *Authoritarian Origins of Democratic Party Systems in Africa*. Cambridge: Cambridge University Press.

Samb, S. (2001). 'Guinea-Politics: Possible Third Term for Conte Shakes Up Political Landscape'. *Inter Press Service*, October 19.

_____(2001).'Analysis: Guinea's Crucial Referendum', *BBC News*, November 1, 2001.

Santora, M. (2015). 'In Burundi, President Pierre Nkurunziza's Push for Power Is Marked by Bloodshed'. *The New York Times*, July 20.

'Senegal's President Can Run for Third Term, Court Rules'. (2012). *The Guardian*, January 30.

Simmons, C. (2016). 'Sub-Sahara Africa Fights over Presidential Term Limits'. *BTI Blog*, August 30.

Simon, D.J. (2005). 'Democracy Unrealized: Zambia's Third Republic under Frederick Chiluba' in L. A. Villalon & P. VonDoepp, eds., *The Fate of Africa's Democratic Experiments: Elites and Institutions*. Bloomington: Indiana University Press.

Souare, I. (2009). *The AU and the Challenge of Unconstitutional Change of Government in Africa*. Pretoria, Institute for Security Studies, Briefing Paper no. 197.

Stearns, J.K. (2017). 'The Democratic Republic of the Congo: An Elusive Peace' in G.M. Khadiagala, ed., *War and Peace in Africa's Great Lakes Region*. New York: Palgrave Macmillan.

Sturman, K. (2009). 'Niger: Who Needs Presidential Term Limits?'. *AllAfrica.com*, August 17.

Tangri, R. (2006). 'Politics and Presidential Term Limits in Uganda' in R. Southall & H. Melber, eds., *Legacies of Power: Leadership Change and Former Presidents in African Politics*. Pretoria: HSRC Press.

Thurston, A. (2016). 'Sall Maneuvers for Re-Election in Senegal with Term-Limit Referendum Win'. *World Politics Review*, March 23.

'Two Term Limit? Not for Us, West African Presidents Say, adding to Central African-led Pushback'. (2015). *Mail and Guardian*, May 21.

'Two Term Limits Set for Burkina Faso Presidents'. (2015). *eNCA*, November 6.

Vencovsky, D. (2007). 'Presidential Term Limits in Africa'. *Conflict Trends*, 2, pp. 15-21.

Vogt, V. (2015). 'Rwanda Joins African Trend in Term-Limits Referendum'. *Wall Street Journal*, December 18.

VonDoepp, P. (2005). 'Institutions, Resources, and Elite Strategies: Making Sense of Malawi's Democratic Trajectory', in L.A. Villalon & P. VonDoepp, eds., *The Fate of Africa's Democratic Experiments: Elites and Institutions*. Bloomington: Indiana University Press.

Wilmot, C. (2015). 'How and Why Term Limits Matter'. *African Arguments*, October 5.

Winsor, M. (2016). 'Seychelles Cuts Presidential Term Limits, Going Against Recent Trend in Africa'. *International Business Times*, May 4.

Woldemariam, Y. (2016). 'Africa Desperately Needs Term Limits'. *World Post*, May 11.

Yarwood, J. (2016). 'The Struggle over Term Limits in Africa: The Power of Protest'. *Journal of Democracy*, 27(3) p. 51.

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- EISA is a stronger and more influential organisation

The vision of EISA is "an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment". This vision is executed through the organisational mission of "striving for excellence in the promotion of credible elections, participatory democracy, a human rights culture, and the strengthening of governance institutions for the consolidation of democracy in Africa".

Having supported and/or observed over 100 electoral processes in Africa, EISA has extensive experience in formulating, structuring and implementing democratic and electoral initiatives. It has built an internationally recognised centre for policy, research and information and provides this service to electoral management bodies, political parties, parliaments, national and local governments and civil society organisations in a variety of areas, such as voter and civic education and electoral assistance and observation. Besides its expanded geographical scope, the Institute has, for the past several years, been increasingly working in new in-between election areas along the electoral and parliamentary cycle, including constitution building processes, legislative strengthening, conflict management and transformation, political party development, the African Peer Review Mechanism (APRM) and local governance and decentralisation.

EISA provides technical assistance to inter-governmental institutions, such as the African Union, the Pan-African Parliament and Regional Economic Communities (RECs), to reinforce their capacity in the elections and democracy field. The Institute has signed Memoranda of Understanding with the African Union (AU), the Economic Community of Central African States (CEEAC); the East African Community (EAC); and the Common Market for East and Southern Africa (COMESA). EISA also works on an ad hoc basis with the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS).

EISA has current and former field offices in Angola, Burundi, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of Congo, Egypt, Gabon, Kenya, Madagascar, Mali, Mozambique, Rwanda, Somalia, Sudan, Zambia and Zimbabwe.

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