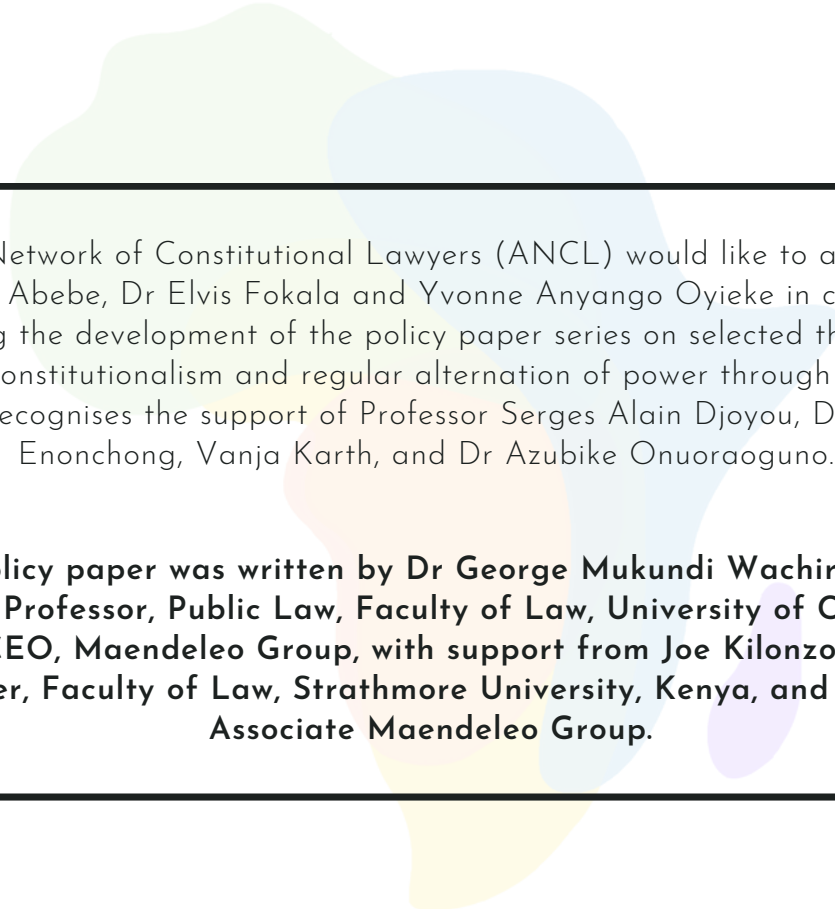


PROMOTION OF CONSTITUTIONALISM  
THROUGH TERM LIMITS IN AFRICA:  
**ROLES AND PRACTICES OF THE AFRICAN UNION  
AND REGIONAL ECONOMIC COMMUNITIES**

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PROMOTING PEACEFUL POLITICAL TRANSITIONS THROUGH TERM LIMITS:  
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DEVELOPED BY THE AFRICAN NETWORK OF CONSTITUTIONAL LAWYERS

## 1. Introduction

In the post-independence era, several African states experienced transfer of power through coup d'états.<sup>i</sup> Many post-independence founding political leaders were unceremoniously ousted by coups, or died in office because of natural causes, whereas transfer of power through elections was an exception.<sup>ii</sup> However, from the early 1990s, partly due to a wave of democratisation and constitutionalism, institutions that uphold democracy have attained greater importance in constraining executive power and addressing undemocratic processes, as well as enabling peaceful transfers of power. The 1990s marked a period of significant transformation of political systems across Africa ranging from the introduction of a multi-party system of governance and the fall of many civilian and military dictators to respect for the rule of law and constitutionalism.<sup>iii</sup>

Most notably, since the 1990s, an overwhelming majority of African states adopted presidential term limits in their constitutions as part of broader rules that sought to entrench transitions from personal and authoritarian rule to democratic governance.<sup>iv</sup> Although in some African states presidential term limits have been respected, there has also been a worrying trend to either circumvent or remove presidential term limits, and many African states are yet to see peaceful alternation of power.<sup>v</sup> Combined with the weak institutionalisation of democratic governance in Africa, the trend to circumvent or remove term limits creates 'conditions that make it very difficult for the opposition to participate competitively in elections.'<sup>vi</sup> This circumvention of term limits and its consequences of incumbency advantage is inconsistent with AU and REC norms that seek to entrench democracy, good governance, and respect for human rights and the rule of law. It undermines AU's aspiration for a peaceful continent of 'good governance, democracy, respect for human rights, justice, and the rule of law' as articulated under AU's Agenda 2063.

The AU and some RECs has adopted various norms that address unconstitutional changes of government, arguably including the phenomenon of circumventing or removing presidential term limits. Although the AU has been active in addressing unconstitutional changes of government, particularly those arising from military coups, questions remain on why the 'AU is relatively passive' regarding circumvention or removal of presidential term limits by incumbents. While the norms are robust, AU's action or intervention among its member states following circumvention or removal of term limits by incumbents, has not been as proactive.<sup>vii</sup>

This policy paper focuses on the role and practice of AU and RECs in promoting peaceful political transitions in Africa through term limits.

This policy paper includes five distinct sections:

1. Introduction
2. Why presidential term limits matter
3. Assessment of AU and RECs normative frameworks relative to term limits
4. A brief overview of the practice of AU and RECs, including on consequences of inconsistencies
5. Policy issues for consideration on improving the establishment of term limits as critical to peaceful alternation of power.

## 2. Do presidential term limits matter?

While constitutional limits have attained prominence in Africa since the 1990s as a tool against prolonged stays in power, with Tanzania witnessing the first ever peaceful transition of power due to term limits in 1995, they have been subject to intense contestations. This has reignited debate as to whether term limits are legitimate and matter. Why should the AU and RECs consider presidential term limits as critical to the aspiration for a peaceful, prosperous and integrated Africa that is characterised by good governance and democracy?

There are valid reasons why presidential term limits are critical to the realisation of good governance and democracy in line with AU Shared Values. First, presidential term limits enhance power alternation. In Africa, there is an empirically proven correlation between respect for presidential term limits and alternation of leadership.<sup>viii</sup> In various AU member states, such as Benin, Kenya, Ghana, Malawi, Mali, Nigeria, and Seychelles, presidential term limits have fostered unprecedented and smooth political transitions from ruling to opposition parties, and change of leadership within ruling parties in many states, such as Botswana, Mauritania, Mozambique, Niger, and Tanzania. For instance, President Uhuru Kenyatta's most recent hand over of instruments of power to William Ruto on 13 September 2022, despite the former having supported long time opposition leader Raila Odinga's candidacy, is a classic testimony to the importance of presidential term limits to good governance and democracy in the continent.<sup>ix</sup>

Importantly, alternation of power has the potential to positively impact democratic consolidation. It leads to a change of personalities and possibly introduction of new ideas, reforms and development strategies, some of which may raise hope for good governance, rule of law and development among citizens.<sup>x</sup> Elections where incumbent presidents do not run have been useful to the removal of entrenched, corrupt, and authoritarian regimes from power, creating opportunities for increased political liberalisation and improved governance.<sup>xi</sup> The defeat of KANU in Kenya

in 2002 is an example.<sup>xxi</sup> Until the end of President Daniel Moi's term, and the non-incumbent elections in 2002, 'the reintroduction of multipartyism in Kenya had not resulted in an improvement in governance or civil liberties.'<sup>xxii</sup>

Second, term limits facilitate improved electoral processes. Restrictions on the number of times an incumbent may run for presidency facilitates electoral processes and prevents the emergence of 'electoral dictatorships' and pseudo-monarchs.<sup>xxiii</sup> Term limits regulate and shield the political environment from the excesses of the incumbent, and allow electoral processes to function.<sup>xxiv</sup> This is critical in Africa where elections are expected to perform at least three functions that are aligned with AU and RECs normative frameworks on governance and democracy.<sup>xxv</sup> The functions include:<sup>xxvi</sup> i) helping the continent establish and sustain effective democratic institutions; ii) providing African citizens with an effective legal tool to limit and guard the government and enhance accountability; and iii) increase the ability of the people to change their government and elect new political leadership.

Third, presidential term limits lead to development of state institutions and levelling of the political playing field. Presidential term limits serve as incentives for incumbent leaders to develop equitable and effective institutions, which they will be subject to upon leaving office.<sup>xxvii</sup> Unlike a protracted stay in power, which creates personalisation of power and entrenchment of informal networks of patronage, presidential term limits make it harder to establish patronage networks and such networks also become less valuable.<sup>xxviii</sup> This creates a chance to build state institutions and levelling of the political playing ground which facilitates democratic development.<sup>xxix</sup> This is in line with the goal for creation of capable institutions and transformative leadership as outlined under aspiration 3 of the AU Agenda 2063.

While presidential term limits are critical to promotion of peaceful transitions and enhancement of democracy and good governance, several arguments have been made against imposition of term limits. First, term limits are said to constrain democratic choice of voters.<sup>xxx</sup> In a democracy, it is argued, citizens should be free to elect whoever they want to even in cases where a candidate has already exhausted their constitutional tenure.<sup>xxxi</sup>

Second, alternation of power through term limits is not always a guarantee of good governance and democracy.<sup>xxxii</sup> There is no guarantee that the leader elected upon the end of term of the incumbent president will lead in a more democratic and transparent manner than his predecessor.<sup>xxxiii</sup> In some AU Member States, some alternations of power have resulted in bleak experiences.

Third, continuity of leadership may contribute to political stability in the short term while term limits risk instability. It is evident that presidential term limits have not successfully addressed rivalry over power succession in Africa.<sup>xxxiv</sup> In fact, attempts to evade term limits, successful or otherwise, have often generated political and even security instability.

However, a critical assessment shows that 'despite the inherently contentious and conflictual character of presidential term constraints, most conflicts emerged from circumstances of defiance of term limits. Struggles over the subject of term limits often characterised the people's resistance to efforts by leaders that sought to stretch the initial boundaries.'<sup>xxxv</sup> Crucially, presidential term limits are very popular among Africans, and the overwhelming majority of African constitutions impose term limits.<sup>xxxvi</sup> Term limits not only represent the popular will, but also that countries with term limits are more likely to show better performance on key indicators of stability, rule of law, good governance and corruption.

### 3. AU and RECs Normative Frameworks Relative to Term Limits

The AU has laid down normative frameworks to address unconstitutional changes of government. The prohibition against unconstitutional changes of government became prominent in 2000 because of the Lome Declaration<sup>xxxvii</sup> where OAU Heads of State and Government undertook to unequivocally condemn and reject all forms of unconstitutional change of governments within the continent with specific reference to military coups. This was premised on the position that the peoples' will ought to be expressed through the ballot and not the bullet. Similarly, one of the core principles upon which the AU functions pursuant to the AU Constitutive Act is the condemnation and rejection of unconstitutional changes in government.<sup>xxxviii</sup> Based on this principle, the Constitutive Act provides for the suspension of governments that come to power through unconstitutional means from participation in the activities of the AU.<sup>xxxix</sup>

In addition, the African Charter on Democracy, Elections and Governance, 2007 (ACDEG) was established out of appreciation that unconstitutional changes of government contribute to insecurity, instability and violent conflicts.<sup>xxxix</sup> Hence, one of the underlying objectives of the ACDEG is to prohibit, reject and condemn unconstitutional changes of government bearing in mind that such transitions are outright threats to stability, peace, security and development within the continent.<sup>xxxix</sup> From this objective stems the obligation of AU member states to condemn and totally reject governments that have come into power through unconstitutional means and changes.<sup>xxxix</sup> Further, the ACDEG obliges the AU to issue appropriate sanctions in response to conduct that amounts to illegal means of

accessing or maintaining power, which includes the amendment or revision of constitutions or legal instruments which infringe on principles of democratic change of government.<sup>xxxiv</sup>

However, there is no express articulation of constraints on extension or removal of presidential term limits. Indeed, attempts to include term limits in the ACDEG were rejected during the drafting process. In addition, attempts by ECOWAS to amend its Protocol on Democracy and Good Governance to include presidential term limits have so far been unsuccessful.<sup>xxxv</sup> Nevertheless, it is possible to imply support for the establishment of presidential term limits and discouragement of, even prohibition against, removal of term limits from the provision of the ACDEG banning constitutional and legislative amendments that undermine democratic change of governments.

Indeed, recently, in March 2022, the participants of the AU Reflection Forum in Accra Ghana adopted the Declaration on Unconstitutional Changes of Government in Africa.<sup>xxxvi</sup> The Declaration includes an acknowledgement that the AU and RECs have made significant efforts in tackling unconstitutional changes of government through various measures as provided by AU/RECs frameworks, including sanctions and other punitive measures.<sup>xxxvii</sup> It also recognises that AU Member States have made efforts in promoting democracy and good governance by conducting free and fair elections as well as upholding presidential term limits provided in their respective constitutions.<sup>xxxviii</sup> It further acknowledges with regret the increased practice by incumbents to manipulate democratic processes to eliminate, modify or resist term limits in their laws.<sup>xxxix</sup>

On the premise of its normative frameworks, the AU has acted against unconstitutional changes of government through military coups, although at times it has shown serious issues of inconsistency.<sup>xl</sup> However, the AU has remained relatively passive regarding incumbents' manipulation of constitutions to circumvent or remove presidential term limits.<sup>xli</sup> As demonstrated in the next section of this paper, different incumbents have gotten away with constitutional amendments to facilitate the extension of their terms in office and are yet to face any condemnation or serious consequences from the AU. The AU has therefore not been actively condemning efforts to undertake constitutional amendments even when the constitutional structures do not allow for amendments that purport to interfere with the lawfully prescribed presidential tenure.<sup>xlii</sup>

One of the challenges that may constrain AU from actively condemning presidential term extensions before elections is based on the overriding criteria upheld by the AU to recognize power transitions. The nature of the current framework mainly recognizes credible elections (free, fair and democratic) as the only scale upon which the validity of

power alternation is weighed.<sup>xliii</sup> The resulting assumption that democratic election is the sole basis of the authority of representative governments has created a loophole that has been exploited by incumbents and also constrained active reaction or consequences from the AU.

Even so, under the ACDEG, amendments or revision of constitutionally entrenched term limit provisions could be recognized as unconstitutional changes to the extent that they are undertaken with underlying infringement of democratic principles of democratic change of government.<sup>xliv</sup> At a minimum, changes to term limit provisions should create a presumption of violation of democratic principles that should trigger AU and REC condemnation. In practice, despite reports of discreet AU engagement, the extent to which the AU has never publicly called out incumbents undertaking such unconstitutional changes has created the impression that term limit violations are not seen as constituting infringement of democratic principles. This uncertainty means that the ACDEG is not clear on the scope of principles of democratic change of government that it protects. The ambiguity in the provisions of the ACDEG has been taken advantage of by incumbents through arguments that the prohibitions against term limits ought not to apply retrospectively. For instance, incumbents in Burundi (2015), Senegal (2012), Burkina Faso (2014) and most recently in Guinea-Conakry (2020) and Cote d'Ivoire (2020) have invoked this argument to justify that the constitutional term limits did not apply retrospectively to their first terms in office.<sup>xlv</sup>

While the AU has instruments prohibiting constitutional alterations that undermine democratic principles, most of the RECs have not established similar specific normative frameworks. ECOWAS adopted a Protocol on Democracy and Good Governance, which bans changes to electoral rules six months before elections.<sup>xlvi</sup> This arguably would apply to changes to presidential term limits, but does not preclude abusive and regressive changes prior to the six-month cut-off time. Nevertheless, the organisation has never invoked the Protocol to ban or reject presidential term removals. In fact, the region has had one of the highest concentrations of term limit alterations since the 1990s.<sup>xlvii</sup> In recognition of the gap in its frameworks, ECOWAS sought to amend the Protocol to explicitly establish a two-term limit, which was defeated, most recently in 2022, when Senegal, Cote d'Ivoire and Togo reportedly blocked the move.<sup>xlviii</sup> The process of review of the Protocol is ongoing.

Other RECs do not have robust democratic frameworks as ECOWAS. Nevertheless, RECs, as building blocks of the AU, are in principle expected to apply continental standards. Indeed, one of the key objectives of the Protocol on the Relations between the AU and RECs is the coordination and harmonisation of policies and establishment of a framework for the contribution of RECs to the realisation of the

objectives of the AU Constitutive Act.<sup>lix</sup> RECs also expected to align their policies, programmes and strategies with those of the AU.<sup>l</sup> Accordingly, the absence of specific sub-regional instruments does not provide excuses for REC's reluctance to admonish incumbents that temper with term limits. Indeed, the principle of subsidiarity that animates the Protocol on the Relations between the AU and RECs assumes a responsibility on the RECs to recognise, adapt and apply continental standards, including notably on ensuring respect for constitutionalism and democratic governance.

At the same time, in view of the reluctance of the AU to invoke the ACDEG and other instruments against term limits, the responses of the RECs regarding term limit evasion are not surprising. This must entail both legal and moral responsibilities on the AU to lead by example.

#### 4. Practices of the AU and RECs on Term Limits

While the AU has adopted several normative instruments to address unconstitutional changes of governments, in practice the AU and RECs have been more active in addressing military coups as opposed to violation of presidential term limits by incumbents. An assessment of recent history shows that the AU and RECs are yet to enforce the framework against undemocratic extension of term limits and its impediments to peaceful political transition in the continent.<sup>li</sup> So far, the AU remains silent on attempts by African presidents to seek third terms which effectively serves the interests of incumbents.<sup>lii</sup> Since ACDEG came into force in 2012, the AU is yet to invoke it to sanction unconstitutional change of government through removal or circumvention of term limits despite the proliferation of apparent third-termism in the continent.<sup>liii</sup> An initial AU attempt to prevent term limit evasion against Burundi in 2014 failed because of resistance from some neighbouring states.

The AU's lack of reaction to the recent growing practice of undemocratic elimination of term limits has been interpreted as a cautious approach against interfering with the sovereignty of its member states and their power to determine their own affairs – such as constitutional amendments – without external intervention.<sup>liv</sup> This could be attributed to the ostensibly democratic instruments that African incumbents have deployed to circumvent presidential term limits which include national referenda, constitutional amendments through national parliaments, and judicial interpretations from the courts.<sup>lv</sup> For instance, Idris Deby of Chad, in 2005 used the mechanism of a referendum to delete constitutional provisions on term limits,<sup>lvi</sup> while Alpha Conde of Guinea-Conakry used a referendum in 2020 to adopt an ostensibly new constitution to reset the term count.<sup>lvii</sup> Other leaders have also explored the mechanism of parliamentary votes to effect

amendments on term limits and extend their time in office. Some have sought the judicial declaration of the Constitutional Court to interpret the law with the effect of conferring another change to run for office.<sup>lviii</sup>

An analysis of AU's approach towards tackling unconstitutional changes of government shows that AU has only sanctioned military coups, even though ACDEG requires the sanction of all forms of unconstitutional changes of government, including constitutional amendments undermining democratic principles.<sup>lix</sup> So far, the AU has only led soft interventions against unconstitutional change of governments through extension of term limits. For instance, it refused to participate in Burundi's 2015 general elections after the then president resorted to courts to allow him to run for a third term following his failed effort to amend the constitution through parliament.<sup>lx</sup>

The AU has acknowledged the extension of term limits as a challenge to democracy in Africa as seen in the Accra Declaration of March 2022. However, the Declaration only appeals to member states to adhere to presidential term limits and organize free and fair elections.<sup>lxi</sup> This approach is considerably weaker than the stronger interventions that the ACDEG provides for which include condemnation of such action and imposition of sanctions and suspension of member states from participating in the activities of the Union. In addition to the AU's passive approach on the issue, talks of amending the ACDEG and the ECOWAS Protocol on Democracy and Good Governance to provide for outright prohibition against third termism have not gained political traction.<sup>lxii</sup>

Efforts towards constitutional reforms purporting to extend presidential tenure through removal of term or age limits have encountered opposition from civil society organizations, trade unions, and citizens.<sup>lxiii</sup> For instance, the October 2020 national elections in Guinea were marred with violent protests following the forceful insistence by the incumbent president to remain in power despite exhausting his term limits.<sup>lxiv</sup> Similar protests in 2014 forced the then incumbent president of Burkina Faso out of power after he attempted to extend his constitutional mandate.<sup>lxv</sup> Several other AU member states have also experienced violent protests in opposition to distortion of term limit provisions resulting in instability in the respective countries.<sup>lxvi</sup>

Ongoing uncertainties around the intention of incumbents who are serving their second and last term in Senegal (which has elections in 2024) and the Central African Republic (election in 2025) on a possible third term are already causing confusion and political tension. Despite these consequences undermining continental peace, stability, integration and democratic progress, the AU and the respective RECs are yet to publicly discuss the

developments, let alone engage the incumbents to discourage any desire to run for a third term.

### *Consequences of AU/RECs Inconsistencies*

AU's inconsistency and practice towards circumvention or removal of presidential term limits has given way to undesirable outcomes across the continent that range from deterioration in stability, human right violations, political intimidation, undermining of democratic institutions and civil unrest. These consequences have a significant bearing on peace, stability, and integration in the continent. Elections following term limit alterations in various parts of the continent have also been marred with human rights violations and characterized with intimidation and violence. For instance, recently in the October 2020 elections in Guinea, it was reported that at least 20 people lost their lives in events following the violent disputes over the elections.<sup>lxvii</sup> The circumstances surrounding the elections involved the quest by the incumbent president Alpha Conde to serve a third term despite exhausting the constitutionally prescribed two terms. In the same vein, the use of force to deal with protests in opposition to constitutional reforms by the National Front for the Defense of the Constitution (NFDC) left many protestors wounded, arrested and killed.<sup>lxviii</sup>

Another outcome that automatically flows from the persisting unconstitutional change of governments through extension of term limits is the intimidation of the political opposition and entrenchment of personalised dictatorship. The impunity incidental to the extension of term limits has also driven incumbents into criminalizing the activities of opposition parties to the extent that makes their existence and persistence in the political space inconsequential to democracy. Indeed, only one incumbent president – Abdoulaye Wade of Senegal in 2012 - who altered presidential term limits has ever lost their term bid in elections in Africa.<sup>lxix</sup> Term limit alterations therefore signify the height of entrenchment of personalised power and dictatorship, and almost certainly entail rigging of elections – incumbents that run for a third term make sure they win them at whatever cost, by hook or by crook.

Democratic institutions that are key to peaceful political transitions have also suffered a blow in the face of the persisting unconstitutional government changes through extension of term limits. Incumbents have sought to aid their stay in power by interfering with and rendering ineffective institutions that are essential for holding the government accountable by preserving democracy while maintaining checks and balances. These have been achieved by engineering strong political support of the legislature, as well as interference with the independence of election management bodies, the judiciary and other state organs.

Democratic institutions play a critical role in expressing the will of the people. Even though the Lomé Declaration and subsequent AU/OAU frameworks intended that the people's will ought to be expressed through the ballot, incumbent presidents in Africa have found loopholes to influence democratic institutions and hence purport to express their individual interests through referenda, legislative changes and judicial declarations in the guise of the will of the people to extend their term limits.

Empirical evidence suggests that revision of constitutional term and age limits hinders peaceful alternation of power and has been the cause of turmoil in the affected countries.<sup>lxx</sup> What is apparent from the foregoing is that the AU and RECs inconsistent application of democratic principles comes at the cost of peaceful transition across various countries in the continent, and worsening insecurity and governance. The absence of peaceful transition results in conflicts whose effects are long-term and transnational in nature.<sup>lxxi</sup> This justifies the need for intervention on the issue at a supranational level. While the prevailing AU and RECs frameworks impliedly prohibit the extension of term limits, the absence of an outright continental policy on the same has enabled African leaders to capitalize on these ambiguities and continue to fetter peaceful political transition. In short, term limit evasion has destabilising consequences and reinforces the personalisation of power and thriving of patrimonial and corrupt systems, rather than rule of law.

Therefore, it is important that the issue of presidential term limits be situated within the AU and REC's approach to entrenching constitutionalism and the rule of law, including their agreed role in enhancing and protecting these norms.<sup>lxxii</sup> This should be encouraged and supported by AU institutions including the Peace and Security Council, the African Peer Review Mechanism, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights. Accordingly, all actors supporting the integration of the continent and implementation of the African Continental Free Trade Area must also support respect for term limits as necessary (but insufficient) preconditions for democratic governance, without which a peaceful, prosperous and integrated Africa will remain a pipe dream.

## **5. Policy Issues for Consideration**

In view of their significance to the core African vision and aspiration, to improve the establishment of presidential term limits as a measure for peaceful political transitions in Africa, the AU and RECs should consider, among other measures, the following propositions:

- a. Elaborate and clarify a continental policy and guidance pursuant to the ACDEG and the Lomé Declaration prohibiting extension of term limits as violation of

constitutionalism and AU Shared Values instruments on democratic governance. The ongoing effort to adopt a guideline on constitutional amendments provides a good opportunity to clearly state that tempering with term limits undermines democratic principles and is therefore inconsistent with African standards.

- b. Revisit the AU/RECs sanctions regime. Just like the case of military coups, the AU and RECs should adopt a more active, rigorous, and fierce sanctions regime to deter circumvention or removal of term limits by incumbents. The AU and RECs should send a strong signal to incumbents that manipulation of constitutions to circumvent or remove presidential term limits is a thing of the past that can no longer be tolerated in the continent.
- c. Change the practice of having heads of state holding influential positions at the AU/RECs even when they are subject to a re-election in a year, or there are still pending election results. This will ensure that AU/RECs can take a strong position against any manipulation of constitutions or elections with undue influence.
- d. Harness the capacity of civil society organisations as champions for democracy and good governance in the continent. Civil society organisations across the continent have been protesting the circumvention or removal of term limits by incumbents,<sup>lxxiii</sup> and the AU and RECs should provide political support to them.
- e. Engage and involve African citizens in finding solutions to challenges posed by circumvention or removal of term limits. This is important considering that Afrobarometer data has shown that the majority of Africans support term limits.<sup>lxxiv</sup> The AU/RECs can rely on institutions and organs such as the African Governance Architecture and Economic Social and Cultural Council (ECOSOCC) as platforms for citizen engagement and popularisation of AU norms against unconstitutional changes of government.

In conclusion, term limits are no magic wand to a democratic Africa, and they cannot guarantee the achievement of continental aspirations. They may be insufficient, but without them, it is impossible to imagine the realisation of the enduring vision of building a united Africa.



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- lix Diadie Ba and Bate Felix, ["Senegal wins" as Wade concedes election defeat | Reuters](#) 'Reuters', 26 March 2012, available at (accessed 4 January 2023).
- lxx Namakula (note 8 above).
- lxxi As above.
- lxxii Wiebusch and Murray (note 47 above).
- lxxiii Wilmot (note 20 above).
- lxxiv Dulani (note 4 above).