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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT ON TERM-LIMITS**  
**PART I - PRESIDENTS**

**Adopted by the Venice Commission**  
**at its 114<sup>th</sup> Plenary Session**  
**(Venice, 16-17 March 2018)**

**On the basis of comments by**

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## I. Introduction

1. By a letter dated 24 October 2017, the Secretary General of the Organization of American States (OAS) invited the Venice Commission to undertake a study on the right to re-election, against the background of a recently observed bad practice of modification of presidential terms through a decision of constitutional courts rather than through a reform process.

2. OAS put four questions:

- Does a human right to re-election exist? If so, what are the limits to this right?
- Do term limits constrain the human and political rights of aspirant candidates?
- Do term limits constrain the human and political rights of voters?
- What is the best way to modify term limits within a constitutional state?

3. Mr Castella Andreu, Ms Cleveland, Mr Hyst, Mr Kang, Ms M. Otálora Malassis and Mr Tuori acted as rapporteurs.

4. It was decided to split the study into three parts: a) term-limits of presidents, b) of members of parliament and c) of locally elected representatives.

5. The present report, which deals with the first part of the study, was examined by the Council for Democratic Elections on 15 March 2018 and subsequently adopted by the Venice Commission at its 114<sup>th</sup> Plenary Session (Venice, 16-17 March 2018).

## II. Comparative survey of limits on presidential terms in the constitution

6. A comparative survey of constitutional provisions on limits on presidential terms in Venice Commission member states and other selected states (CDL-REF(2018)009) has been prepared.<sup>1</sup> It concerns both presidential (or semi-presidential) and parliamentary regimes, and in the latter both directly and indirectly elected presidents.

7. The survey indicates that there are five main models of limitation of presidential term limits:

- No limitation at all, either in the absence of any provision to the contrary (Azerbaijan,<sup>2</sup> Belarus,<sup>3</sup> possibly Bolivia,<sup>4</sup> Costa Rica, Cyprus, Iceland,<sup>5</sup> Italy<sup>6</sup>) or with a specific provision allowing for unlimited re-election (Venezuela<sup>7</sup>);
- Limitation on consecutive terms (with no maximum number): Peru, Chile, San Marino<sup>8</sup>, Switzerland,<sup>9</sup> Uruguay;
- Limitation through fixed number (two) of possible terms: Albania, Algeria, Croatia, Greece, Hungary, Ireland, Kosovo, Montenegro, Poland, Portugal, Romania, Serbia, South Africa, "the former Yugoslav Republic of Macedonia", Tunisia, Turkey, USA;

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<sup>1</sup> See also a previous comparative table on the limitation of consecutive terms in elected office, CDL-REF(2012)026.

<sup>2</sup> Limitation removed by referendum in 2009.

<sup>3</sup> Limitation removed by referendum in 2004.

<sup>4</sup> The legal situation is unclear, after the limitation was declared non-applicable by the Constitutional Court in 2017.

<sup>5</sup> Parliamentary system with a directly elected president.

<sup>6</sup> Parliamentary system with an indirectly elected president.

<sup>7</sup> Since a constitutional amendment of 2009.

<sup>8</sup> Two *Capitani Reggenti* are indirectly elected for a term of six months.

<sup>9</sup> Parliamentary system with an indirectly elected President for a term on one year.

- Limitation through fixed number (two) of possible consecutive terms: Argentina, Austria, Bosnia and Herzegovina, Brazil, Bulgaria, Czech Republic, Estonia, Finland, France, Georgia, Germany, Israel, Kazakhstan, Latvia, Lithuania, Republic of Moldova, Russia, Slovakia, Slovenia, Ukraine;
- Absolute ban on re-election: Armenia, Colombia, Republic of Korea, Kyrgyzstan, Malta, Mexico.

8. In almost all the presidential or semi-presidential systems under examination, the constitution sets limits on the President's re-election: either an absolute ban (Colombia, Republic of Korea, Mexico), or a maximum number of two terms (Algeria, Turkey, USA), or of two *consecutive* terms (Brazil – two times four years, France – two times five years, Kazakhstan – two times five years and Russia – two times six years). The only exceptions to the limitation in Europe are Azerbaijan, Belarus and Cyprus, and in Latin America possibly Bolivia, Costa Rica and Venezuela.

9. In countries with a parliamentary system and a directly elected president, limits on re-election or on consecutive re-election are always provided (the prohibition is absolute in Armenia and in Malta), with the exception of Iceland. In parliamentary systems with an indirectly elected president, limits are provided with the exception of Italy, where the Constitution does not limit the presidential terms but there exists a consolidated practice of non-re-election.<sup>10</sup>

### III. Some examples of limitations on presidential terms in recent constitutional history

10. The following section presents selected examples of recent constitutional changes in countries in different continents.

#### A. Europe

##### Azerbaijan

11. In a referendum held on 18 March 2009, voters overwhelmingly supported the constitutional amendment removing the two-term limit on the presidential mandate.<sup>11</sup> This change was effective for the current holder of the office.

12. In 2016, a further amendment to Article 101 increased the term of the presidential mandate from five to seven years.

13. President Ilham Aliyev, in office succeeding his father since 2003, has been nominated as the ruling party's candidate for the forthcoming 2018 presidential elections. He has called for early elections on 11 April 2018. If he wins, it will be his fourth term.

##### Belarus

14. The Constitution of Belarus, as amended in 1996, provided for a two-term limit on the presidential mandate.<sup>12</sup> On 7 September 2004, President Lukashenko, in office since 1994,

<sup>10</sup> As the only exception, President Napolitano was re-elected in 2013 but resigned two years later.

<sup>11</sup> Article 101 § 4 of the Constitution provided: "No one can be elected as the President of the Republic of Azerbaijan more than twice consecutively."

<sup>12</sup> Article 81 provided: The President shall be elected directly by the people of the Republic of Belarus for a term of office of five years by universal, free, equal, direct and secret ballot. The same person may be President for no more than two terms. [...]

called a referendum to take place 17 October 2004, in which voters would be asked to answer the following single question: “Do you allow the first President of the Republic of Belarus Alexander Grigoryevich Lukashenko to participate in the presidential election as a candidate for the post of the President of the Republic of Belarus and do you accept Part 1 of Article 81 of the Constitution of the Republic of Belarus in the wording that follows: “The President shall be elected directly by the people of the Republic of Belarus for a term of five years by universal, free, equal, direct and secret ballot?” This question in fact covered both the question of the ability of President Lukashenko to run for a third term of office and the amendment of Article 81 by removing the two-term limitation. The result of the referendum overwhelmingly supported the proposal.

15. President Lukashenko was re-elected in 2006, 2010 and again, for a fifth term, in 2015.

#### France

16. In France, the President has been directly elected since the constitutional reform of 1962. In 2000, following a referendum, the length of the presidential term was shortened from seven to five years, effective as of the presidential election of 2002.

17. On 23 July 2008, a two-term limit on consecutive presidential mandates was introduced.<sup>13</sup>

#### Turkey

18. Since 2007, the President of Turkey is elected through a direct vote (Article 101). The term of office is five years and the person may be re-elected once.<sup>14</sup>

19. Following the constitutional amendments of 2017, in case new elections have been decided by the Grand National Assembly during the second term of office of the President, he/she can run for the presidency one more time.<sup>15</sup>

#### Ukraine

20. The 1996 Constitution of Ukraine provided for a two-term limit on consecutive presidential mandates.<sup>16</sup>

21. President Leonid Kuchma won the 1994 presidential elections and won re-election for an additional five-year term in 1999.

22. In 2003, a year before the presidential elections in Ukraine, the debate on the terms of office of the acting President resulted in an appeal to the Constitutional Court of Ukraine. In December 2003 the Court ruled that the provision limiting the presidential terms applied only to persons elected after the entry into force of the Constitution of Ukraine. Therefore, a person newly elected the President of Ukraine in accordance with the Constitution of Ukraine in effect in 1999 had the right to run for presidency in the next presidential election in 2004.

23. Mr Kuchma eventually decided not to run for the third consecutive term in 2004.

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<sup>13</sup> Article 6 of the French constitution provides: « Nul ne peut exercer plus de deux mandats consécutifs ». This limitation already existed under the Constitution of the IVth Republic.

<sup>14</sup> See Article 101 of the Turkish Constitution.

<sup>15</sup> See Article 116 of the Turkish Constitution.

<sup>16</sup> Article 103 § 3 provided: “The same person may not serve as the President of Ukraine for more than two consecutive terms”.

24. The current Constitution of Ukraine still contains the two-term limit on consecutive presidential mandates.

B. Africa<sup>17</sup>

Algeria

25. Under the 1996 Constitution of Algeria, there existed a two-term limitation on the presidential term.<sup>18</sup>

26. In November 2008, a constitutional revision lifted this limitation.<sup>19</sup>

27. President Bouteflika was elected in 1999, then in 2004, 2009 and for a fourth term in 2014.

28. In 2016, the two-term limitation was reintroduced.<sup>20</sup>

C. Asia

Kyrgyzstan

29. The 2007 Constitution of Kyrgyzstan stated that the same person could not be elected for more than two *consecutive* terms. In 2010, a two-term limit on the presidential mandate was introduced.<sup>21</sup>

Republic of Korea

30. In the Republic of Korea, the current Constitution, which was adopted in 1987 after the success of the democratic uprising, provides<sup>22</sup> for direct election of the President for a single five-year term limit. Since then, several peaceful transfers of power have taken place.

D. Americas

United States

31. The United States historically had a custom of limiting the Presidency to two terms, starting with the first president of the United States, George Washington, who decided not to stand for office after his second term.

32. The State of Virginia's Declaration of Rights, adopted the same year as the American Declaration of Independence, limited successive terms in office, providing that in order for members of the legislative and executive to be "restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be

<sup>17</sup> As concerns Africa, see the statistics on Constitutional Term Limits for African Leaders elaborated by the Africa Center for Strategic Studies: <https://africacenter.org/spotlight/constitutional-term-limits-african-leaders/>.

<sup>18</sup> Article 74 of the 1996 Constitution provided: "La durée du mandat présidentiel est de cinq ans. Le président de la République est rééligible une seule fois. »

<sup>19</sup> Law no. 08-19 of 15 November 2008.

<sup>20</sup> Art. 88 of the Algerian Constitution now provides : « La durée du mandat présidentiel est de cinq (5) ans. Le Président de la République est rééligible une seule fois. »

<sup>21</sup> Article 61 of the Constitution of Kirghizstan in force provides: "1. The President shall be elected by the citizens of the Kyrgyz Republic for a term of 6 years. 2. One and the same person may not be elected President twice. [...]".

<sup>22</sup> Article 70 of the Constitution provides: "The term of office of the President is five years, and the President cannot be re-elected".

supplied by frequent, certain, and regular elections, in which all or any part, of the former members, to be again eligible, or ineligible, as the laws provide. (Virginia Declaration, article 5).

33. President Franklin Delano Roosevelt was the only US President to serve more than 2 terms. After President Roosevelt was elected to a fourth term, Congress adopted the Twenty-Second Amendment to the Constitution, providing that no person shall be elected to the office of the President more than twice.

### Bolivia

34. Current President Morales was first elected in 2005 under the previous constitutional regime<sup>23</sup>. A new Constitution was approved in 2009, according to which the presidential term was set at five years, and limited to only one consecutive re-election.<sup>24</sup> Under this new constitutional regime, President Morales was re-elected in 2009 and 2014 (the Constitutional Court ruled his first term did not count, because it occurred before the term limit was imposed).

35. In a referendum held on 21 February 2016, a proposed constitutional amendment that would have allowed the president and vice president to run for a third consecutive term was rejected by a narrow majority of 51.3%.

36. The ruling party (MAS) challenged the constitutionality of the limit on more than two consecutive terms. In its judgment of November 2017, the Plurinational Constitutional Court exercised a control of conventionality of Articles 156, 168, 285 and 288 of the Constitution<sup>25</sup> in relation to the American Convention on Human Rights, and established that the protection of political rights afforded by the latter international treaty is more favorable than the one afforded by the constitution. Indeed, according to the Constitutional Court, Article 23 § 2 CADH only allows for an exhaustive set of limitations (numerus clausus), exclusively “on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings”. As the Bolivian constitution prescribes that international treaties which represent the most favourable norm for human rights have to be applied and prevail even over the Constitution itself, the Court concluded that, regarding political rights, the CADH should have preferential application over Articles 156, 168, 285.II and 288.<sup>26</sup>

### Colombia

37. Article 197 of the 1991 Constitution of Colombia established an absolute prohibition on presidential re-election.<sup>27</sup> This article was amended in 2004, establishing the limit of one re-

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<sup>23</sup> Article 87. I of the 2004 Constitution of Bolivia provided: “The non-extendable mandate of the President is five years. The President can be re-elected only once after at least one constitutional term has passed.”

<sup>24</sup> Article 168 of the Bolivian Constitution provides: “The period of mandate of the President and Vice-President is for five years and they can be re-elected only one consecutive time.”

<sup>25</sup> See Articles 156 (limit on re-election for members of parliament), 168 (limit on re-election for President and Vice-President), 285.II (limits on election of executive authorities of autonomous governments) and 288 (limits on election for members of autonomous governments’ councils and assemblies).

<sup>26</sup> Ruling of the Plurinational Constitutional Tribunal, TCP-0084/2017, 14 December 2017, available at: <https://edwinfigueroag.files.wordpress.com/2017/12/sentencia-0084-2017-tcp-bolivia-reeleccion-evo-morales.pdf>

<sup>27</sup> Article 197 provided: “The citizen who for whatever reason has held the presidency may not be elected President of the Republic.”

election (the so-called “immediate re-election clause”).<sup>28</sup> The amendment also introduced clauses aimed at leveling the political playing field, in view of the advantages that an incumbent president has, in terms of resources, media access and visibility. The Constitutional Court upheld the amendment, holding that allowing the immediate re-election of the incumbent President for one additional term did not amount to a “substitution” of the constitutional regime and was therefore constitutional and could be adopted by Congress. Under the amendment, President Uribe was allowed to hold a second term.

38. In 2009, confronted with another constitutional amendment that would have allowed for a third consecutive presidential term, the Court decided against it: two presidential terms did not amount to a substitution for the constitutional system, but three terms do.

39. Current President Santos is currently serving his second term (2014-2018), and is leaving office in 2018.

40. In 2015, Article 197 of the Constitution was amended again to return to the absolute 1991 prohibition on re-election, adding that this change now may only be amended or repealed by a popular referendum or constituent assembly.<sup>29</sup>

41. The impossibility for Congress to change the limits on presidential re-election was challenged before the Constitutional Court, which however declined to rule on it on formal grounds.<sup>30</sup>

#### Ecuador

42. During his first term, President Rafael Correa called for a Constitutional Assembly which enacted the 2008 Constitution, including a limitation to one presidential re-election.<sup>31</sup> Pursuant to this provision, he held two more presidential terms in 2009 and 2014.

43. On 4 December 2015, Ecuador's National Assembly passed a constitutional amendment lifting presidential term limits, beginning in 2021. This amendment, together with 15 others, was approved in a vote of 100-8 in a legislature where sitting President Rafael Correa's political party, Alianza Pais, had a two-thirds majority. A transitional provision was included to make this change effective after the presidential elections of May 2017. President Correa, in office since 2007 and until the end of his second mandate in 2017, pledged not to run again in 2021, despite being eligible to do so under the new amendment.<sup>32</sup>

44. The Constitutional Court had expressed the view that the lifting of limits to presidential terms did not alter the basic constitutional foundations nor the organization of the State and did not restrict rights –on the contrary, it widened the rights of participation, so that it could be processed as a constitutional reform through the Congress.

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<sup>28</sup> Revised Article 197 provided: “Nobody can be elected for President of the Republic for more than two periods.” A transitional provision stated that “Who held or has held the Presidency before this reform will only be able to be re-elected for one new term.”

<sup>29</sup> Amended Article 197 currently in force provides: “The citizen who for whatever reason has held the presidency may not be elected President of the Republic. [...] The re-election prohibition may only be amended or repealed by referendum of popular initiative or constituent assembly.”

<sup>30</sup> <http://www.corteconstitucional.gov.co/relatoria/2016/C-230-16.htm>

<sup>31</sup> Article 144 provided: “The President of the Republic shall remain four years in office and can be re-elected only once.”

<sup>32</sup> <http://www.jurist.org/paperchase/2015/12/ecuador-lawmakers-end-presidential-term-limits.php>



45. In May 2017, Lenin Moreno was elected President and he decided to call a referendum asking, among other questions, whether the Constitution should be amended again to limit re-election to only one time.

46. In the referendum held on 4 February 2018, Ecuadoreans voted with 64 percent of voters in favor of referendum question 2, which would amend the constitution so that all elected officials can only be re-elected once for the same office, thus overturning the 2015 constitutional amendment which removed the limits on presidential re-election. Former President Correa will therefore no longer be allowed to run for president in the 2021 election.

### Honduras<sup>33</sup>

47. On April 22, 2015, the Constitutional Division of the Supreme Court of Justice resolved two constitutional challenge suits, permitting indefinite presidential re-election in Honduras. In that judgment, the Court ruled on an action filed by 15 congressmen, almost all of them members of Partido Nacional, against the second paragraph of Article 239<sup>34</sup> and Article 42.5<sup>35</sup> (both) of the Constitution of the Republic and against Article 330 of the Criminal Code, and on an action brought by former President Rafael Callejas to have Article 239 of the Constitution<sup>36</sup> declared inapplicable.

48. The judgment declared the unconstitutionality of Article 330 of the Criminal Code, which orders the imprisonment of anyone seeking to amend the articles of the Constitution that prevent presidential re-election. The Court considered that said article unlawfully restricted freedom of expression and contradicted principles established in the Constitution and in the American Convention on Human Rights.

49. At the same time, it declared Article 42.5 of the Constitution, on prohibiting the re-election of the President, and Article 239 of the Constitution, on the disqualification or dismissal of anyone proposing re-election, to be inapplicable. By extension, it established the inapplicability of the last paragraph of Article 4, which established that said offense constitutes treason.<sup>37</sup> Nevertheless, the Court upheld the preceding paragraph, which makes alternation in the exercise of the Presidency mandatory. Finally, the Court's judgment declares the inapplicability

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<sup>33</sup> Extract from Organization of American States, Electoral observation mission, General elections, Honduras, November 26, 2017, Final Report, p 6, at: <http://scm.oas.org/pdfs/2017/CP38551E01H.pdf>.

<sup>34</sup> ARTICULO 239.- El ciudadano que haya desempeñado la titularidad del Poder Ejecutivo no podrá ser Presidente o Vicepresidente de la Republica. El que quebrante esta disposición o proponga su reforma, así como aquellos que lo apoyen directa o indirectamente, cesarán de inmediato en el desempeño de sus respectivos cargos y quedarán inhabilitados por diez (10) anos para el ejercicio de toda función publica.

<sup>35</sup> ARTICULO 42.- La calidad de ciudadano se pierde: [...] 5. Por incitar, promover o apoyar el continuismo o la reelección del Presidente de la Republica; [...].

<sup>36</sup> Judgments 1342-2014 and 243-2015, joined, on actions brought by Deputies José Oswaldo Ramos Soto, Oscar Arturo Álvarez Guerrero, David Guillermo Chávez Madison, Antonio Cesar Rivera Callejas, José Tomás Zambrano Molina, José Celin Discua Elvir, Miguel Edgardo Martínez Pineda, Rodolfo Irias Navas, Mario Alonso Pérez López, Milton Jesús Puerto Oseguera, Román Villeda Aguilar, Juan Carlos Valenzuela Morlina, Welsy Linea Vásquez, José Francisco Rivera Hernández, and Edwin Roberto Pavón León, as well as former President Rafael Leonardo Callejas Romero.

<sup>37</sup> ARTICULO 4.- La forma de gobierno es republicana, democratica y representativa. Se ejerce por tres poderes: Legislativo, Ejecutivo y Judicial, complementarios e independientes y sin relaciones de subordinacion. La alternabilidad en el ejercicio de la Presidencia de la Republica es obligatoria. La infraccion de esta norma constituye delito de traicion a la Patria.

of Article 374 on the impossibility of amending certain hard and fast articles of the Constitution.<sup>38</sup>

50. The Supreme Court held that the clauses prohibiting presidential re-election were in conflict with free speech and thought, and unduly limited political participation and debates. The Court further held that the restriction on human liberty that the prohibition of presidential re-election presents could be accepted in principle if deemed reasonable and socially necessary. However, while the ban had been reasonable and salutary for democracy in earlier periods in Honduran history, this was no longer true since the country had stabilized its democracy through alternation without interruption since 1982.<sup>39</sup>

### Venezuela

51. The 1990 Constitution of Venezuela contained a two-term limitation of consecutive presidential mandates.<sup>40</sup> Hugo Chavez was first elected President in 1999, but under the new Constitution enacted that year he was able to run for the two following mandates in accordance with the original version of article 230 regulating presidential terms.

52. In 2007, President Chavez proposed a set of constitutional amendments, which was further extended by the National Assembly. Among the reforms proposed by Chavez (first block of reforms) was the modification of article 230 in order to extend the presidential term from six to seven years and remove the limits for re-election. In a referendum held that year, the constitutional amendment was rejected by 50,65% of the votes.

53. In 2009 the issue of re-election was again submitted to referendum, with the following question: "Do you approve the National Assembly amendment to articles 160, 162, 174, 192 and 230 of the Constitution that widens the political rights of people in order to allow that any citizen exercising an elected public position can run for candidate for the same position for the period established in the Constitution, depending only on its popular election?". This time, the constitutional amendment was approved by 54,86% of the votes.

54. In 2012, Chavez was re-elected for his fourth consecutive presidential term.

### **IV. Previous works of the Venice Commission on limiting presidential mandates**

55. In several country-specific opinions, the Venice Commission has taken a positive view on limiting the mandates of presidents. In Belarus, the limitation was eliminated after a referendum held on 17 October 2004. In its opinion on the referendum (CDL-AD(2004)029), the Venice Commission adopted a critical view of the removal of the limitation. The commission appealed, first, to international practice:

*In those democracies where the president exercises important functions of State, a system of constitutional checks and balances ensures that he or she cannot exercise arbitrary power while in office, and in any event the term of office is limited. The constitutions of democratic countries with presidential systems of government, as are to be found in particular in Latin America, generally either prohibit the immediate re-election of an incumbent President or at least limit it to one further term, as is the case in*

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<sup>38</sup> The UN Human Rights Committee, in its Observaciones finales sobre el segundo informe periódico de Honduras of 24 July 2017, called on Honduras to "Respetar el criterio de elegibilidad establecido en la Constitución, en particular el de la limitación del mandato presidencial." (CCPR/C/HND/CO/2), § 45 d).

<sup>39</sup> <http://www.poderjudicial.gob.hn/Documents/falloSCONS23042015.pdf>

<sup>40</sup> Article 230. The Presidential term is for six years. The President of the Republic can be re-elected, immediately and for only one time, for a new period.

*the Constitution presently in force in Belarus. Even democracies where the President's functions are largely ceremonial tend to limit the possibility of continuous terms of office. The undesirability of unlimited terms for the president is recognised in new (e.g. the Republics of Albania, Armenia, South Africa, Lithuania, Poland, Russia, Ukraine, etc. etc.) as well as in old democracies. (Para 12)*

56. In addition the Commission evoked the issue of the distorted balance of power in Belarus:  
*In Belarus, where the balance of powers between the organs of government is distorted, and there is a preponderance of power in the hands of the President, it is particularly undesirable that a system should be created in which the imbalance of powers is effectively institutionalised in the person of the present incumbent. (Para 13)*

57. In its Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan,<sup>41</sup> the Venice Commission stated that "in a country with a presidential (or sometimes semi-presidential) system, power tends to be concentrated on the President, while that of the Legislature or the Judiciary is relatively weaker. Therefore, the regular change of office holder through the process of election is the very method to prevent too strong a concentration of powers in the hands of the President."<sup>42</sup> Considering that "Azerbaijan, the Constitution of which provides for a Presidential system of Government, is undoubtedly a country where the President concentrates extensive powers in his hands, given the few checks and balances which exist, it was ... logical that the original text of the Constitution of Azerbaijan provided for a two-term limit."<sup>43</sup> The Commission stated that as a rule, it can be said that the abolition of existing limits preventing the unlimited re-election of a President is a step back, in terms of democratic achievements. Here the Commission referred to the constitutional referendum held in 2009 in Venezuela and in 2004 in Belarus. Conversely, the subsequent introduction of such limits in the Constitution goes in the right direction. Here the reference was to the United States and France. Coming back to Azerbaijan, the Commission emphasized that "explicit constitutional limitations on the successive terms of a president are particularly important in countries where democratic structures and their cultural presuppositions have not yet been consolidated."<sup>44</sup> The Commission concluded that the elimination of the present limitation in Article 101(V) of the Constitution may therefore appear as a serious set-back on Azerbaijan's road to a consolidated democracy.

58. In its Opinion on Azerbaijan, the Commission also dealt with two counter-arguments. According to the first of these, the removal of the two-term limit would strengthen the freedom of the voters to choose their President. In the opinion of the Commission, while this argument may sound rather attractive at least in theory, explicit limitations are needed in practice, because an incumbent president may easily use various plebiscitary means in order to strengthen his or her position and secure his or her re-election. The Commission argued that the constitutional limitations on successive terms are ... "meant to limit the risk of negative consequences for democracy arising from the fact that a same person has the possibility of occupying the presidency for an excessive period of time".<sup>45</sup>

59. The Commission also rejected the comparison with the position of the Prime Minister in parliamentary systems, whose term in office is not limited. The Commission pointed to the fact that parliamentary mechanisms usually secure democratic rotation in the office of the Prime Minister, but these mechanisms obviously do not extend their influence on the presidency.

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<sup>41</sup> CDL-AD(2009)010.

<sup>42</sup> *Ibid.*, § 10.

<sup>43</sup> *Ibid.* § 12.

<sup>44</sup> *Ibid.* § 16.

<sup>45</sup> *Ibid.* § 14.

60. In its Opinion on the Draft Constitution of the Kyrgyz Republic,<sup>46</sup> the Venice Commission welcomed a one-term limitation by arguing that the provision tried to prevent the establishment of authoritarian structures: if a President has no chance of being re-elected immediately, there will not be an incentive to build up a strong power base and to crush the opposition.

61. In its Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions,<sup>47</sup> the Commission presented a survey of the constitutions of its member states and concluded that in most cases, the constitutions of the Council of Europe member countries, as well as of those countries that are not Council of Europe members, contain provisions for a time-defined limitation of the mandate of the president of the country with the right to one re-election.

62. The report summarized arguments pro and contra limitations as follows: "The critics say that the frequent replacement of the holders of public (political) functions in the country can have a negative impact on the quality and on the continuity of the public policies in the country and that it brings about major political uncertainty. The supporters of the limited mandate believe that it is a positive aspect of the system seen through the prism of an influx of fresh ideas, pluralism in political thought, avoidance of political domination and, most importantly, avoidance of the concept of irreplaceability in the political establishment".<sup>48</sup> According to the report, the arguments against the limited mandate are most often concentrated around the idea that citizens have the right to say who will govern them, and that they are the only ones who have the right to a free and absolute choice of their politicians, and when the people want one person to lead them for a longer period of time, they should be allowed to have that right. The democratic argument against unlimited mandates is recapitulated as follows: "[...] the unlimited mandate opens the door to the factual strengthening of the position of head of state in the parliamentary systems, and even more so in the semi-presidential systems. In the presidential systems, the unlimited mandate creates the danger of having a "republican monarch". In countries that have no democratic tradition and that do not have a developed civil society, the unlimited mandate of the Head of state could introduce a new "Caesar" or a new "Bonaparte", regardless of the model of government."<sup>49</sup>

63. As a conclusion and due to the risks for the balance of powers and even for democracy as such involved in the possibility for the incumbent to be re-elected more than once, the Venice Commission has clearly expressed its critical approach towards constitutional provisions allowing for more than one re-election of the head of state in presidential or semi-presidential systems.

## **V. The international standards applicable to the right to vote and be elected**

64. Article 21 of the Universal Declaration of Human Rights (adopted by the UN in 1948) declares that:

*(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

*(2) Everyone has the right of equal access to public service in his country.*

*(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*

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<sup>46</sup> CDL-AD(2010)015

<sup>47</sup> CDL-AD(2012)027.

<sup>48</sup> Ibid. § 62.

<sup>49</sup> Ibid. §§ 66-67.

65. Article 25 of the International Covenant on Civil and Political Rights (adopted by the UN in 1966) provides that

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

*(c) To have access, on general terms of equality, to public service in his country.*

66. In its General Comment on Art. 25 of the ICCPR, the Human Rights Committee points to the connection between passive and active electoral rights: the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote must have a free choice of candidates. The General Comment also emphasizes that any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria and that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.<sup>50</sup>

67. Article 2 § 1 ICCPR prohibits discrimination:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

68. The right to free elections guaranteed in Art. 3 of Protocol 1 to the European Convention on Human Rights (ECHR) covers only the “legislature” and not the presidency (except for the theoretical possibility where the presidency could be construed as being part of the legislature).<sup>51</sup> Thus, in the case of *Sejdic and Finci*, with regard to the presidency, the position of the applicants was examined in the light of the general prohibition of discrimination in Art. 1 of Protocol 12,<sup>52</sup> which reads:

*1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

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<sup>50</sup> General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25), CCPR/C/21/Rev.1/Add.7.

<sup>51</sup> See Guide on Article 3 of Protocol 1 to the European Convention, para 4: *As regards presidential elections, the Court has taken the view that the powers of the Head of State cannot as such be construed as a form of “legislature” within the meaning of Article 3 of Protocol No. 1. It does not exclude, however, the possibility of applying Article 3 of Protocol No. 1 to presidential elections. Should it be established that the office of the Head of State in question had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a “legislature” within the meaning of Article 3 of Protocol No. 1 (Boškoski v. the former Yugoslav Republic of Macedonia (dec); Brito Da Silva Guerra and Sousa Magno v. Portugal (dec.)). This possibility has never been used, however, and has not even been mentioned in subsequent cases (Paksas v. Lithuania [GC]; Anchugov and Gladkov v. Russia, §§ 55-56).*

<sup>52</sup> ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina* judgment of 22 December 2009, Applications nos. 27996/06 and 34836/06.

*2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

69. Since the case of *Gitonas and others v. Greece*<sup>53</sup> the European Court of Human Rights holds that the right to be elected is not an absolute one but includes “implicit limitations” imposed by the states – such as grounds for ineligibility – to ensure equality among candidates and to preserve the electorate from pressures of the officials in charge.

70. Art. 23(1b) of the American Convention on Human Rights (1969) guarantees the right to participate in government and provides:

*1. Every citizen shall enjoy the following rights and opportunities:*

*a. to take part in the conduct of public affairs, directly or through freely chosen representatives;*

*b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and*

*c. to have access, under general conditions of equality, to the public service of his country.*

*2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.*

71. Article 23(2) of the American Convention that limits the reasons for which it is possible to restrict the use of the rights of paragraph 1 has only one purpose – in light of the Convention as a whole and of its essential principles – to avoid the possibility of discrimination against individuals in the exercise of their political rights.

72. In addition to the above, according to the case-law of the Inter-American Court of Human Rights, Article 23 of the Convention imposes certain specific obligations on the State. From the moment that Article 23(1) establishes that the right to participate in the conduct of public affairs may be exercised directly or through freely chosen representatives, the State has a positive obligation that is manifested with the obligation to carry out certain actions or conducts, and to adopt measures that arise from the obligation to ensure the free and full exercise of human rights to all the persons subject to their jurisdiction (Article 1(1) of the Convention) and of the general obligation to adopt measures in their domestic law (Article 2 of the Convention). This positive obligation consists in designing a system that allows representatives to be elected to conduct public affairs. Indeed, for political rights to be exercised, the law must establish regulations that go beyond those related to certain State limitations to restrict those rights, established in Article 23(2). The States must organize their electoral systems and establish a complex number of conditions and formalities to make it possible to exercise the right to vote and to be elected. The establishment and application of requirements to exercise political rights is not, per se, an undue restriction of political rights. However, the power of the States to regulate or restrict rights is not discretionary, but is limited by international law, which requires compliance with certain obligations that, if they are not respected, make the restriction unlawful and contrary to the American Convention. The conditions and requirements that must be fulfilled when regulating or restricting the rights and freedoms embodied in the Convention, are: the lawfulness of the restrictive measure; the purpose of the restrictive measure and the necessity in a democratic society and proportionality of the restrictive measure. As regards the purpose, Article 23 of the Convention does not explicitly establish the legitimate causes or

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<sup>53</sup> ECtHR, *Gitonas and others v. Greece* judgment of 1 July 1997, Application no. 18747/91; 19376/92; 19379/92.

permitted purposes by which the law may regulate political rights. Indeed, this Article merely establishes certain aspects or reasons (such as civil or mental capacity and age) on the basis of which political rights may be regulated in relation to their titleholders, but does not determine explicitly either the purposes or the specific restrictions that will necessarily have to be imposed when designing an electoral system, such as electoral districts and others. However, the legitimate goals that the restrictions should pursue arise from the obligations that can be inferred from Article 23(1) of the Convention.<sup>54</sup>

73. Art. 1(1) of the American Convention further prohibits discrimination with regard to Convention rights:

*The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*

74. According to Article 3 of the Inter-American Democratic Charter of the OAS, the essential elements of representative democracy include, inter alia, 'respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government'.

75. Article 13 of the African Charter on Human and Peoples' Rights (1981) provides that:

- "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*
- 2. Every citizen shall have the right of equal access to the public service of the country.*
- 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.*

76. Article 17 of the African Charter on Democracy, Elections and Governance (2007-2012) reads as follows:

*State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall:*

- 1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.*
- 2. Establish and strengthen national mechanisms that redress election-related disputes in a timely manner.*
- 3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.*
- 4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels*

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<sup>54</sup> See among others Inter-American Court of Human Rights, Case of Castañeda Gutman v. México, Judgment of August 6, 2008, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_184\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_184_ing.pdf).

## VI. Does a human right to re-election exist? If so, what are the limits to this right?

77. Almost all modern democracies are representative democracies. Elections are essential tools to enable people to take part in the establishment of a government and the conduct of public affairs. Political rights entitle people with rights to elect public officials or themselves to hold public office. The right to vote and to be elected are key elements of political rights. All modern democracies established these political rights in constitutions. The precise contents of political rights are defined by the constitutions or by laws implementing them.

78. Re-election may be defined as a possibility to be elected, after already having served one term in office. There is a relation between re-election and the human right to stand for election, understood as a part of the right to political participation. However, this raises the question whether re-election is also a human or fundamental right or merely a specific aspect of the functioning of the institution concerned. Term-limit clauses for presidents are found in constitution chapters referring to the institution of the presidency, not in the bills of rights. It is therefore important to mention that a constitution comprises not only rights, but also provisions on the functioning of democratic institutions. There are principles, institutions, mandates as well. The “constitution of the rights” is an essential part of a constitution in the constitutional tradition, but also the “constitution of the powers” or structure of government (Article 16 of the French Declaration of the Rights of man and citizen, or Virginia Declaration of Rights). Rights do not represent the whole content of the constitution.

79. Human rights may be understood as recognized claims: “to have a right is to have a claim to something and against someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principle of an enlightened conscience”.<sup>55</sup> Rights require social recognition as such. In a democratic state, this recognition must be institutionalized and acknowledged by the state. Without such recognition, human rights may be morally justifiable, but not enforceable.<sup>56</sup>

80. Human rights may be recognized in different ways. One is constitutional recognition as a fundamental right, made by a constitutional assembly or other body acting as a founder of a democratic state. Another way is by judicial interpretation, where courts determine whether specific claims possess the character of a human right. Occasionally, courts may even recognize new human rights<sup>57</sup>, although most of them derive or develop a “new” human right from those already recognized in the constitution or international law, due to the judiciary’s own constitutional restraints.

81. A review of international treaties, national constitutions and judicial decisions shows that re-election is not conceived as a human right. The main international instruments recognize the right to take part in the conduct of public affairs, to vote and to be elected, and to have access to public service, on general conditions of equality. The right to active and passive vote should be realized through genuine periodic elections, by universal and equal suffrage, and by secret vote or other equivalent procedures that guarantee the free expression of the will of the voters.<sup>58</sup> These are essential elements to ensure that individuals participate in the political life of

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<sup>55</sup> Feinberg, Joel, “The Nature and Value of Rights”, *The Journal of Value Inquiry*, December 1970, Volume 4, Issue 4, pp 243–260.

<sup>56</sup> Martin, Rex, *A System of Rights*, Oxford, Oxford University Press, 1997, pp. 86-87; Hann, Matt, *Egalitarian Rights Recognition: A Political Theory of Human Rights*, Basingstoke, Palgrave Macmillan, 2016, pp. 117-125.

<sup>57</sup> Rey Martínez, Fernando, *La dignidad humana en serio. Desafíos actuales de los derechos fundamentales*, Mexico, Porrúa, IMDPC, 2013, 81-84; Cartabia, Marta, *The Age of “new Rights”*, NYU School of Law, 2010.

<sup>58</sup> Article 21 of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948; article 25 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966; article 3 of the



their community. Just as other human rights, they protect the foundations of liberty, self-fulfillment and fundamental rights of any person, considered as the essential condition of human dignity.

82. A person who seeks re-election has already exercised her right to be elected, so term limits or even a prohibition of re-election should not be interpreted, a priori, as a violation of a human right. If re-election were to be recognized as a human right, it would imply that the current content of the human right to political participation is insufficient to guarantee legitimate interests and expectations.

83. However, a broad recognition of a right to political participation in international treaties does not admit such a deficiency. Also, there is no empirical evidence that could demonstrate that the current content of the right to stand for election is insufficient to guarantee participation in public life. On the contrary, it seems that the circumstances that generated the most common restriction to the right to stand for office (for example, the need to prevent incumbents from taking advantage of their position in order to remain in power or abuse state's resources<sup>59</sup>), persist in most contemporary democracies.

84. Even in the recent decisions in Bolivia and Honduras, the courts, while declaring that the constitutional articles containing that prohibition of presidential re-election were inapplicable on the grounds of unconstitutionality or inconsistency with international treaties, did not recognize re-election as a human right in and of itself.

85. At any rate, as long as there is no theoretical, international or constitutional foundation to recognize re-election as a human right, it should be conceived as an autonomous clause, linked with the right to political participation and of the right to stand for election.<sup>60</sup> In any case, term limits or other limitations of the right to run for office in different ways, for example, prohibiting re-election of political officers, restricting the number of consecutive terms an official can serve or forbidding consecutive re-election of any public official, impose restrictions on the human right to political participation. As such, they must be justified by a legitimate aim, be necessary in a democratic society, and be reasonable.

86. In conclusion, the Venice Commission is of the view that there is no specific and distinct human right to re-election. The possibility to stand for office for another period foreseen by the constitution is a modality of or a restriction to the right to political participation and, specifically, to stand for office.

## **VII. Do term limits unduly limit the human and political rights of aspirant candidates?**

87. Under international standards, notably the ICCPR, whatever form of constitution or government in force, the States should adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.<sup>61</sup>

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European Convention on Human Rights, adopted by the Council of Europe on 4 November 1950; article 23 of the American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, 22 November 1969, Cited in Section III.

<sup>59</sup> Jaramillo Pérez, Juan Fernando, "La reelección presidencial inmediata en Colombia", en *Constitución, democracia y derechos*, Bogotá, Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2016, pp. 240-1.

<sup>60</sup> Along those lines, the Electoral Tribunal of the Federal Judiciary of Mexico described re-election as a mere possibility to exercise the right to be elected after serving the first term and after fulfilling all the requirements established by the law: see Ruling of the Electoral Tribunal of the Federal Judiciary, SUP-JDC-1172/2017, 24 January 2018.

<sup>61</sup> General Comment No. 25 [57]: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25), CCPR/C/21/Rev.1/Add.7, paragraph 4,

88. In modern democracies, while the principle of universal suffrage is widely accepted and carefully protected, the right to be elected can be more easily limited as a consequence of both legal requirements and a limited number of elective offices available. After all, if everyone may vote, only one person in the whole country may be elected as Head of State. The scope of the right to be elected is determined by the governmental system. The governmental system is decided by the people who are the sovereign constitution-making entity.

89. Term limits usually apply to the Head of State/President of the Republic, while they are less common for members of parliaments. This distinction arises from the different nature of the executive and the legislative branch and from the different relationships among them. The literature emphasises “the danger of abuse of power by incumbents who seek to prolong their tenure”.<sup>62</sup> Some authors state that presidential regimes give the incumbent an excessive advantage when they run for re-election; therefore, term limits “are meant to prevent incumbents from taking advantage of their position in order to remain in power”<sup>63</sup> and to guarantee an even playing field for other candidates. To put it in the words of the Venice Commission, “in a presidential system, the unlimited mandate creates the danger of having a “republican monarch”.<sup>64</sup> These arguments are stronger in case of immediate re-election.

90. Nearly all states which have adopted a presidential or semi-presidential system impose constitutional limitations on the number of (successive) terms of a president in order to preserve a system of constitutional checks and balances.<sup>65</sup> History and the social context have a direct effect on national regulations on re-election and term limits, as shown, for example, by Latin American history, both distant and recent.<sup>66</sup>

91. In parliamentary systems, term limits almost always apply to the Head of State, both directly and indirectly elected.<sup>67</sup> The same idea of avoiding a perpetuation in power therefore applies also to the Head of State in parliamentary systems. It is true that his/her powers are mostly ceremonial or representative in nature but in a republican State a perpetuation as a Head of State, particularly if directly elected by the people, could mean a greater role and a devaluation of the leadership that the prime minister assumes in such parliamentary systems.

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CCPR/C/100/D/1354/2005. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.

<sup>62</sup> Carey, *op. cit.*, 119.

<sup>63</sup> Cheibub, José, *Presidentialism, Parliamentarism, and Democracy*, Cambridge, Cambridge University Press, 2007, 167.

<sup>64</sup> CDL-AD(2012)027rev, § 66.

<sup>65</sup> This is the case of the United States and 14 out of 18 Latin American countries (where democratic countries with presidential systems are heavily concentrated). Also, semi-presidential systems like France, Poland and Indonesia limit presidential re-election to two consecutive terms. Thompson, José, “La reelección y sus implicaciones para la equidad en la contienda electoral”, en *Construyendo las Condiciones de Equidad en los Procesos Electorales. Cuaderno de Capel 57*, San José, IIDH, 2012, pp. 279-288.

<sup>66</sup> Jaramillo Pérez, *op. cit.*, pp. 241-2. A relation may exist between reforms that bypass legal presidential term limits and abuse of power of office holders, although, it is not clear whether, how and to what extent presidential re-election undermines democratic quality. According to Freedom House Freedom in the World database, Venezuela, Dominican Republic and Nicaragua suffered a decline in democratic quality in the years following elimination of presidential term limits (<https://freedomhouse.org/report/freedom-world/freedom-world-2018>). A further study to assess the strength and direction of this possible relation is required. Other elements must be considered, including the political and social context, if there are other limits or constraints to the modality of re-election, among others.

<sup>67</sup> See Ireland and Germany as respective examples.

The longer the time in office, the stronger could be the temptation for the President to abandon his/her role as *super partes* arbiter and enter into party politics.<sup>68</sup>

92. To the contrary, at least in Venice Commission member states term-limits do not apply to the Head of government (usually the prime minister), who technically may be removed at any time, in contrast to the rigid and difficult impeachment procedures under presidential systems. Therefore, the danger of abuse of power by the Head of the executive branch is greater under presidential regimes than in parliamentary ones. Moreover, such a “perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation is incompatible with the effective exercise of democracy”.<sup>69</sup>

93. Term limits aim to protect a democracy from becoming a *de facto* dictatorship. Furthermore, term limits may strengthen a democratic society, as they impose the logic of political transition as a predictable event in public affairs. They can be “*important mechanisms to safeguard against “winner-take-all” politics*”.<sup>70</sup> They also keep alive the opposition parties’ hope of gaining power in the near future through institutionalized procedures, with little incentive to seize power in a coup. Term limits therefore aim to protect human rights, democracy and the rule of law, which are legitimate aims within the meaning of international standards.

94. In modern democracies, the sovereignty of a nation resides in the people. All state authority shall emanate from the people. No one can therefore argue to be entitled to run for re-election after a first mandate if the constitution provides otherwise. The restriction to the right to be elected derives from a sovereign choice of the people in the pursuit of the above mentioned legitimate aims of general interest, which prevail over the right of the incumbent president. As explained above, the criteria for such restriction are both objective and reasonable.

95. For the above reasons, it is obvious that limiting presidential mandates for reasons of safeguarding democracy, which together with human rights and the rule of law is a foundational value of the Council of Europe, does not amount to discrimination in the sense of Art. 1 of Protocol 12. Limits on presidential mandates, aiming at securing democracy, i.e. the very same purpose which electoral rights also serve, would not be found discriminatory or unreasonable in the sense of Art. 25 of the ICCPR. Limitation of mandates is not one of the grounds for discrimination contained in international treaties. However, term limits should be neutral and should not be imposed or removed in a manner that would prematurely remove someone from office or secure the continued service of someone currently holding office (i.e., by lifting term limits). This risk may be averted if such changes do not benefit the incumbent.

96. In conclusion, the right to be elected is not an absolute right. Objective and reasonable limits may be placed on the right to be elected. Term limits which most representative democracies put on the right of the incumbent president are a reasonable limit to the right to be elected because they prevent an unlimited exercise of power in the hands of the President and protect other constitutional principles such as checks and balances and the separation of powers. The president has a duty to uphold the constitution and to protect human rights. The president cannot demand his/her political rights against the constitution. The limits on the president’s re-election do not therefore unduly restrict his/her human and political rights.

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<sup>68</sup> On the role of the Head of State in parliamentary systems, see Venice Commission, Opinion on the proposal by the President of the Republic to expand the President’s powers to dissolve parliament in the Republic of Moldova, CDL-AD(2017)014, § 20.

<sup>69</sup> Declaration of Santiago, Chile, adopted on occasion of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12 to 18, 1959, Final Act, Doc. OEA/Ser.C/II.5, pp. 4-6; available at <http://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/minutes.asp>.

<sup>70</sup> Report of the Secretary-General, Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization, (A/72/260), § 43, [https://digitallibrary.un.org/record/1302192/files/A\\_72\\_260-EN.pdf](https://digitallibrary.un.org/record/1302192/files/A_72_260-EN.pdf).

### **VIII. Do term limits unduly limit the human and political rights of voters?**

97. Democracy, human rights, and the rule of law are the three pillars of the European constitutional heritage. Democracy is a form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from a monarchy, aristocracy, or oligarchy.<sup>71</sup> Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status. These principles comprise two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret, and direct suffrage, and the second the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law, and effective procedural guarantees, are met.<sup>72</sup>

98. The will of the people shall be the basis of the authority of government. In a constitutional democracy, it is implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Genuine periodic elections in accordance with paragraph (b) of article 25 of the ICCPR are essential to ensure the accountability of representatives for the exercise of the powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.

99. It is true that term limits may inhibit voters from choosing the incumbent or former president as a new president. However, the right to vote presupposes passive electoral rights, and limitations on passive electoral rights obviously also restrict active electoral rights. As argued above, limits on re-election pursue the aim of preserving democracy. They contribute to guaranteeing that periodic elections are “genuine” in the sense of Article 25 ICCPR and Art. 23(1b) ACHR.<sup>73</sup>

100. In addition, when the people choose as constituent power or in an amendment to the constitution to adopt a presidential system, they also have the authority to decide the presidential power and the term of office of the president. The constitutional architecture establishing term limits and the prohibition of re-election is the expression of a people’s decision, in the exercise of its self-determination, to prevent a republican monarch. Presidential term limits are therefore a self-imposed restriction on the power of the people to choose a representative at their will with the aim of maintaining a democratic system.

101. In the Commission’s view, and in the light of the comparative analysis of the constitutions of the 58 countries under consideration, abolishing limits on presidential re-election represents a step back in terms of democratic achievement, at least in presidential or semi-presidential systems.<sup>74</sup> By eliminating an important protection against distortive concentrations of power, abolishing term limits also risks undermining various aspects of the human right to participate in public life. These include the right to participate in genuine periodic elections, the ability to ensure “that persons entitled to vote have a free choice of candidates,” that representatives are freely chosen and accountable, and that the authority of government continues to be based on the free expression of the will of electors.<sup>75</sup> At any rate, if the people really want to re-elect the incumbent president against their previous decision on term limits, a constitutional amendment

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<sup>71</sup> Black’s Law Dictionary 432 (6<sup>th</sup> ed. 1990).

<sup>72</sup> Venice Commission’s Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev.

<sup>73</sup> Moreover, according to the Preamble to the ACHR, democracy constitutes the general framework for the Convention. In the Preamble, the Signatory States reaffirm their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.

<sup>74</sup> Venice Commission, CDL-AD(2009)010, CDL-AD(2010)001.

<sup>75</sup> CCPR, General Comment No. 25, paras. 7, 9, 15, 23.

needs to be sought according to the relevant constitutional rules. The danger of manipulation of the public opinion by an authoritarian regime should not be underestimated.

102. Term limits may also impact voters' rights in another respect. Arguably, the possibility of re-election helps to guarantee accountability, so a ban or restrictions on re-election affects the right and the capacity of citizens to hold those in power accountable. From this point of view, restrictions on re-election or term limit affect directly one of the foundations of a democracy: the capacity to choose representatives freely, by popular vote, without restraints. In presidential regimes, term limits are interpreted as a form of control of political power, as they work as an embedded elimination of political monopolies, producing change of government and strengthening electoral competitiveness.

103. Nevertheless, it should be underlined that the people may vote freely, but only for those candidates who appear on the ballot. The citizens' ability to hold those in power accountable is always limited by legal conditions related to suffrage regulations, such as age, citizenship, legal capacity, among others, and by the rules that regulate the right to stand for office and access to the ballot or nomination rules. Still, the right to vote for a preferred candidate is only one, though an essential one, of a large scope of political rights and activities related to political participation. Therefore, limitations on access to the ballot or re-election cannot be seen as an obstruction to exercise those rights and to participate in politics. Therefore, in general, restrictions to the human right to political participation and to choose leaders are allowed within a constitutional democracy, although from the subjective rights perspective they should be justified and deemed necessary.

104. Furthermore, term limits can help ensure accountability among elected representatives, and thus help promote the human right to political participation, by preventing concentrations of power in the Presidency that may distort the effective functioning of genuine periodic elections in ensuring accountability. Finally, a recent study shows that term limits may be in the interest of voters "despite the accountability effect of elections": they may foster "truthful" behavior by incumbents, which in turn enables voters to selectively re-elect higher quality agents to a second term in office strengthen electoral accountability of executive" by reducing the value of holding office.<sup>76</sup>

105. In conclusion, the limitation of the right to vote which term limits impose pursue legitimate aims, are entrenched in the constitution and should be considered as "implied limitations" which are objective and reasonable, within the margin of appreciation of the States. It follows that term limits do not unduly limit the human and political rights of voters, but can help to serve those rights.

#### **IX. What is the best way to modify term limits within a constitutional state?**

106. In constitutional and representative democracies, the powers of the representatives are given by the people through the constitution. The representatives cannot assert their authorities without an explicit delegation from the constitution.

107. Term-limits constrain the rights of the president. However, the right of the president is given by the people who have sovereign power. The people have a power to decide the term and the possibility of re-election of the president. This decision is written in the constitution.

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<sup>76</sup> Smart, Michael and Daniel M. Strum, "Term limits and electoral accountability", *Journal of Public Economics*, No. 107, 2013, pp. 93-102, p. 100.

108. A constitutional amendment is therefore required to modify term limits. Only the people can modify the scope of delegation which they gave to the president, following the applicable constitutional procedures.<sup>77</sup>

109. A decision to alter or remove presidential term limits should be subject to thorough public scrutiny, as it has a significant impact on the political system, a country's stability and on confidence in the electoral process. In the long term, a reform of these provisions may affect democratic quality or even democratic endurance. A broad consensus, as well as respect for constitutional and legal procedures, is crucial to maintain strong democracy and confidence in institutions and electoral processes. As the United Nations Secretary General has pointed out, "*under certain circumstances, the removal of or a change in the term limits can undermine the confidence necessary for the political system to function well. The potential for amendments to a legal framework to undermine confidence is greater when they are introduced without following the prescribed process, if they are undertaken shortly before an election or if the process is not based on broad national consensus.*"<sup>78</sup>

110. To the extent that constitutional amendments *strengthening or prolonging* the power of high offices of state are proposed, the motivation should be to improve the machinery of government as such, not the personal power and interests of the incumbent. The Venice Commission has therefore previously expressed the view that a sound principle and a good general standard against which to measure the democratic implications of such amendments would be that such amendments (if enacted) should have effect only for *future* holders of the office, not for the incumbent.<sup>79</sup>

111. Some countries provide for the need for a constitutional amendment to be approved by popular referendum. The aim is to strengthen the legitimacy of the constitutional amendment. In the Commission's view, for constitutional reform, "it is equally legitimate either to include or not include a popular referendum as part of the procedure".<sup>80</sup> However, "recourse to a referendum should not be used by the executive in order to circumvent parliamentary amendment procedures. The danger and potential temptation is that while constitutional amendment in parliament in most countries requires a qualified majority, it is usually enough with simple majority in a referendum. Thus, for a government lacking the necessary qualified majority in parliament, it might be tempting instead to put the issue directly to the electorate. On several occasions the Venice Commission has emphasized the danger that this may have the effect of circumventing the correct constitutional amendment procedures. It has insisted on the fact that it is expedient in a democratic system upholding the separation of powers that the legislature should always retain power to review the executive's legislative output and to decide on the extent of its powers in that respect".<sup>81</sup>

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<sup>77</sup> In Spain, in the context of a parliamentary system, a parliamentary bill with an amendment to the Law of the Government was recently introduced in Parliament for discussion (September 4th 2017) to limit to 8 years (two terms) the mandate of the President of the Government, following similar clauses included last years in some Statutes of Autonomy of some Autonomous Communities. Scholars have criticized such proposal, since at the national level such attempt would require a constitutional reform.

<sup>78</sup> Report of the Secretary-General, Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization, (A/72/260), § 43, [https://digitallibrary.un.org/record/1302192/files/A\\_72\\_260-EN.pdf](https://digitallibrary.un.org/record/1302192/files/A_72_260-EN.pdf).

<sup>79</sup> See Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, § 145. The Korean Constitution is an example of a constitutional system which applies this kind of restrictions: amendments to the Constitution for the extension of the non-renewable five-year term of office of the president or for a change allowing for the re-election of the president shall not be effective for the president in office at the time of the proposal for such amendments to the Constitution (paragraph 2 of article 128 of the constitution).

<sup>80</sup> Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, § 184.

<sup>81</sup> Ibid., § 185.

112. Popular referendums aimed at abolishing limits on presidential terms are particularly dangerous, to the extent that it is usually the incumbent who – directly or indirectly – calls on the referendum and the referendum itself is a manifestation of such plebiscitarian power which limitations on presidential mandates seek to prevent.

113. For these reasons, the Venice Commission stresses that recourse to a popular referendum to lift or amend limits on presidential re-election should be confined to those political systems in which this is required by the constitution, applied in accordance with the established procedure, and should not be used as an instrument in order to circumvent parliamentary procedures, or to undermine fundamental democratic principles and basic human rights.<sup>82</sup>

114. Finally, Constitutional or Supreme Courts may play a role in the procedure of constitutional amendment, including of presidential terms. Indeed, constitutional review may be required, or possible, either *a priori* or *a posteriori*, but the Venice Commission stresses that Constitutional Courts should intervene after the amending text has been adopted by the constitutional legislator pursuant to the relevant, special constitutional requirements. The Venice Commission has previously examined the different forms of involvement of the Constitutional Court in the amendment procedure: besides the unproblematic, widespread *a posteriori* review of whether the correct procedures for constitutional amendment have been respected, it has found that the mandatory *a priori* judicial review of proposals for constitutional amendment<sup>83</sup> could bring excessive rigidity to the process and even have unintended political consequences.<sup>84</sup> As regards the possibility for the Constitutional Court to carry out a substantive *a posteriori* review that the amendment adopted is not in breach of “unamendable” provisions or principles,<sup>85</sup> the Venice Commission has expressed the view that it is a “problematic instrument, which should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator”. In the Commission’s view, “as long as the special requirements for amendment in the constitutions of Europe are respected and followed, then these are and should be a sufficient guarantee against abuse.”<sup>86</sup>

## X. Conclusion

115. The Venice Commission, upon a request by the Secretary General of the Organisation of American States (OAS), has examined the question of the compatibility of term limits and other limitations on the right for incumbent presidents to be re-elected with international standards on human rights protection.

116. With reference to the specific questions put by OAS, the Venice Commission has reached the following conclusions:

- Does a human right to re-election exist? If so, what are the limits to this right?

117. The Venice Commission is of the view that there is no specific and distinct human right to re-election. The possibility to stand for office for another period foreseen by the law is a

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<sup>82</sup> See Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, §§ 180 ff.

<sup>83</sup> See for example See article 153 of the Constitution of Azerbaijan, article 98 of the Constitution of the Kyrgyz Republic, Article 141.2 of the Constitution of Moldova, and Article 159 of the Constitution of Ukraine.

<sup>84</sup> See Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, §§ 194-196.

<sup>85</sup> Countries that have justiciable unamendable provisions include Austria, Bulgaria, Germany and Portugal. See Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, §§ 225 ff and footnote 152.

<sup>86</sup> See Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, § 236.

modality of, or a restriction to, the right to political participation and, specifically, to stand for office.

118. Under international standards, notably the ICCPR, whatever form of constitution or government in force, the States should adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Any conditions which apply to the exercise of the rights protected by article 25 should not be discriminatory and should be based on objective and reasonable criteria.

- Do term limits unduly limit the human and political rights of aspirant candidates?

119. In modern democracies, while the principle of universal suffrage is widely accepted and carefully protected, the right to be elected can be more easily limited as a consequence of both legal requirements and a limited number of elective offices available/derogated. The scope of the right to be elected is determined by the governmental system. The governmental system is decided by the people who are the sovereign constitution-making entity.

120. Presidential term-limits are common in both presidential and semi-presidential systems, and also exist in parliamentary systems (both where the Head of State is directly and indirectly elected), while in the latter systems they are not imposed on prime ministers, whose mandate, unlike those of Presidents, may be withdrawn by parliament at any time. In presidential and semi-presidential systems, term-limits on the office of the President therefore are a check against the danger of abuse of power by the head of the executive branch. As such, they pursue the legitimate aims to protect human rights, democracy and the rule of law. The entitlement to run for office after a first mandate cannot be guaranteed if it is otherwise provided in the constitution. Restriction of the right to be elected of incumbent presidents derives from a sovereign choice of the people in the pursuit of the above mentioned legitimate aims of general interest, which prevail over the right of the incumbent president. The criteria for such restriction must be both objective and reasonable, and may not be discriminatory to the extent that they should be neutral and should not be imposed or removed in a manner that would prematurely remove someone from office or secure the continued service of someone currently holding office (i.e., by lifting term limits). This risk may be averted if such changes do not benefit the incumbent.

121. In conclusion, term-limits that satisfy the above criteria do not unduly limit the human and political rights of aspirant candidates.

- Do term limits unduly limit the human and political rights of voters?

122. In a constitutional and representative democracy, it is implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Genuine free and periodic elections in accordance with paragraph (b) of article 25 of the ICCPR are essential to ensure the accountability of representatives for the exercise of the powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.

123. It is true that term limits may inhibit voters from choosing the incumbent or former president again as president. However, this is a necessary consequence of the need to restrict the right to re-election of the incumbent or former president. As argued above, limits on re-election pursue the aim of preserving democracy and protect the human right to political participation. They contribute to guaranteeing that periodic elections are "genuine" in the sense of Article 25 ICCPR and Art. 23(1b) ACHR, and to ensuring that representatives are freely chosen and accountable. In addition, when the people choose to adopt a presidential or semi-presidential system, they also have the authority to decide the presidential power and the term



of office of the president. Presidential term limits are therefore a self-imposed restriction on the power of the people to choose a representative at their will with the aim of maintaining a democratic system.

124. In the Commission's view, and in the light of the comparative analysis of the constitutions of the 58 countries under consideration, abolishing limits on presidential re-election represents a step back in terms of democratic achievement. At any rate, should the people wish to modify such term limits, a constitutional amendment needs to be sought according to the relevant constitutional rules.

125. To the extent that a ban or restriction on re-election may affect the right and the capacity of citizens to hold those in power accountable, it should be emphasized that the citizens' ability to hold those in power accountable is always limited by legal conditions related to suffrage regulations, such as age, citizenship, legal capacity, among others, and by the rules that regulate the right to stand for office and access to the ballot or nomination rules.

126. Furthermore, term limits can promote accountability of elected officials by helping to prevent inappropriate concentrations of power.

- What is the best way to modify term limits within a constitutional state?

127. Presidential term limits are entrenched in the Constitution; a constitutional amendment is therefore required to modify them. Only the people who have lawful sovereign power can modify the scope of authority which they gave to the president. A decision to alter or remove presidential term limits should be subject to thorough public scrutiny and debate, and should fully respect the relevant constitutional and legal procedures.

128. To the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent.

129. While approval by referendum may strengthen the legitimacy of the constitutional amendment, in the Commission's view for constitutional reform it is equally legitimate either to include or not include a popular referendum as part of the procedure. However, recourse to a referendum should not be used by the executive in order to elude parliamentary amendment procedures. Popular referendums aimed at abolishing limits on presidential terms are particularly dangerous, to the extent that it is usually the incumbent who – directly or indirectly – calls on the referendum and the referendum itself is a manifestation of such plebiscitarian power which limitations on presidential mandates seek to prevent. Recourse to a popular referendum to lift or amend limits on presidential re-election should therefore be confined to those political systems in which this is required by the constitution and is applied in accordance with the established procedure, and should not be used as an instrument in order to circumvent parliamentary procedures, or to undermine fundamental democratic principles and basic human rights.

130. As regards the possible role of Constitutional or Supreme courts, they should intervene after the relevant amendment has been adopted by the constitutional legislator pursuant to the relevant, special constitutional requirements. The possibility for the Court to carry out a substantive *a posteriori* review that the amendment adopted is not in breach of "unamendable" provisions or principles should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator.