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DRAFT REPORT ON TERM-LIMITS

PART II – MEMBERS OF PARLIAMENT
PART III – REPRESENTATIVES ELECTED AT SUB-NATIONAL AND
LOCAL LEVEL
AND EXECUTIVE OFFICIALS ELECTED AT SUB-NATIONAL AND
LOCAL LEVEL

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. At its 114th Plenary Session, in March 2018, the Commission adopted the first part of the study, which provided a response to the four questions put by OAS in respect of term limits of Presidents (Report on term-limits, Part I – Presidents, CDL-AD(2018)010).

4. The present report deals with the second, third and fourth questions put by OAS in respect of term limits of members of parliament, locally elected representatives and of governors and mayors. It was examined by the Sub-Commission on Latin America on 30 November 2018 and was subsequently adopted by the Venice Commission at its ... Plenary Session (Venice,).

II. Comparative overview of limits on terms of Members of Parliament and on representatives elected at sub-national and local level as well as on executive officials elected at the sub-national and local level¹

5. The Commission has collected information on the constitutional and legislative provisions on term limits for members of parliaments, members of sub-national legislative bodies, governors and mayors in 63 countries (CDL-REF(2018)040rev.). With respect to Members of Parliament at the national level, the comparative analysis of these provisions reveals that term-limits for MPs are very rare. No country in Europe has introduced them; in Switzerland a proposal of 2009 to introduce a two-term limit was not adopted. In France, a legislative reform envisaging the introduction of a three-consecutive-term limit is currently pending. In Italy, the prohibition of a third mandate is contained in the code of ethics of the political group “MoVimento 5 stelle”, but it is not binding.

6. In the Americas, parliamentary term limits exist in Bolivia (two consecutive terms), Costa Rica (no consecutive term), Ecuador (two consecutive terms) and Venezuela (two consecutive terms). In 2014, the Mexican Congress passed a constitutional amendment lifting the one-term limits and thus allowing for the re-election of federal representatives and senators, as well as city mayors and local representatives.² In Peru, Congress approved, last September, a constitutional amendment to re-establish bicameralism. At the same time, it approved an additional constitutional amendment to ban the immediate re-election of legislators. According to this amendment, neither representatives nor senators will be able to run for immediate re-election in their respective chambers. These two amendments were submitted to a national referendum on

¹ In this report, the following terms are used with the following meanings: national legislators = members of parliament; representatives elected at sub-national and local level = members of sub-national assemblies such as regional councils, parliaments of federal entities, parliaments of Autonomous Communities, provincial councils, municipal councils; executive officials elected at the sub-national level = presidents of regions, governors, presidents of Autonomous Communities, presidents of provinces; executive officials elected at the local level = mayors.

² Constitutional reform of February 10th, 2014. Retrieved from http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_216_10feb14.pdf

9 December 2018; the first was rejected, while the second was approved. With regard to re-election of majors and regional governors, Congress approved in 2015 a constitutional amendment prohibiting their immediate re-election. In 2018, the Peruvian Constitutional Court confirmed the constitutionality of this amendment.³ The United States Constitution does not allow for term limits for members of the US Congress.⁴

7. In Asia, term-limits for MPs exist only in the Philippines (two consecutive terms).

8. Term limits of two consecutive mandates exist for representatives at the sub-national level in Bolivia and Ecuador; they also exist in the Republic of Korea⁵ and in the Philippines.

9. Term limits are relatively more frequent for executive positions at the regional or municipal level (Bolivia, Brazil, Ecuador, Peru, Italy, Republic of Korea and Taiwan). In the United States, 36 out of 50 States have some form of term limit for governors, and 15 States have term limits for state legislators. Some cities impose term limits for mayors and/or city council members.

10. In Europe, term limits at the sub-national level exist in Spain, where over the last few years a limitation of no more than two consecutive mandates has been introduced for the President of the Autonomous Communities in some of the Statutes of Autonomy or in Regional Laws.⁶ Such new rules do not apply retroactively. In Spain, Autonomous Communities, as the Central State, are parliamentary systems, with an indirect election of their Presidents. The context of the legal reforms was the political and economic crisis, with several cases of corruption or misconduct and popular demands of regeneration of political life. Some parties have introduced such limitation in their Manifestos.

III. Previous works of the Venice Commission on limiting presidential mandates

11. In December 2012, the Commission adopted a report on “Democracy, limitation of mandates and incompatibility of political functions” (CDL-AD(2012)027rev). The Commission argued the following:

“61. The theory of limitation of mandate has its followers as well as its opponents.

62. 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

³ Espediente 00008-2018-PI/TC.

⁴ Under the Constitution, members of the United States Senate may serve an unlimited number of six-year terms and members of the House of Representatives may serve an unlimited number of two-year terms (U.S. Const., Article I, sec. 2, 3; Amendment XVII). In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Supreme Court invalidated 23 state laws imposing term limits on members of the US Congress. The Court held that because the United States Constitution establishes the qualifications for members of Congress, any additional limitation would have to be imposed through a constitutional amendment. In the United States, such an amendment requires approval by a two-thirds supermajority in Congress as well as ratification by the legislatures of three-fourths of the states.

⁵ Local government officials filed the constitutional complaint arguing that the Local Autonomy Act which imposed term limits was unconstitutional. The Constitutional Court of Korea dismissed the petitioners' claims in a 6:3 decision: 18-1(A) KCCR 320, 2005 Hun-Ma 403, February 23, 2006.

⁶ Castilla La Mancha was the first in 2003: Ley 11/2003, del Gobierno y del Consejo Consultivo, applying the provisions of the Article 13.2 of the Statute of Autonomy (1997); Extremadura in 2014: Ley del Gobierno y del Consejo Consultivo for the President; Murcia in 2014: Ley del Estatuto del Presidente y del Consejo de Gobierno, for the President; Castilla y León in 2016 by amendment of the Ley del Estatuto de los Altos Cargos de la Administración for the President and regional ministers or councillors. In the other regions the term limit is only for the President.

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.

63. It is a fact that the effects of the non-existence of limitations for the re-election of a member of parliament are widely softened by the activities of the opposition parties in parliament, as well as by the increased transparency and publicity that the democratic parliaments demonstrate through their activities. Perhaps these two conclusions identify the main reason why most constitutions foresee an unlimited possibility for re-election of members of parliament. Consecutively, we may draw the same conclusion vis-à-vis the re-election of ministers in coalition governments, contrary to homogeneous ones.

64. Namely, unlike the homogeneous governments -most often single-party governments- the coalition governments have a greater possibility of controlling their members, as there is a stronger inter-party consensus to open the issue of political responsibility for what has been or has not been done.

65. The majority electoral model, where the election of holders of political functions is done directly by the electorate, is more likely to lead to the admissibility of an unlimited parliamentary mandate than a pure proportional model with closed lists where the political parties have the final word. [...]

71. [...] prohibiting re-election of parliamentarians involves the risk of a legislative branch of power dominated by inexperienced politicians. This may lead to increase the imbalance in favour of the executive, even if the head of state and possibly ministers are not re-eligible, since the executive is seconded by a permanent public service.

12. The Commission concluded that “When it comes to the function of members of parliament, however, the situation is very different, since there are in general no constitutional limitations here, not in the Council of Europe states, nor beyond, with regard to the right to (re)election, like there are for the presidential function. This comes as a result of three main factors. The first factor concerns the need for an experienced legislature which has to be in a position to control the executive branch of power; the second one refers to the work of the opposition parties in parliament, and the third one to the increased openness and publicity in the work of the parliaments.”

IV. The international standards applicable to the right to vote and be elected

13. In its “Report on term limits – Part I Presidents”, the Commission analysed the international human rights standards applicable to the imposition of term limits on the re-election of Presidents.⁷ These standards also apply to term limits of MPs, representatives elected at sub-national and local level and executive officials elected at the sub-national and local level. Of special relevance are Article 25 of the International Covenant on Civil and Political Rights (ICCPR) on participatory rights, complemented with Articles 2(1) and 26 on the prohibition of discrimination, of ICCPR; Art. 1 of Protocol 12 to European Convention on Human Rights (ECHR) on the prohibition of discrimination; as well as Article 23(1b) of the American Convention on Human Rights (ACHR) on participatory rights, complemented by Art. 1(1) on the prohibition of discrimination.

14. Article 25 ICCPR recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to stand for election, and the right to public service. Whatever form of constitution or government is in force, the exercise of these rights by citizens

⁷ Venice Commission, Report on term limits, Part I: Presidents, CDL-AD(2018)010, §§ 64 to 76

may not be suspended or excluded except on grounds which are established by laws and that are objective and reasonable.⁸ Persons who are otherwise eligible to stand for election should not be excluded by reason of political affiliation.⁹

15. While it is not directly relevant for presidential elections, Art. 3 of Protocol 1 to the ECHR, providing that “*the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*” applies to electoral rights concerning national parliaments and other “legislatures”. According to the European Court of Human rights, the term “legislature” does not necessarily mean the national parliament alone: it has to be interpreted in the light of the constitutional structure of the State in question. Municipal councils, district councils and regional assemblies may be covered by Article 3 Protocol 1 if they possess inherent primary rulemaking powers and form part of the legislature (see a contrario *Mólka v. Poland* (dec.)); generally speaking, however, the power to make regulations and by-laws, which is conferred on the local authorities in many countries, is to be distinguished from legislative power, including at the regional level, so that the scope of Article 3 of Protocol No. 1 does not cover local elections, whether municipal (*Xuereb v. Malta*; *Salleras Llinares v. Spain*) or regional (*Malarde v. France*).¹⁰

16. The Court has emphasized that the electoral rights guaranteed in Art. 3 of Protocol 1 are not absolute, but there is room for “implied limitations” within a rather wide margin of appreciation conferred on the States. This margin is not limited by an explicit list of legitimate aims, such as Articles 8-11 of the Convention. Yet, the aim a state pursues must be compatible with the principle of the rule of law and the general objectives of the Convention.

17. The concept of “implied limitations” also means that the Court does not apply the traditional tests of “necessity” or “pressing social need” which are used in the context of Articles 8 to 11. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In addition, it underlines the need to assess any electoral legislation in the light of the political evolution of the country concerned, which means that unacceptable features in one system may be justified in another (*Mathieu-Mohin and Clerfayt v. Belgium*, § 52; *Ždanoka v. Latvia* [GC], §§ 103-104 and 115).¹¹

18. Stricter requirements may be imposed on eligibility to stand for election to Parliament (the “passive” aspect) than is the case for eligibility to vote (the “active” aspect). In fact, while the test relating to the “active” aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a group of persons from the right to vote, the Court’s test in relation to the “passive” aspect has been limited largely to verification of the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate (*Ždanoka v. Latvia* [GC], § 115; *Melnitchenko v. Ukraine*, § 57).¹²

19. It follows from the above standards that the right to political participation is not absolute. International treaties – as well as national constitutions - establish restrictions on its exercise,

⁸ See CCPR, General Comment No. 25, op. cit., paras. 3 and 4. Cf. *Arias Leiva v. Colombia*, Communication No. 2537/2015 (July 2018), paras. 11.5-11.7 (addressing ban on political service of former Minister as a result of criminal conviction); *Nasheed v. Republic of Maldives*, Communication Nos. 2270/2013, 2851/2016 (April 2018), para. 8.4-8.7 (addressing ban on political service of former President as a result of a criminal conviction).

⁹ *Ibid.*, para 15.

¹⁰ See Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights, Right to free elections, https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf

¹¹ *Ibidem*

¹² *Ibidem*.

which may differ in scope and aims. The most common requirements are citizenship and age, and there is a broad range of possible additional restrictions. The scope of the right to be elected is determined by the system or form of government, which in turn is decided by the people who are the sovereign constitution-making entity. In general, therefore, restrictions to the human right to political participation and to stand for election are allowed within a constitutional democracy to the extent that they are based in law, reasonable and objective. As long as these conditions allow for reasonably free access to office, are prescribed by law, pursue legitimate aims, are necessary in a democratic society and are not discriminatory, they should be permitted.

V. Do term limits unduly limit the human and political rights of aspirant candidates or of voters?

1. Term limits as regards MPs

a. Arguments in favour of term limits for MPs

20. The idea of restricting the number of mandates of elected representatives is based on the presumption that power is a privilege which spoils inevitably. Imposing term limits also implies a conviction that the democratic procedures fail to guarantee that unwanted representatives will not be re-elected.

21. Term-limit advocates argue that limits have a positive influence on legislative behaviour:¹³ they minimize the incentives for re-election based on “pork-barrel” legislation;¹⁴ the parliamentary mandate ceases to be seen as a career instead of a temporary assignment to public service, and consequently MPs spend less time posturing, raising money for their re-election campaigns and running for office.¹⁵ Term limits thus foster better representation, reduce the ideological divergence between the electorate and their representatives, and increase the elected representatives’ responsiveness toward the electorate.¹⁶ They remove the intense focus on politics and place it back on policy. Term limited politicians may also be willing to take positions of principle on politically controversial issues that protect the interests of minorities and human rights.

22. When term limits exist, the handing over of functions from the outgoing MPs to the incoming ones is duly organised and accompanied by the relevant political parties, instead of resulting in conflictual situations.¹⁷

23. Also, term limits may function as an antidote to the MP’s entrenchment and concentration of power; they may represent a necessary corrective to inequalities which inevitably hinder challengers and aid incumbents and avoid the concept of irreplaceability in the political establishment. Term limits could also avoid having MPs become enmeshed in a culture which is too familiar with the government and insulated from the communities they represent. Term limits thus help secure MP’s free and independent judgment.

¹³ See Carey, John M, “Los límites a la reelección y representación legislativa”. Mexico: CIDE. 2006, p. 37 ; Türk P., « Le cumul des mandats dans le temps : Quelles limites au renouvellement du mandat et à la rééligibilité des gouvernants », Les Petites Affiches, 31 juillet 2014, n°PA201415208, p. 32.

¹⁴ Boeckelman, Keith A. 1993. “Term Limitation, Responsiveness, & the Public Interest”. Polity, Vol. 26, No. 2, pp. 189-205.

¹⁵ « En rendant les députés perpétuellement rééligibles, ne les a-t-on pas rendus perpétuellement candidats ? » : TARDIEU A., La révolution à refaire, tome II : La profession parlementaire, 1937, Flammarion, p. 33

¹⁶ Elhauge, Einer. “Are Term Limits Undemocratic?”. The University of Chicago Law Review. 1997. 64(1): 83-201

¹⁷ TURK P., op. cit.

24. Term limits also ensure that MPs are eventually exposed to life outside of the Parliament and diversify their professional experience. In this sense, term-limits become a reality check.

25. Another common claim by proponents of legislative term limits is that they will result in a more diverse legislature, increasing the number of women and minorities, while introducing younger, “fresher” representatives into the political process.¹⁸

26. In many ways, it is argued, term limits would restore respect for the Parliament.¹⁹

b. Arguments against term limits

27. There are numerous counterarguments to the wisdom of term limits for MPs. The most general one is that they are undemocratic in that they restrict voters’ rights, reducing representatives’ accountability through elections, and hence the right and the capacity of citizens to hold those in power accountable. From this point of view, restrictions on re-election or term limits directly affect one of the foundations of a democracy: the capacity to choose representatives freely, by popular vote, without restraints.²⁰

28. Representative democracy implies that politics is channeled through institutions because they have the ability to make decisions in a more conducive atmosphere, to follow established procedures and create checks and balances among themselves – possibilities that are not completely applicable to any form of “direct democracy”. The credibility of the system is achieved by the experience that institutions actually do what they are created for. Decision making outside the institutions destroys credibility. Term limits therefore interfere with three main premises of modern democratic representation: 1) that professionalization of representatives is desired and favourable for democratic government, 2) that representatives are more responsive to voters’ demands when they are more independent from their political party’s leadership, and 3) that career perspectives of representatives shape their political behaviour.

29. Thus, term limits impede professionalization, automatically locking out experienced (and effective) legislators and diminishing MPs’ motivation and need to develop expertise on specific issues. To the extent that prohibiting the re-election of parliamentarians involves the risk that the legislative branch of power be dominated by inexperienced politicians, this may lead to increase the imbalance in favour of the executive, even if the head of state and possibly ministers are not re-eligible, since the executive is assisted by a permanent public service.²¹

30. Term limits can increase the influence of party leaderships. Those who are prohibited from running for office but wish to stay in politics may seek another way to do so, such as currying favour with the party leadership to obtain other offices (e.g. in the executive branch or at local or regional level) other than the other House of Parliament. This increases the power of party structures to an unnecessary, unhealthy extent.

31. In addition, term limits may increase the influence of lobby groups and legislative staff. More novice legislators are more inclined to fill their own informational and policy gaps by an

¹⁸ Deanna Wallace, *Legislative Term Limits: Friend or Foe*, 6 *Grove City C. J.L. Pub Pol'y* 81 (2015)

¹⁹ Dan Greenberg, *Term Limits: The Only Way to Clean Up Congress*, http://thf_media.s3.amazonaws.com/1994/pdf/bg994.pdf; Tom Murse, *The Debate over Term Limits for Congress*, <https://www.thoughtco.com/debate-over-term-limits-for-congress-3367505>.

²⁰ Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), pp. 831-879 Retrieved from <https://supreme.justia.com/cases/federal/us/514/779/> U.S. 779 (1995), pp. 831-879, Retrieved from available at <https://supreme.justia.com/cases/federal/us/514/779/> (striking down state efforts to impose term limits on members of the US Congress, and noting that the qualifications set forth in the Constitution for such members advanced the “fundamental principles of our democracy”, “that the people should choose whom they please to govern them”).

²¹ Venice Commission, CDL-AD(2012)027rev., § 71.

increased reliance on special interests and lobbyists,²² as well as on employees of government agencies, and MPs' staffs; this may have a negative impact on accountability.

32. Reforms in campaign finance law, particularly in order to eliminate tremendous incumbent advantages in elections, are needed rather than term limits.

33. The effects of the lack of limitations for the re-election of a member of parliament are softened by the activities of the opposition parties in parliament, as well as by the increased transparency and publicity that the democratic parliaments demonstrate through their activities²³ and primaries inside the party for the election of the candidates. The unwanted, i.e. untrusted, may not be always ousted by the voters but the more independent the candidates, the more the chances for this outcome in elections. In addition, an important subsidiary principle of democracy is that when majorities don't care (or are lazy to care) the active minorities decide.

c. Empirical research

34. The effects of term limits on the political system have been widely studied, although most research on this topic focuses on legislative rather than executive behaviour. Some empirical research on term limits points out their negative effects. However, it is inconclusive, as evidence supporting both positions has been found. The seminal study of John M. Carey shows that term limits do not improve policies, nor do they eliminate the impact of private interests on legislative behaviour.²⁴ Another study shows that legislators who can no longer seek re-election sponsor fewer bills, are less productive on committees, and are absent from more floor votes.²⁵ Term-limited politicians dedicate less effort to their office, engage in opportunistic behaviour,²⁶ and frequently run for another office or for a different party.²⁷ Recently, a 2017 study of the effects of term limits on representation in US state legislatures provided no evidence that term limits improve collective representation.²⁸ Moreover, term-limited officials pay less attention to local matters, focusing instead on nationwide issues.²⁹

35. Especially when political parties are weak, such as in new democracies, "*the adoption of rules that constrain electoral accountability may feed into higher volatility, which can in turn weaken parties' roots in society and decrease their legitimacy. This dynamic can create a vicious cycle where the weakness of individual parties, in combination with limited electoral accountability, reinforces the weakness of the party system as whole*".³⁰

²² <http://journals.sagepub.com/doi/abs/10.1177/153244000100100404>; D. Wallace, op. cit.

²³ CDL-AD(2012)027rev, § 63.

²⁴ Carey, 2006, op. cit., pp. 315 and 339-40.

²⁵ Fourniaies, Alexander and Andrew B. Hall. "How Do Electoral Incentives Affect Legislator Behavior?". Working Paper. March 19, 2018. Retrieved from http://www.andrewbenjaminhall.com/Fourniaies_Hall_Electoral_Incentives.pdf

²⁶ Ferraz, Claudio, and Frederico Finan. "Electoral Accountability and Corruption: Evidence from the Audits of Local Governments." *American Economic Review*. 2011. 101: 1274–311; Zamboni, Yves, and Stephan Litschig. "Audit Risk and Rent Extraction: Evidence from a Randomized Evaluation in Brazil." Barcelona GSE Working Paper Series. Working paper no. 554. July 2016. Retrieved from http://www3.grips.ac.jp/~s-litschig/pdfs/Zamboni_and_Litschig_2016.pdf

²⁷ Klasnja, Marko and Rocío Titiunik. "The Incumbency Curse: Weak Parties, Term Limits, and Unfulfilled Accountability". *American Political Science Review*. 2017. 111(1): 129–148, 132.

²⁸ Olson, Michael and Jon Rogowski. "Legislative Term Limits, Polarization, and Representation". Harvard University Working Papers. Retrieved from https://scholar.harvard.edu/files/rogowski/files/ajps_nonblind.pdf

²⁹ Egan, Patrick J., "Term Limits for Municipal Elected Officials: Executive and Legislative Branches". A study prepared for the New York City Charter Revision Commission. June 2010. Retrieved from <https://as.nyu.edu/content/dam/nyu-as/faculty/documents/egan.municipal.termlimits.2010.pdf>

³⁰ Klasnja, Marko and Rocío Titiunik, op. cit., p. 130.

36. Empirical research has clearly confirmed that term limits weaken the legislature's power vis-à-vis the executive branch.³¹ This effect is strong even when both branches are subject to similar limits. Term limits diminish the legislature's role³² and "contribute to a migration of power from elected representatives to nonelected officials".³³

37. Some research shows that term limits have not led to the election of more women or racial minorities as legislators,³⁴ nor have they been associated with election to office of legislators who are younger, less wealthy, less ideological, or less likely to already be politicians.³⁵

38. An assessment of the introduction of term limits in the Philippines found that "the ability of term limits to dismantle political dynasties is not obvious, as term limited incumbents may be replaced by relatives or may run for a different elected office. Whether these strategies undermine the direct effects of term-limits in reducing the time an individual can hold office is an empirical question. I find no evidence of a statistically significant impact of term limits on curbing families' persistence in power. Moreover, term limits deter high-quality challengers from running prior to the expiration of an incumbent's term. Challengers prefer to wait for the incumbent to be termed-out and run in an open-seat race. As a consequence, incumbents are safer in their early terms prior to the limit. These results suggest that political reforms that do not modify the underlying sources of dynastic power may be ineffective in changing the political equilibrium."³⁶

2. As regards representatives elected at the sub-national and local level

39. The effects of term limits on representatives elected at the sub-national and local level could be considered similar to those observed in national legislators. This is the case considering the similarities that exist between national, sub-national and local government: "*council manager governments share many features with parliamentary government and mayoral government is quite similar to a presidential system*".³⁷

40. On the other hand, local bodies deal with a different set of problems. They are less prone to pursuing reformative approaches (i.e. are expected to operate on a higher level of consensus) and have less bearing on the issue of creating dictatorial parties. The risks of limitation of the terms of office with them are less harmful for the credibility of the democratic institutions. In smaller communities, however, if the same decision-makers are reproduced by

³¹ Kousser, Thad. *Term Limits and Dismantling of State Legislative Professionalism*. New York: Cambridge University Press, 2005; Kurtz, Karl T., Bruce Cain, and Richard G. Niemi, eds. *Institutional Change in American Politics: The Case of Term Limits*. Ann Arbor: University of Michigan Press, 2007; Moncrief, Gary and Joel A. Thompson. "On the Outside Looking In: Lobbyists' Perspectives on the Effects of State Legislative Term Limits" *State Politics and Policy Quarterly* 2001, Vol. 1, 394-411; Peery, George and Thomas H. Little. "Leading When the Bell Tolls: Perceptions of Power among Termed and Untermoted Leaders", in *The Test of Time: Coping with Legislative Term Limits*, ed. Rick Farmer, John David Rausch and John C. Green. Lexington, MA: Lexington Books, 2002; Powell, Richard J. "Executive-Legislative Relations" In *Institutional Change in American Politics: The Case of Term Limits*, ed. Karl T. Kurtz, Bruce Cain, and Richard G. Niemi. Ann Arbor: University of Michigan Press, 2007. Carey, John M., Richard G. Niemi, Lynda W. Powell, and Gary F. Moncrief. "The Effects of Term Limits on State Legislatures: A New Survey of the 50 States" *Legislative Studies Quarterly* 2006, 31(1): 105-134.

³² Kousser, *op. cit.*, p. 207.

³³ Powell, *op. cit.*, p. 146.

³⁴ Carroll, Susan J. and Krista Jenkins. "Do Term Limits Help Women Get Elected?", *Social Science Quarterly*, 2001 82(1): 197-201.

³⁵ Egan, *op. cit.*, with references to Bernstein & Chadha 2002; Carey et al, 2006; Carroll & Jenkins 2001).

³⁶ Pablo Querubin, *Political Reform and Elite Persistence: Term Limits and Political Dynasties in the Philippines*, https://leitner.yale.edu/sites/default/files/files/resources/papers/Querubin_Term_Limits.pdf.

³⁷ Tausanovitch, Chris and Christopher Warshaw. "Representation in Municipal Government". *American Political Science Review*, 2014, 108(3), 605-641, 26.

stable local (clannish) configurations, this can negatively affect the credibility of local institutions and the functioning of representative government.

41. So far there is no evidence that term limits for city councils provide for a greater responsiveness of elected officials.³⁸ On the contrary, some studies provide evidence that term limits lead to increased short-sighted decision making, since they weaken elected officials' accountability to voters. This may happen due to misalignment in officials' interests, who "*will not be eligible to reap the benefits of far-sighted behaviour. As a result, [they] face[] incentives to spend government money to implement [their] preferred policies, or limit the spending behaviour of future policy-makers*".³⁹ Moreover, research suggests that term limits are not helpful in ousting bad legislators and local politicians, as they provide equal treatment for both good and bad representatives and shorten the politicians' time horizon.⁴⁰

3. As regards executive officials elected at the sub-national and local level

42. Special considerations apply to executive positions as opposed to the legislative or representative ones. Regional presidents or governors⁴¹ can be either directly elected by citizens, or indirectly elected by the sub-national councils (executive-appointed governors do not fall within the scope of this analysis). The same applies to mayors, who may be either directly elected by citizens or indirectly elected by municipal councils.

43. In systems where governors, regional presidents or mayors are directly elected, there is a risk that the incumbents abuse of their office to distort the electoral competition and the equality of opportunity of all candidates. It is counter-argued that regional and municipal councils may nonetheless serve as an effective check on the powers of directly elected governors or mayors. Another counter-argument is that non term-limited governors or mayors show accountability incentives, and also acquire experience, hence accrued competence. Finally, in small communities it may be difficult to find suitable alternative candidates.

44. In systems where governors, regional presidents and mayors are indirectly elected by the sub-national or municipal councils respectively, they are accountable before them and the risks of concentration of powers and of interference with equality of opportunity in elections are far less significant.

45. Some research regarding governors in the United States suggests that "*holding tenure in office constant, differences in performance by reelection-eligible and term-limited incumbents identify an accountability effect: reelection-eligible governors have greater incentives to exert costly effort on behalf of voters. Holding term-limit status constant, differences in performance by incumbents in different terms identify a competence effect: later-term incumbents are more likely to be competent both because they have survived reelection and because they have experience in office. [...] economic growth is higher and taxes, spending, and borrowing costs are lower under reelection-eligible incumbents than under term-limited incumbents (accountability), and under reelected incumbents than under first-term incumbents (competence), all else equal.*"⁴²

³⁸ Tausanovich and Warshaw, *op. cit.*, pp. 24-5.

³⁹ Donovan, Colleen. "Direct democracy, term limits, and fiscal decisions in US Municipalities". *Job Market Paper*. November 2009, p. 4. Retrieved from https://www.ocf.berkeley.edu/~colleend/DonovanJM_Nov6.pdf; See also Timothy Besley and Anne Case. "Does electoral accountability affect economic policy choices? evidence from gubernatorial term limits". *The Quarterly Journal of Economics*, 110(3):769-798, 1995.

⁴⁰ Donovan, *op. cit.*

⁴¹ Presidents of Autonomous Communities, Presidents of Provinces and similar.

⁴² Alt, James, Bueno de Mesquita, Ethan, Rose, Shanna, "Disentangling accountability and competence in elections: evidence from US term limits". Retrieved from https://dash.harvard.edu/bitstream/handle/1/9639960/alt_disentangling.pdf?sequence=1

4. Venice Commission's position

46. The Venice Commission considers that restrictions on the rights to political participation should be assessed against multiple factors, such as constitutional values, political tradition and social context, a country's own history, the concentration of power in a political system, and the broader political and social trends. Democracies differ profoundly – in terms of checks and balances or scope of governments' accountability and responsiveness – so that elements that could deeply affect the relations between voters and representatives, like term limits, should be carefully analysed. Concerns as to what enhances the credibility of the democratic institutions should also be taken into account.

47. The Commission has examined the comparative material, the numerous arguments in favour and against term limits for members of parliament, as well as the results of empirical research. It considers that, in principle, term limits for MPs are not arbitrary or disproportionate interferences with the free participation of the people in public and political life. Neither are they, per se, arbitrary or disproportionate limitations of the right to be elected.

48. The Commission has previously reached the firm conclusion that in a presidential regime, presidential term limits should be considered as necessary to maintain the democratic system.⁴³ Presidential regimes indeed give the incumbent an excessive advantage when he or she runs for re-election; term limits aim at preventing the incumbent from taking advantage of his or her position in order to remain in power and at guaranteeing a level playing field for other candidates. These arguments are stronger in case of immediate re-election.

49. In parliamentary systems, term limits usually exist for Heads of State, despite their mostly ceremonial role, in order to avoid a perpetuation of power and the weakening of the position of the Prime Minister, and instead do not exist, at least in the 63 countries observed, for Prime Ministers, as the government's survival is closely tied to the legislative term, and the PM depends on the continued confidence of parliament, other than on internal elections or primaries in the party.

50. Unlike Presidents, members of parliament exercise a representative mandate and form part of a collegiate body. Term limits for MPs are therefore not required to prevent the equivalent of an unlimited exercise of power by the Executive. In a collective representative body, the possibility of re-election does not entail a similar advantage for the incumbent.

51. It is true that term limits for MPs may have a positive effect a corrective to inequalities which inevitably hinder challengers and aid incumbents and avoid the concept of irreplaceability in the political establishment; they may also avoid the concentration of power in the hands of a few professional politicians and foster more accurate representation and increased responsiveness of the elected representatives toward the electorate.

52. However, term limits also weaken the legislature's power vis-à-vis the executive branch and diminish the legislature's role, even when both branches are subject to similar limits.

53. Term limits may also increase the influence of party leaderships. The dependence of MPs on party leadership, which distances the represented from their representatives, becomes inevitable when the leadership is responsible not only for choosing the candidates, but also for accommodating them after the term expires. Political parties then become dominant in every political decision. Bureaucracy is an important part of democracy but only as complementary to (not as a substitute for) political representation. Strong party headquarters turn the very parties into a bureaucracy. To avoid such an effect it is important to guarantee the independence of the elected representatives. The pressure of the realities in parliament to

⁴³ Venice Commission, Report on term-limits, Part I: Presidents, §§123, 124.

form groupings of MPs should suffice to guarantee for the maintenance of parties under normal circumstances. The limitation of the number of terms of office for those who are determined to stay in politics seriously diminishes their level of independence.

54. Term-limits finally increase the influence of lobby groups and legislative staff, thus contributing to a migration of power from elected representatives to nonelected officials, which risks negatively impacting voters' ability to hold representatives accountable.

55. In balance, therefore, the Venice Commission does not recommend the introduction of term-limits for MPs, although it recognises that it is up to each constitutional or legal system to decide on their opportunity in light of the prevailing particular circumstances and of the will of the population.

56. The Commission is also of the view, for the reasons sets out above, that if term limits are to be introduced for a legislative body, they should be less strict than those that apply to an executive body.

57. Further, the very limited state practice (see paras. 5 and 6 above) suggests that at least two consecutive terms should be allowed. This appears to be a mitigation of the adverse effects of term limits indicated above, and would preserve in particular the need for accountability towards the electorate. It would also be more respectful of the principle of proportionality in the interference with the rights to vote and be elected.

58. The Commission is of the view that guaranteeing continuity in a functioning democracy also requires that the rule should be applied in a manner allowing for gradual renewal of the MPs. Staggering the departures would also mitigate the adverse effects of having too many novice legislators at the same time in terms of influence of lobbyists and parliamentary staff.

59. The Commission has reached similar conclusions as regards representatives elected at the sub-national and local level, who like national MPs exercise a representative mandate and form part of a collegiate body.

60. By contrast, the position of a directly elected regional president or governor and of a directly elected mayor may be more comparable to that of a president in a presidential system, to the extent that the incumbent could abuse of his or her office in order to distort the electoral competition and the equality of opportunity of all candidates, and also to concentrate powers to an excessive extent. These risks prevail over the advantages of accountability and competence incentives. The check on their powers exercised by the sub-national or municipal councils might not be sufficient. For this reason, the imposition of term limits on directly elected sub-national or local executive officials could appear more justifiable. Comparative law supports this conclusion.

61. The position of governors, regional presidents and mayors who are indirectly elected by the sub-national or municipal councils respectively is, however, different, and is more similar to that of a Prime Minister in a parliamentary system. They are accountable before the relevant representative body and need to have the latter's continued confidence. The threat of great accruals of power and of interference with equality of opportunity in elections is far less significant. For this reason, in the Commission's view, imposing term limits on them does not seem justified.⁴⁴

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

⁴⁴ This differentiation may also be found with reference to the institute of recall, which insofar as mayors are concerned, is, as a rule, associated with direct election by the voters; where mayors are not directly elected, instead, preference is given to a system, closer to the logic of a representative system, of a no-confidence motion, enabling the local council to decide on the early termination of the mayor's mandate.

62. In a previous 2018 report, the Venice Commission recognized that a constitutional amendment is required to modify term limits for presidents. Any adjustment in a political system that affects checks and balances between the executive and the legislative branches and that has an impact on the citizens' ability to hold representatives accountable should be adopted through the established amendment procedure, according to the Constitution.⁴⁵ Introducing or lifting term-limits of members of parliaments entails a modification of the conditions of the representative mandate; only the sovereign people can modify the scope of delegation which they have given to MPs: term limits should therefore be established in the Constitution.

63. A popular referendum should not be used as a way to override the due constitutional amendment procedure.

64. For the sub-national authorities, regulation should be made at the same level of regulation of their legal status: it could be the State Constitution, or a Statute of Autonomy, and at times also national or regional legislation.

65. At local level, national or regional legislation is required in accordance with the relevant rules of local self-government in each country.

VII. Conclusion

66. There is no absolute human right to hold office, i.e. to be part of a particular government institution. The rights to vote and to be elected and the right to political participation are not absolute. The general right to participate in government is based on rules established by law, which also define the framework of exercise of the rights to elect and be elected, with due respect for international standards. What distinguishes representative (i.e. institutional) democracy from direct democracy is that only those hold office, who are trusted by the voters (following an established procedure). Both international treaties and national constitutions establish restrictions on the right to vote and to be elected, which may differ in scope and aims. Such restrictions must be established by law and must be reasonable and objective. Voters' capacity to elect freely thus is always limited by the rules that regulate the right to stand for office and access to the ballot or nomination rules. The most common requirements are citizenship and age, and there may be additional ones.

67. Restrictions to the human right to political participation and to stand for election are therefore generally allowed within a constitutional democracy, to the extent that they are justified and necessary.

68. The Venice Commission has examined the numerous arguments in favour and against term limits for members of parliament. It considers that they are not *per se* arbitrary or disproportionate interferences with the right of the people to vote and participate in public life. Nor are they arbitrary or disproportionate limitations of the right to be elected.

69. The Commission stresses, however, that MPs, unlike Presidents, exercise a representative mandate and form part of a collegiate body. Term limits for MPs therefore are not required in order to prevent the equivalent of an unlimited exercise of power by the Executive. There is academic research that supports the idea that term limits for MPs may have a positive effect in terms of avoiding concentrating power in the hands of a few professional politicians and fostering more accurate representation and increased responsiveness of the elected representatives

⁴⁵ The same view was expressed by the US Supreme Court: "State imposition of term limits for congressional service would affect such a fundamental change in the constitutional framework that it must come through a constitutional amendment properly passed under the procedures set forth [in the Constitution]": *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), 781. Retrieved from <https://supreme.justia.com/cases/federal/us/514/779/>

toward the electorate. However, they also weaken the legislature's power vis-à-vis the executive branch and diminish the legislature's role, even when both branches are subject to similar limits. They also may increase the influence of party leaderships, as well as of lobby groups and legislative staff, thus contributing to a migration of power from elected representatives to nonelected officials, which risks impacting on voters' ability to hold representatives accountable.

70. In balance, therefore, the Commission does not recommend the introduction of term-limits for MPs, although it recognises that it is up to each Constitutional or legal system to decide on their opportunity in the light of the prevailing particular circumstances and the will of the population. The Commission is of the view nonetheless that if term limits are to be introduced for a legislative body, they should be less strict than those that apply to an executive body.

71. If term limits are introduced, at least two consecutive terms should be allowed. This appears to be a reasonable mitigation of the adverse effects of term limits indicated above, and would preserve in particular the need for accountability towards the electorate. It would also be more respectful of the principle of proportionality in the interference with the rights to vote and be elected. The introduction of term limits should be applied so as to allow for a gradual renewal of the MPs, thus guaranteeing continuity.

72. The Commission has reached a similar conclusion as regards representatives elected at the sub-national and local level.

73. The imposition of term limits on executive officials directly elected at the sub-national and local level could appear more justifiable, as their position may be more comparable to that of a president. By contrast, the position of executive officials who are indirectly elected by sub-national or municipal councils is more similar to that of a Prime Minister in a parliamentary system. For this reason, in the Commission's view, imposing term limits on them does not seem justified.

74. If adopted, in general term limits for members of national parliaments should be established in the Constitution. Thus, in general, the appropriate legal route to introduce or modify term limits is the same as for any other constitutional amendment. A popular referendum should not be used as a way to override the due constitutional amendment procedure.

75. For the sub-national authorities, regulation should be made at the same level of regulation of their legal status: it could be the State Constitution, or a Statute of Autonomy, and at times also national or regional legislation. At local level, national or regional legislation is required to impose time limits in accordance with the relevant rules of local self-government in each country.