

**WHY CONSTITUTIONS IN AFRICA DO NOT STAND THE TEST OF TIME:
LESSONS AND PERSPECTIVES FROM THE 1995 UGANDA'S CONSTITUTION.**

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ABSTRACT

Since the 1990s, there has been an unprecedented wave of newly crafted constitutions in Africa. As of today, over fifty nations in Africa have either written a new constitution or modified the previous ones. Uganda was one of these countries that rewrote its constitution in 1995. Basing on the turbulent constitutional instability and history of Uganda, the 1995 constitution-making exercise went through consultative and non-consultative constitution making processes with the hope that consultations would make the constitution stand the test of time unlike the previous three constitutions i.e. 1962, 1966 and 1967 that were either abrogated or abolished within a period of less than a decade. The 1995 Ugandan constitution although not yet abolished as the previous ones were, has not stood the test of time as it has been amended even before allowing some provisions time to be practiced. For example, the provision on presidential term limits was amended and the constitution now provides for unlimited terms even before president Museveni under whose incumbency it was made had not been succeeded. In less than six years after the 1995 constitution was adopted, a constitutional review commission was set up to review the 1995 constitution and also in less than two decades after its passage, over 120 amendments to the 1995 constitution have been made or proposed.

Such a phenomenon of constitutional uncertainty and instability requires a study to inform the debate on constitutional instability that is the cause or effect of political conflicts that have characterized African countries like Uganda since independence five decades ago. This study therefore seeks to explain why constitutions in Africa do not stand the test of time using Uganda as a case study. I trace the links of the Constitution to three factors, which in different ways are integral and shape the constitution i.e. state, society and economy. The state and its structures are in themselves the principle object of a constitution. The economy is an underlying, and sometimes an overt, concern and theme (and often the Ideology) of the constitution. Society is the maker or recipient of the constitution. I argue that this interaction maybe the key to understanding the potential of the constitution and to explain its success and failure. Constitutional stability depends on the dynamics of the social, economic and political environment. The contention of this paper is that context matters. The specific context in which the constitution is conceived, drafted, formulated, debated and promulgated has been

examined. The context in which the constitution is made does not only influence the actual framing of the constitution as a document but also determines whether it will be respected and upheld after it has been promulgated. Therefore, contextual factors such as historical legacy, regime type, constitutional structure/design and the structure of society influence and continue to shape constitution-making process and practices in countries like Uganda leading to an outcome (constitution) that has not stood the test of time.

1.0 INTRODUCTION

The late twentieth century has been an era of constitution making with issues of constitutionalism in Africa gaining considerable prominence. We could describe the present developments as constituting a new epoch in African history –the epoch of the rebirth of constitutionalism assuming a new value within the context of debates about politics, statehood and democracy. This is part of the recent ‘wave’ of democratisation around the world.

As much as these new winds have generated expectations of a new dawn and the end of an era of corrupt, authoritarian and incompetent dictatorships, that had earned the continent notoriety for political stability, civil wars, famine, diseases conflicts etc. African leaders today hope and calculate that adoption of written constitutions will legitimize their regimes in several possible ways; as self-justification in the eyes of the world as a promise of just and democratic rule, and to their own citizens as a manifestation of consent and mutual respect. The pressure from both within and without has forced African governments to re-establish their credibility by amending or radically changing their constitutions.

These new or revised constitutions have taken diverse forms that reflect the received colonial models. For the most part, the nineteenth-century European laws have been the primary foundation of law in Africa. Brausch asserted that the independence constitutions of Africa were “too close to their western models”.¹ They merely imitated and thereby reproduced the constitutional models of former colonising powers. This explains why independence constitutions were altered or overturned completely after the first few years of their promulgation. The experiences under these new or revised constitutions in the last decade have exposed numerous structural and institutional weaknesses and gaps. A few of what one

¹G E J Brausch *African Ethnocracies: Some Sociological Implications Of Constitutional Change in Emergent Territories of Africa* (1963)85.

can consider as some of the fundamental challenges that have made present constitutions not to stand the test of time.

The recent constitutional changes, it's assumed, have failed to adequately draw inspiration from some silent lessons of Africa's dark authoritarian past. For example, little has been done to curb the temptation for leaders to seek to entrench themselves or their parties in office. As result, the constitutional rights revolution on the continent, whilst real, remains uncertain.²

Executive power in Africa is overwhelming partly because the leaders do not believe in constitutional rule or those provisions that limit their powers. Okoth Ogenia assessing African political elites observes a paradox in Africa, instead of controlling a government the constitution is there to serve government, leaving room for manipulation.³

Constitutional history in Africa, confirms that several African countries have either, amended, abrogated, suspended or rewritten their original constitutions. For example, in less than two decades after the passage of the 1995 Uganda constitution, over 120 amendments have been made or proposed. In a mere 32 years, the Zimbabwe constitution has been amended 19 times. The Kenyan constitution was amended 50 times by 2010. The majority of these amendments made to the constitutions, have not been based on the need to preserve and improve on constitutions, but on the contrary desecration and weakening of the same.

Although, constitutions are usually designed to endure in order to ensure political stability, however, they are not immutable documents frozen in time that should endure regardless of the changes in the polity's circumstances and citizens' values. Because constitutions inevitably obsolesce with time, there must be an effective and efficient process to ensure that they can be regularly updated to avoid the dangers of change.⁴

Needless to say, the history of constitutionalism and constitutional democracy in Africa is not particularly a happy one. Many of the continent's problems have been caused, not by the absence of constitutions *per se*, but rather the ease with which constitutional provisions were abrogated, subverted, suspended or brazenly ignored.⁵ Uganda provides a laboratory of

² Charles Manga *Challenges to Constitutionalism and Constitutional Rights in Africa and the enabling role of Political parties: Lessons and Perspectives from Southern Africa* (2007)3.

³ Okoth-Ogenia "Constitutionalism without Constitutionalism: Reflections on African Political Paradox in Douglas Green et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993)66.

⁴ Charles Manga CF (2007)1.

⁵ Charles Manga (2007)2.

inordinate magnitude for a discourse on the intricacies concerning democracy and constitutional instability. Uganda's history is replete with constitutional crises, civil wars, military coups, insurgencies, ethnic/religious/political cleavages and violent unconstitutional regime changes all of which have caused the constitutional instability.

The question now is what factors lead to constitutional instabilities in Africa. Analytically the constitutional life span will depend on different factors. These factors are determined by the specific context in which the constitution is conceived, draft formulated, debated and promulgated. Therefore, context is of paramount importance. The contextual factors in this case are the structural factors or political, historical and socio-economic conditions that have conspired to create constitutional instability in Africa and Uganda in particular. The structural factors are measured by the nature of Ugandan state (political level), level of development (socio-economic level, and the global structure (international level). However, there are other factors like agential factors in terms of leadership capability (individual level, the organisational arrangements (institutional level), and ideational in terms of intellectual discourse (cultural-ideological level) which have also affected constitution stability. All these factors undoubtedly have shaped Uganda's constitutions.

1.1 THE CONCEPT OF CONSTITUTIONAL STABILITY

“Constitutional stability” is difficult to define and measure. The lifetime of constitutions can be affected by different events. From a formal or legal point of view, constitutions can be altered by means of amendment, interpretation, and replacement.⁶ One could also argue that suspension of all or part of its provisions is a form of alteration. From this perspective any alteration or transformation of the original agreement may affect the stability of constitutions. This concept of constitutional stability, however, is probably unrealistic, because as noted earlier, constitutions are not immutable. Amendment procedures, for instance, have been designed for the purpose of adapting a constitution to new circumstances without affecting its legal continuity.⁷

Constitutions need to be and often are altered over time to respond to changes in the political, economic, or social environment under which they operate. This explains why context is of paramount importance. The design of a constitution must be matched to a

⁶ G L Negretto G L *The Durability of Constitutions in changing Environments: Explaining constitutional Replacement in Latin America* (2008)3.

⁷ G L Negretto (2008)2.

country's political, economic, social and other circumstances at particular historical moments. However, alteration or amendment does not imply the legal abrogation of the existing constitution.

The situation is different with constitutional replacement. In this case, whether or not procedural forms are observed, institutional reformers decide that a new constitution should be created usually by procedures that are not regulated by the existing constitution. This decision could very well be based on merely symbolic reasons, such as signalling the transition to democracy, with little or no substantive change in relation to the previous constitution. Nevertheless, replacements constitute a clear case of discontinuity and should obviously count as indicators of constitutional instability.⁸

The irregular suspension of the constitution by the leaders of a military or civilian coup is perhaps the hardest case to classify. Clearly enough, the suspension compromises the continuity of the constitution. The problem however, is that their regular suspension of the constitution generally coincides with the transition from a democratic to an authoritarian regime. In other words, suspensions may be highly correlated with regime change, indicating political rather than constitutional instability.

For these reasons, constitutional stability can be defined as the durability, in legal terms, of the original constitution. From this perspective, the lifespan of a constitution is the length of time that passes between its enactment and its formal replacement by another constitution. Thus, constitutions that stand the test of time are those that survive for long without being replaced.

1.2 DEBATE ON CONSTITUTION SURVIVAL

Over time scholars have developed a number of theories to explain constitutional stability or survival. Theoretical works on the nature of constitutions see constitutional stability as a function of time. Comparative studies imply that durability of constitutions is a function of specific variables that either increase or decrease the capacity of constitutions to survive.⁹ One group of theories supports the importance of social and political environmental or exogenous shocks, both domestic and international, when analysing the probability of constitutional survival. Other theories focus on constitutional design. Self-enforcement mechanism, the

⁸ G L Negretto(2008)5

⁹ G L Negretto (2008)3.

addition of an independent judiciary, and how inclusive the constitutional writing process and text are, are just a few of the other factors studied in relation to constitution design.¹⁰

Scholars have investigated various design-driven factors in constitutional survival literature. One argument is that self-enforcing constitutions are more likely to survive and that different elements within the constitutions make them self-enforcing. Among these elements, argue Alberts, are counter majoritarian provisions. Such provisions include institutions that provide targeted protection (or federalism), limits on governmental power, super-majority requirements for amendments, and a constitutional court with judicial review. A deferential court with strong judicial review power, in particular has been shown to contribute to constitutional stability.¹¹

In *The Endurance of National Constitutions* (2009), Elkins, Ginsburg, and Melton, present a primarily design-based argument in which they study the effects of three factors on constitutional endurance: inclusiveness, flexibility, and specificity. According to the Authors, inclusive drafting process, and the promise of future inclusivity through guarantees for participation increase the visibility of the constitution and imply greater consent to it, in addition to increasing the attachment that citizens have to document.¹² More inclusive processes enable the integration of new social forces conducive to constitutional survival because the “can promote a unifying identity and invite participants to invest in bargain”¹³ “Why,” they ask, “do some constitutions endure, whereas others do not?”

Some analysis point to unseen and/or difficult to measure mechanisms, such as crystallisation Elkins, *et al* when hypothesizing about the effects of age. Others argue that constitutions over time generate increasing benefits for certain portions of the population. Regardless of the mechanisms, the basic argument states that older constitutions are more likely to survive than newer constitutions.¹⁴

The touchstone for arguments about constitutional endurance has been Thomas Jefferson, who famously argued against entrenchment in his debates with Madison, and derided those who “look at constitutions with sanctimonious reverence, and deem them like the arc of the

¹⁰ Erin Rice, *International Participation and constitutional Survival* (2013)2.

¹¹ Barry Weingast, *Symposium: The Judiciary and the Popular Will: Constitutional Stability and the Deferential Court.*” (2010).

¹² Zachary Elkins et al *The Endurance of National Constitutions* (2009)90-1.

¹³ Zachary Elkins et al (2009) 211.

¹⁴ Barry Negretto (2006).

covenant, too sacred to be touched.”¹⁵ . Jefferson believed in automatic expiration of laws, including the constitution, so that present day majorities could not bind future ones. To him constitutions do not have an expiry date written on them. He recognised that some durability in laws was desirable, and thought democracy was the key criteria of optimal duration.

Madison ties constitution-making to crisis and is concerned that constitutional reform without crisis may become overly tainted with self-interest.¹⁶ He is certainly right that constitutions tend to be written following catastrophic events. Constitutions are often created in the wake of crisis. This could refer to any number of events including revolution, coup, civil war, political demonstrations, or even shifts in the political landscape that are not a direct consequence of the constitution, for example, the sudden rise of a new dominant party.¹⁷

The role of international community in constitutional survival though little has been explored, could influence constitutional replacement. Constitutions obviously do not exist in vacuums.¹⁸ The content of constitutions has become increasingly isomorphic. This is partly attributed to third party countries, typically western democracies with longer surviving constitutions, who often serve as constitutional models.¹⁹

A separate rationale for endurance comes from the economic sphere. Since at least Weber (1977), social scientists have been concerned with the relationship between constitutions and capitalism.²⁰ Clearly constitutions provide a substantive basis for regulation of economic activity, and so we ought to expect that constitutions that, for example, protect property rights and create structures for the enforcement of contracts will facilitate capitalist development. We ought to observe a correlation between constitutional duration and long-term investment.

1.4 BRIEF CONSTITUTIONAL HISTORY OF UGANDA (1962-1995)

Uganda has undergone a turbulent constitutional history having in effect four constitutions since independence. From the colonial times, Uganda has witnessed a number of changes in governments and subsequent constitutional changes and amendments. Successive governments have often politicized the constitution-making processes, manipulated the

¹⁵ Letter to Samuel Kercheval, July 12, 1816

¹⁶ Zachary, Elkins Ginsburg, Elkins, Melton *The Life Span Of Written Constitutions* (2007) 12.

¹⁷ G LNegretto (2006)18, Russell (1993)106.

¹⁸ Erin Rice (2013)7.

¹⁹ Bailey M J “*Toward a New Constitution for Future Country* (1997)73-4. see also *Osiatynski, Wiktor Paradoxes of Constitutional Borrowing* (2003).

²⁰ Torsten Person & G Tabellini *The Economic Effects of Constitutions* (2003).

constitutions to suit their needs. Political, historical and social conditions have also conspired to create undemocratic and exclusionary processes which in turn have contributed to the constitutional instability in Uganda.

Uganda's constitutional history has witnessed consultative and non-consultative constitution-making processes since 1959. For example, constitutional committees and commissions were established to gather views which enabled them to write reports from which the final draft constitutions would be produced except for 1966 and 1967 constitutions. Notable examples of these committees and commissions include the, the wild committee (1959), Munster commission 1960, and the Odoki commission 1986. These commissions were mandated to collect views and workout draft constitutions for Uganda taking into consideration all the interested parties.

However, none of the constitutions has satisfactorily answered the needs and aspirations of the Ugandan people. The manner in which the constitutions were made and unmade, the suitability of the institutions and the processes that were established and the extent to which they were viable and acceptable have long been a subject of debate and controversy.²¹

Uganda's first constitution – the 1962 independence constitution-was established in context of the events that begun in 1959. The constitution-making process was more based on the decisions of colonial powers. Ugandans had very little say on how the constitution to govern the government should be made, to the extent that even some articles and clauses from a foreign constitution which were not applicable at all to the local situation in Uganda were put in the constitution. This in effect was the beginning of turbulent constitutional instability in Uganda that has lasted for over 30 years till to date.

The independence constitution of 1962 had been worked out as a result of negotiations in London among major political actors of the day. Oloka- Onyango writes that the process of promulgation of the independence constitution resembled in many ways the “amiable farce” of treaty-negotiation that took place with the advent of colonialism.²² The constitution provided for a Westminster form of government with executive powers vested in the prime minister who, with his cabinet, was head of government. Under this constitution, Uganda instituted a unitary system, with Buganda enjoying autonomous status or federal status with

²¹Benjamin Odoki in Oloka-Onyango *Constitutionalism In Africa: Creating Opportunities and Facing Challenges* (2001) 264.

²² Oloka Onyango ‘ *Judicial Power and Constitutionalism in Uganda*’(1993) 19.

greater rights and privileges than other districts in Uganda. The country's other three kingdoms- Ankole, Bunyoro and Toro- enjoyed a quasi-autonomous status. Thus, this constitution was a comprise constitution negotiated between the British and key elite leaders; a mix of federal, semi-federal, and unitary constitutional features.

In 1966, following a confrontation between the then Prime Minister Apolo Milton Obote, and Sir Edward Mutesa, President of Uganda, the 1962 Constitution was abrogated by Obote and replaced by the Interim Constitution of 1966.²³ The Constitution was not debated and it was known as the 'Pigeon-hole Constitution'. It came to be known as the 'pigeon-hole' Constitution, because Obote told Members of Parliament that they would find copies in their pigeon holes at the end of the National Assembly sitting. In 1966, five cabinet ministers were imprisoned because they differed in opinion with Obote. This marked the first country's constitutional crisis. Obote organised a military takeover of Buganda Kingdom palace, especially since the Kabaka had contested the constitutional changes in an appeal to the United Nations.²⁴

The 1966 crisis and the subsequent political changes, gave way for the constitutional changes of 1967. In 1967, Obote introduced another constitution that was republican in nature. The 1967 constitution provided for a far more powerful executive president while continuing to pay lip service to the principle of parliamentary supremacy. It also abolished kingdoms and other aspects of federalism and turned Uganda into a unitary state. Although the constitution recognized the multiparty system of government, opposition political parties were later banned, effectively transforming Uganda into a single-party state.²⁵ Therefore, the 1966 constitutional crisis produced images of undemocratic legislation in parliament and exclusionary processes in the constitution-making that contributed to the disapproval of the resultant constitution.

The effects of the 1966 crisis and the events thereafter set a stage for the reign of terror experienced under Idi Amin (1971-1979) and later under Milton Obote's second government (1980-1998). When Amin seized power in 1971, he suspended the constitution and declared himself president for life. He violently suppressed all political oppositions and created the public safety unit and the State Research Bureau to carry out this suppression. Under Amin regime, between 100,000 and 500,000 people were killed, including his chief Justice

²³ Benjamin Odoki ed Olaka Onyango (2001) 265.

²⁴ Jorgensen J J *Uganda a Modern History* (1981).

²⁵ Oloka Onyango (2001)265.

Benedicto Kiwanuka. This was followed up by the Moshi Agreement which acted as a constitution for Uganda after the fall of Idi Amin's regime in 1979. This ushered in the Obote regime under the UPC for a second time in 1980. This was charged to restore constitutionalism and democracy in Uganda. However, the power dynamics did not favor the government to that effect and as a result the country experienced a crisis of political and constitutional instability for over five years.

To address the above problem, the NRM government initiated the constitution-making process in 1988 in order to provide an adequate opportunity for freely determining the system of governance and to break away from the previous regimes in order to create a new basis of legitimacy for their party by drafting a new constitution. The NRM government rewrote the constitution in 1995 using a popular approach. In fact, it has been argued that, by far, the greater legacy the NRM has bestowed on Uganda remains the constitution.²⁶

2.0 FACTORS THAT SHAPED THE OPERATIONALIZATION OF THE 1995 UGANDA CONSTITUTION

2.1 Structural factors

2.1.1 Historical legacy/colonialism

The British government declared Uganda a British protectorate in 1894, and so Uganda as an administrative unit was born. As a result of the 1900 agreement the kingdom of Buganda was annexed to the crown as a British protectorate. The Agreement was so comprehensive and elaborate that it covered virtually all aspects of government and Buganda's relations with the protectorate government.²⁷ The status of Buganda and the British allowed the *kabaka*, or king, to govern his kingdom with a measure of internal autonomy. The British signed similar agreements, with varying degrees of autonomy, with the rulers of three other kingdoms, namely, Ankole, Bunyoro and Toro. The special status enjoyed by Buganda thrust the kingdom to the very center of Uganda's constitutional crisis.²⁸ The Buganda agreement has had a significant effect on the course of policy and administration in Uganda since legislative measures were taken to incorporate the Agreement into the protectorate law, making the agreement legally binding.

²⁶ G W Kanyeihamba *Constitutional and Political History of Uganda* (2002)266.

²⁷ John Mugambwa *The Legal Aspects of The 1900 Buganda Agreement Revisited* (1987)246.

²⁸ Francis M S *Protection of Fundamental Rights in the Uganda Constitution*(1994)2.

The British arbitrary colonial act of boundaries was driven by an overwhelming economic logic. British colonialism brought within the fold of one country peoples of different levels of social development split nationalities into or among several countries.²⁹ The north-south divide in Uganda today is one of the most enduring legacies of colonial act. And with the objective of divide and rule, colonial political structures encouraged polarisation of ethnic identities.³⁰ The assignment of the north, for instance, as a source of soldiers and police men had negative implication for stability as the ruling class elite during the post colonial period, who were from the north used the military predominance to acquire and retain power undemocratically or used this power to abrogate the constitution.

Religion also led to the creation of another cleavage. While the British-linked and the British supported elite had largely converted to Protestantism, the majority of the population on the other hand were Catholics. This means the Protestants excluded the Catholics from power.³¹ Religion was a highly mitigating factor and has had an influence on the constitutional history of Uganda and the political events of the day. In Uganda religion had been entrenched in the political, social and economic status quo since the beginning of the twentieth century. These were the Catholics, the Protestants and Muslims. They all had their political affiliations towards a particular political party. The Catholics were affiliated to the Democratic Party since its foundation was based on the fact that they were marginalised politically, economically and socially. The UPC was highly protestant and Muslims had no independent party but they felt more comfortable in the UPC than in DP.

In economic terms, Uganda was turned into a reservoir of raw materials (cotton, coffee, and tea) for British industry. Britain turned the southern part (Buganda, Busoga, and Ankole) into cash crop growing areas. But cash crop growing was discouraged in northern areas. Their production was based on both peasant and migrant labour mainly drawn from the north, west, Kigezi and Rwanda. In the north principally Acholi and Lango, the colonialist recruited soldiers, policemen as well as labourers for factories and plantations in the south.³² The result of this division of labour was further ethnic cleavages.

Socially, most of the social infrastructures such as schools and hospitals were concentrated in Buganda. The distribution of schools in Uganda was unfair. For instance, in the 1920s there

²⁹ R Mukherjee R *Uganda a Historical Accident* (1985).

³⁰ J A Okuku *Ethnicity, State Power and the Democratisation Process in Uganda* (2002)8.

³¹ James Kabagambe *The democratisation Process in Uganda: Obstacles and opportunities*(2006)29.

³² Mahmood Mamdan *Imperialism and Facism in Uganda* (1983) 10.

were 368 schools in Buganda, 44 in western province and none at all in northern Uganda.³³ This was a conscious colonial government policy of making northern areas reserves of cheap unskilled labour for the plantations, the army, police and prisons.

In a nutshell, colonial rule distorted the political, social, and economic institutions indigenous to Uganda society by imposing its own logic. This fact, coupled with the decentralised despotism of the colonial state, left the postcolonial elite (and society at large) bereft of any experience with democratic governance. But, the fundamental problem was rooted in what became the post-colonial crisis, that is, the tensions born out of the challenge of acquiring and maintaining the right to rule fragmented societies corralled into unwieldy political entity known as Uganda.

2.1.2 *Structure of society*

The structure of society is very central to the organisation of politics, administration and economy. African societies are amongst the most pluralist in the world, comprising as they do a diversity of tribal, ethnic, cultural and religious groups, different traditions and people divided along urban and rural lines. It would therefore appear to follow that African states would manifest a healthy legal pluralism reflecting the diversity –but reality demonstrates that this is not necessarily a logical conclusion.³⁴

Uganda as a nation is a mere geographical expression and a creature of British colonial administration. The 64 different indigenous communities now inhabiting the country were brought together during the colonial period. These societies had different languages, cultures and social systems. The colonial state disfigured these pre-colonial centralised polities and the traditional decentralised power.

Uganda is also evenly divided along, religious lines i.e. Roman Catholic, Protestants and Muslims. Religion had been entrenched in the political, social and economic status quo of Uganda since the beginning of the twentieth century. Another historic division has been between the northerners, the rest of Uganda and the Baganda. The early broad-based NRM government, sought to incorporate a wide spectrum of political, ethnic, religious, and other interests, unfortunately, the involvement of masses in government remains minimal, undermining the claim to broad-based government. As Tripp put it;

³³ Tarsis Kabwegyere *The Politics of State Formation* (1974)179.

³⁴ Sammy Adelman *Constitutionalism, Pluralism and Democracy* (1998)73.

As much as Museveni attempted to distinguish himself from the dictators that had ruled Uganda before him, he espoused the same kind of anti-sectarianism that Amin and Obote had adopted and was ultimately challenged by the same dilemmas they faced in trying to create a workable ethnic matrix.³⁵

In fact opponents of Museveni said his anti-sectarian stance was nothing more than populist rhetoric and that he was playing the ethnic card just like his predecessors, only with greater finesse. However, as the legitimacy of NRM, and Museveni waned, the president sought more expedient, narrower, and ever shifting alliances to ensure his own security and political future, as well as NRM dominance. He had to cater not only the citizenry but also the realities of remaining in power. Eventually the objective of inclusive governance came into conflict with the imperatives of remaining in power.

2.1.3 *Economic structure*

Economic structures in addition to other structural impediments threaten the survival of constitutions. For example, constant or worsening economic crises have produced popular and elite discontent and state dependence on external aid, both of which gave political conditionality. Donor countries sometimes use aid as a leverage to pressure a developing country to carry out certain political and social reforms.³⁶ In other words dire economic conditions promote the conditions and changes required for change, but paradoxically impede the ones that favour the endurance of constitutions.

Uganda's economic history has gone through four distinct episodes since independence. The economy has undergone major fluctuations from a vibrant economy in the 1960s, to suffering severe macroeconomic imbalances, including high rates of inflation and balance of payment deficits in the 1970s and 1980s, to enjoying an economic revival since the late 1980s. In the late 1980s it was struggling to end a period of political chaos that destroyed the country. Successive governments had proclaimed their intention to salvage the economy and attract the foreign assistance necessary for recovery, but none had remained in power long enough to succeed. Uganda is one of the poorest countries in the world heavily dependent on foreign aid. Therefore, thirty per cent of the population lives in extreme poverty and donors fund about 45 per cent of the national budget.

³⁵ Aili Tripp *Museveni's Uganda, Paradoxes of Hybrid Regime* (2010) 39.

³⁶ Stephen Brown *Foreign Aid and Democracy Promotion Lessons from Africa* (2005) 181.

Agriculture is the most important sector of the economy –employing over 80 per cent of the work force. Thus, agricultural production based on peasant cultivation has been the mainstay of the economy. Majority of Ugandans depend on the land, often as subsistence farmers. Similarly the industries that developed before 1970, were adjuncts to cotton or sugar production, and were not major contributors to gross domestic product (GDP).

Uganda has received about \$ 2 billion in multilateral and bilateral debt relief. In 2007 Uganda received \$ 10 million for a Millennium Challenge Account Threshold Program. Be that as it may, in Uganda and elsewhere in Africa, the efficacy of governments is very much a function of the opinion of the international community. Because African countries are poor and depend on foreign support, they have no choice but follow their conditions.

It seems an undeniable paradox that the return of national liberal democracy to the African continent has been paralleled by an increasing transfer of power and influence over policy matters to international actors³⁷.

Between 1991 and 1996, the NRM shifted gears in its macro-economic policy, turning from economic statism mandated by the IMF/World Bank to a more liberal philosophical approach. During this time, the economic reform now became “Ugandan owned” as Museveni built a pro-reform coalition.³⁸ These neo-liberal economic policies signalled an unmistakable change in NRM ideological orientation. The movement was gradually shedding its progressive, populist philosophy of the early years and moving to the right of center as the interests of its clientelist class (together with those of the donors) gained prominence in defining the political agenda.³⁹

Therefore, uneven socio-economic structure became unfavourable for sustainable and successful democratisation and constitutionalism in Uganda. Pressures and economic crisis may cause splits within the elite, creating opportunities for the opposition to mobilise and claim new legitimacy for itself while weakening the bargaining power of the incumbents.⁴⁰ Rural poverty and unemployment were, and still remain, a source of ever growing rural migration to the urban areas, increasing the number of urban poor who have constituted the recent demonstrations (walk to work) and strikes which have organised counter-reform

³⁷ Mbabazi, Mugenyi & Shaw “ *Uganda Elections 2001: Lessons for/from Democratic Governance* (2001).

³⁸ S F Burgess *Structural Adjustment and Economic Reform* (ed) Kaiser & Okum (2004).

³⁹ Joshua Rubongoya B *Regime Hegemony in Museveni's Uganda* (2007)123.

⁴⁰ Haggard S & Kaufman *The Political Economy of Democratic Transitions* (1995).

activities. Labour also has been weak and unorganised to be a force for change in most countries. As Mahoney argues, the history and practice of democratization suggests that “working-class strength depends on its organisational ability to form coalitions with other class actors.”⁴¹ Uganda’s working class has remained relatively ineffective in recent democratization.

2.1.4 *Constitutional design/structure*

Certain aspects of constitutional design may also generate the type of events that affect the durability of constitutions. Design factors are those relating to the content and drafting process of the constitution. The design of institutions that will meet the needs of a nation is of central concern to constitutional stability. The 1995 constitution provisions were by and large based on the wishes of the people as expressed in their views to the constitution commission. In the Constituent Assembly, most of the provisions in the constitution were adopted by delegates through consensus. However, a few controversial provisions were resolved through majority vote and some of them continue to attract controversy, debate, and challenge in courts of law.⁴²

Among the controversial provisions was the political system especially the issue of suspension of political party activities, the referendum on political systems, the entrenchment of the movement system in the constitution, separation of powers, federalism, and the issue of land. All these, with the excessive accumulation of powers by the executive branch, have contributed to the failure of democracy and constitutionality in African nation states.⁴³

The above notwithstanding, entrenched in the 1995 constitution of Uganda was the “no-party” Movement system of government, based on personal merit rather than on organised political action. This led to the restriction of political party activities under Article 269 of the constitution which had implications for the fundamental human rights to freedom of assembly, association, and expression.

The *principle of separation of powers* is premised on checking the amount of power in any individual or group’s hands, making it difficult to abuse such power. An independent judiciary and the notion of the supremacy of law all work together to ensure that the letter

⁴¹ James Mahoney “*Knowledge Accumulation in Comparative Historical Research* (2003) 165.

⁴² Benjamin O in Oloka-Onyango (2001)263

⁴³BA Munna *The Challenge of Democracy in Africa: Establishing Democracy in Multi-Ethnic and Multi-Tribal Societies* (2006) 6.

and the spirit of the constitution are honoured in the workings of a constitutional government. The constitution of Uganda enables the executive to function without being checked at every turn. Executive power in Africa is overwhelming partly because leaders do not believe in constitutional provisions that simply limit their powers.⁴⁴ The president combines a wide range of powers. In 2004, he was the head of state and head of government, commander in chief and part of the parliament. A bill passed in parliament could not become law without his consent. He appoints a wide range of officials, including the ministers and the vice president who together constitutes the cabinet.

The adoption of the first –past-the-post electoral system endorsed by the constitution and the Electoral Law has also attracted some controversy. Although one of the essential democratic choices is the kind of the electoral system, there is no clear explanation as to why, for instance, another form of plurality/majority electoral system or even the proportional electoral system or a mixed electoral system was not adopted by the constitution. Prominent scholars on constitutional design in fractured or divided societies have advised against pluralist and in favour of proportional electoral systems. According to Lewis, ‘the surest way to kill the idea of democracy in plural society is to adopt the Anglo-American electoral system of first-past-the-post’.⁴⁵ Despite the fact Uganda is a society divided on religious and ethnic cleavages, the drafters of the constitution opted for the most extreme form of the plurality electoral system, the first-past-the-post.

In 2004 while the Constitutional Review Commission (CRC) had recommended that Uganda should retain the executive form of government but that the president should not exercise any legislative, the government proposed that the president should exercise limited legislative powers and that the right to exercise such power should be granted to the president through an act of parliament without requiring amendment of the constitution. This recommendation raises concern that the president would be given powers, albeit limited, to make laws, thereby undermining the principle of separation of powers and the role of government.

The CRC also recommended that presidential term limits stipulated in the constitution should be lifted a contentious issue that had been advocated by the state. The idea of lifting term limits was not widely accepted by Ugandans. A number of groups opposed this proposal. Even the chairperson of the CRC, Prof. Frederick Sempebwa, wrote a minority

⁴⁴ Sabiti Makara *The challenge of building strong political parties for Democratic Governance in Uganda: Does Multiparty politics in Uganda have a future?* (2009)57.

⁴⁵ Lewis A *Politics Of West Africa*, (1965)71.

report opposing the lifting of the term limits. The provision on presidential term limits was amended even before president Museveni under whose incumbency it was made had not been succeeded. This matter has far-reaching repercussions for the state of constitutional stability and observance of rights in Uganda.

In the 1995 constitution, political lines were also drawn between federalism and decentralisation to address the question of cultural identity, concerns, aspirations and development. Within the CA, however, the Buganda representatives had mixed feelings about federalism as some were not ready to give up Uganda's republican identity. The NRM sought to pre-empt the CA debate on the subject by passing a traditional Rulers statue in 1993, which allowed for the restoration of traditional rulers as cultural leaders.⁴⁶

Federalism has continued to dog Ugandan politics even after the constitution was enacted. Continued pressure for federal system from Buganda resulted in a government proposal for regional parliaments in federal system for Buganda, Busoga, Toro and Bunyoro.

In 2005 a constitutional Amendment was passed to create regional tiers throughout the country as a layer of administration above the existing district system funded by central government. Regional leaders would be unable to tax the population, yet they were to be accountable to them. The regional bodies were to be in charge of secondary education, referral hospitals, cultural matters, inter-district roads, water and sanitation, and monitoring agriculture. A few days prior to the 2006 presidential elections, the Buganda leadership in Mengo rejected the regional tier arrangement, opting for their own version of autonomy, referred to commonly as "*federo*".

Unclear position on traditional Institution has caused the constitutional instability in Uganda. For centuries, the regional kingdoms of Buganda, Toro, Bunyoro and Ankole constituted the apex of political organisation in Uganda. Among these, the Buganda kingdom was considered the strongest and most influential. The status of these tradition institutions has been a thorny issue in the constitution history of Uganda. Their demands were to some extent adhered to in 1993 when the incumbent NRM government decided to restore traditional rulers. Opposed to the political character of the institution in the past, the restored institution of kingship was defined to cultural functions. This implied that the institution changed from being a functioning state within the Ugandan state, to an institution located outside the political

⁴⁶ David Mukholi *A Complete Guide to Uganda's 4th Constitution of Uganda* (1995)33.

sphere and the formal state structure.⁴⁷ This unclear position on traditional institutions has caused a lot of uncertainties and affected the politics of Uganda.

2.1.5 *Regime type*

Since the end of the colonial rule in Africa, African states have been dominated by authoritarian and military regimes with few or no liberties to the citizenry. In the 1990s, changes took place on the continent, with a critical shift away from authoritarian and military regimes to less dramatic regime systems. Uganda just like most African countries is such a hybrid regime situated at crossroads between democratisation and authoritarianism, rarely if ever reverting to full-blown authoritarianism of the kind we saw during Idi Amin's rule in Uganda-but rarely transitioning fully to democracy either.⁴⁸ These contradictory understanding of what had transpired in Uganda since Museveni took over reflect some of the paradoxes of hybrid regimes. They are neither autocracies of the past, nor are they fully democratic. They range from semi-democratic to semi-authoritarian along spectrum of hybridity creating a duality of key elements of both democratic and authoritarian regimes. Political scientists William Muhumuza sums up the contradictions well;

Museveni's government created an impression that it was on a steady path to strengthen democratic institutions...Nonetheless, these institutions have ended up being used for propaganda purposes, they have not been enabled to perform their duties independently. Therefore, Museveni's motive to retain power in a pseudo democratic dispensation has significant implications for Uganda's political future... Personalisation of power leads to authoritarianism and corruption that may reverse Uganda's current gains⁴⁹.

Increasing authoritarianism and the NRM party dominance in the politics of Uganda clearly deviates from the pluralism and democratic tone of the constitution and therefore undermines constitutional stability.

Uganda is also a neo-patrimonial regime. The only distinctive character of Uganda compared to other neo-patrimonial regimes is its military domination. The term Neo-patrimonialism denotes a political system in which the outer appearance and the institutions of legal-rational

⁴⁷ S S Kayunga *The No-Party System of Democracy and the Management of Ethnic Conflicts in Uganda* (2001).

⁴⁸ Aili Tripp A (2010)1.

⁴⁹ William Muhumuza " From Fundamental Change to no Change: The NRM and Democratisation in Uganda (2009)25,40. 40

state are in place, but where the actual power rests on a deeply embedded patrimonial logic, on informal power relationships based on patron-client relationships, favouritism and loyalty.⁵⁰ Uganda has been understood by Africanists as deeply embedded neo-patrimonial state, attributing the slowness of and resistance to the process of democratisation to continued patrimonial logics such as presidentialism and clientelism. Neo-patrimonialism and democratic institutionalisation are opposing logics in analytical terms. Stability is lacking, constitutions are changed or ignored at the whim of individual leaders.

2.1.6 *Global Context (structure)*

The constitution of any one country is often influenced by, and must be interpreted and operationalised within the broader external context and arrangements. With many countries in Africa becoming independent, the “great powers” with Britain in the lead, realised that they could induce and govern, by various informal means, the formation of legal and political regimes in non-European countries which would function to open resources, labour, and markets to free trade dominated by economic competition among European powers without the need for the expensive and increasingly unpopular old imperial system of formal colonies and monopoly trading companies.⁵¹

After decolonisation, a new, non-colonial ensemble of global institutions came together to govern the persisting imperial network of relationships of dependency, inequality, and economic exploitation. Through this dependency rich nations manage to influence poor countries through the different sectors of society. Gallagher, Robinson, and Mommsen stressed the importance of imperially imposed legal and political institutions in dispossessing non-European peoples of popular sovereignty over resources, labour, and markets and opening them to the informal paramouncy of the great powers and their trading companies.

African leaders who support global market economy will always get support from these global powers. Western powers have been apathetic in making sure African leaders learn the democratic principles. Instead, the West helps them strengthen their oppressive regimes, perhaps because the western powers still need to exploit their resources. This explains why these Western countries play a certain role in the political decision-making and agenda.

⁵⁰ Inge Amundsen *Corruption and Lack of Political Will and the Role of Donors*(in Uganda)11

⁵¹James Tully *Modern Constitutional Democracy and Imperialism* (eds) Loughlin M Neil W *The paradox of constitutionalism: Constituent Power and Constitutional Reform*(2007)462.

These global powers are also ready to support anybody who is in support of their war on terrorism irrespective of whether they practice democracy or respect their constitutions. Yet, the anti-terrorism laws and human rights protection is one of the most controversial issues in the contemporary international legal and political environment. Terrorism incites governments to take measures that too often disregard to greater degree human rights, there by undermining the very foundations of democratic societies. In Uganda, the NRM government uses the need to combat terrorism as an excuse to incriminate political opponents and civilians.

In addition to the above, many new constitutions in Africa, human rights and freedoms provisions are largely shaped by progressive international norms, principles which are largely evident in the final products robust of rights. Therefore, constitutions fail to work because they are not fine-tuned to the realities of society. There is need to draft constitutions that are based on the local realities rather than on some intellectual or academic provisions found in other societies books on constitutional law.

2.2. Agential factors

2.2.1 Political Leadership

President Museveni as a leader of the NRM government, has relentlessly influenced the politics of Uganda and the constitutional making process. Though the 1995 constitution curbs presidential powers, in practice, the president wields considerable power over parliament. There is limited separation of powers to check the powers of the president. Regarding the personality issue of President Museveni, the former UPC Chairman of the Presidential Policy Commission James Rwanyarare observed:

President Museveni had a personal hand in the making of the constitution: First of all, he wanted to continue entrenching his movement system of government in power thereby fighting with all his mechanics to influence the constitutional debate proceedings. He was the architects of the whole thing of the movement. He helped in the defeat of federalism in Uganda which UPC and other political organisations supported. He personally met the then Sabalangira Besweli Mulondo who had a last card for the federal ticket to pass through. This was after president Museveni discovering the

Federo will pass through with a nod of the UPC and other opposition parties.⁵²

2.2.2 State Agencies

State agencies too can influence the constitution-making process. In Uganda the laws providing for Uganda's constitutional commission and constituent assembly provided key roles for a minister of constitutional affairs, supported by the public service department (the ministry of constitutional affairs). The Uganda constitutional commission statute of 1988 then gave the minister a number of significant roles in relation to the commission. To make matters worse, there was no provision in either of the statute guaranteeing the independence of these constitution-making bodies. The difficulties with arrangements giving government authorities key roles in establishing constitution-making bodies is that those bodies then take center stage and even interfere in the operations of the constitution-making bodies.

Constitutions commissions, electoral commission which play an important role in democratization, have also been influenced by having ex-officio representation. For example the twenty-one-member Uganda constitutional commission included two ex officio members, one a senior army official, and the other a senior official in the ruling party secretariat. Some members who were appointed by the minister for constitutional affairs were not approved by the president, and some were appointed by the president without approval of the minister, as required by the Uganda constitutional commission Act of 1988. There was no nomination process allowing anyone else to suggest names.⁵³ The most obvious dangers arising when particular governmental interests are represented directly in the constitution-making bodies involve pressure to protect government political interests generally, or pressure to protect the interest of particular parts of government (for example, the interests of the army, or of the attorney general etc.).

The Uganda police and army (UPDF) have also played a prominent role in politics. Militarism was and has been employed as a means of capturing and maintaining power. The army is “*part of everything*” there is no clear divide between the army and politics. It is also at the core of the electorate and political system and also represented in parliament. Likewise

⁵² Interview with James Rwanyarare(2009)

⁵³ Furley & Katalikwe “*Constitutional Reform In Uganda: The New Approach*”(1997)24

the police have been militarised in maintaining law and order. This has eroded the relative degree of democracy and pluralism.

Excessive accumulation of power by the executive has undermined the role of the executive and the judiciary. Institutions of representation have become “rubber stamps” since members of Parliament and the Judiciary are mostly cadres of NRM. It is therefore, not surprising that a chief Justice who is supposed to be the custodian of the 1995 constitution has recently accepted to be appointed unconstitutionally even when the constitution is very clear on retired age. The executive, legislature and the Judiciary have been fused and yet the independence of the three arms is key to good governance and constitutional stability.

2.3 *Ideational factors (old wine in new bottles)*

Practices are informed by the thinking. Museveni’s political and philosophical concepts are encapsulated in some of his utterances and writings. Museveni came to power by violence and has retained power through the abuse of it. He believes in violence as means “to liberate the people”. He has now established an authoritarian regime to enable him hang on to power.

Museveni is a Marxist in ideology although capitalist in economy. Although his Marxist ideology soon gave way to a more neoliberal mentality, in many ways forced upon him by the international Monetary Fund in return for aid. President Museveni and NRM were and still are ideological communists. Communists believe in monopolisation of power. Paraphrasing Fidel Castro, communists hold the view that “Within the party, Everything. Outside the party, Nothing”. Prior to the commencement of the so-called multi-party dispensation in 2005, NRM was the quintessential communist party. Every Ugandan was deemed to be of the NRM. There is no legal differentiation between party and government. Not much has changed since 2005.⁵⁴

Although there is no war in Uganda, militarism as an ideology is present. Violent conflicts, the most harmful manifestations of militarism as an ideology creates culture of fear and supports the use of violence, or military interventions for settling disputes

Therefore, NRM regime is nurtured in that kind of thinking. It does not believe in liberalism. You have a constitution which is liberal and yet the thinking is illiberal. This definitely leads to conflict between laws and politics and sometimes constitutions being abrogated,

⁵⁴ Article in the Daily Monitor on Feb.9(2010).

suspended, amended or subverted because the thinking is not in line with how the constitution is designed.

2.4 Conclusion

The Uganda's 1995 constitution is a good case explaining why constitutions in Africa do not stand the test of time. The context in which the constitution is written and operates in Africa and Uganda in particular determines why the constitutions do not stand the test of time. The contextual factors above, which are the structural factors, were measured by the structure of society, historical legacy, constitutional structure/design, regime type, social-economic, and the global context/structure. The paper argues that Uganda's constitutional instability in Uganda has largely been determined by the structural factors. The Constitution has links to three factors, which in different ways are integral and shape the constitution i.e. state, society and economy. The state and its structures are in themselves the principle object of a constitution. The economy is an underlying, and sometimes an overt, concern and theme (and often the Ideology) of the constitution. Society is the maker or recipient of the constitution. I argue that this interaction maybe the key to understanding the potential of the constitution and to explain its success and failure.

However, there are other contingent factors like agential factors which were examined in terms of leadership capabilities, the state agents (institutional level), and the intellectual discourse (ideational factors). Although human agency remains the critical instrument in rearranging social structure to meet human needs in the realm of politics and economy, *structures* both enable and limit human agency, and *actors* can choose how to use structural resources. Structural factors, Linz and Stephen argue, "Constitute a series of opportunities and constraints for social and political actors."⁵⁵ Ideas too are powerless unless they are fused with material forces. Ideas are connected to their social settings, institutions and social groups. Therefore context is of paramount importance since the constitution must be matched to a country's political, social, and economic conditions. As Karl Marx once said " Men make their own History, but they not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past."

⁵⁵ Linz & Stephan "Crisis , Breakdown, and Equilibrium." *In the Democratic regimes: Crisis, Breakdown and Re-Equilibrium* (1978)4.

Therefore, the paper identified the context factor as the fundamental factor in explaining constitutional instability in Uganda. However, other contingent factors like agents and ideas have also contributed to the constitutional instability. Thus, the complex and dialectal interactions between structural, agential and ideational factors and how they help or hinder constitutional stability have been examined in this paper.

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