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UNPACKING CONSTITUTIONALISM: PERSPECTIVES FROM THE GLOBAL SOUTH

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ABSTRACT

The focus of this paper is the theory of constitutionalism, a philosophy based on the classical liberal idea of the social contract that finds expression in modern concepts like quality of democracy. The conceptual relationship with associated notions like good governance, rule of law, political pluralism, and quality of governance is delineated. These important notions form the foundation of a constitutional democracy and shall be discussed with examples from Africa. In this paper, the philosophical and theoretical rationale for constitutionalism is interrogated. The paper establishes that there is relationship between constitutionalism, good governance, rule of law, political pluralism. Based on theoretical rationale and constitutionalism it was concluded that the quality of government judged from the institutional practices of an impartial state.

Keywords: *Doctrine of Constitutionalism, Quality of Democracy, Good Governance, Political Equality and Political Morality.*

INTRODUCTION

For post-independence Africa, the predicament was European assumptions of neatly bound and culturally homogeneous 'tribes,' an ill-fated presupposition that negatively affected political development on the continent after political independence. Berman (1998:306) clarifies this when he states, "Even as they denounce 'tribalism', African politicians, in open secret of African politics, sedulously attend to the maintenance of the ethnic networks of patronage that are bases of their power," thus creating partial states that advance ethnic interests at the cost of unity. This partly explains why the classical social contract theory and meaningful constitutionalism have not taken firm root in post-independence Africa. In this chapter, the theory and practice of constitutionalism as the underlying rationale for quality of government, good governance and democracy is unpacked.

Development of the Doctrine of Constitutionalism

Constitutionalism can be traced in the works of classical theorists like John Locke's (1690) *The Second Treatise of Government: An Essay Concerning the True Origin, Extent, and End of Civil Government*, Thomas Hobbes's (1661) *Leviathan*, Max Weber's (1848) *Politics as Vocation*, John Stuart Mill's (1861) *Representative Government and Utilitarianism*, Montesquieu's (1748) *The Spirit of Laws,* as well as other contemporary writers including Rawls's (1971; 1993; 1999) *Justice as Fairness, A Theory of Justice* and *Political Liberalism*; and Dworkin's (2009) *Justice for Hedgehogs*.

At the core of social contract theory are principles and justification for the existence of public power and authority. The beginning of the scientific movement in Western Europe implied that human history is a continuous process that from time to time shows developments that bring about profound changes in state-citizens relationships. The earliest recorded move towards formal constitutionalism was in revolutionary France (Richards 1979:24).

For the present purposes, the gist of the analysis suggests that freedom from domination by nature or social institutions is necessary for genuine human development. Anything that subordinates people against their will to the forces of a natural or social environment is inimical to the existence of a truly human social life and therefore is to be resisted. Stage-by-stage, classical political

thinkers have contributed towards the development of constitutionalism as articulated in the context of various themes, including "the search for justice; the nature of sovereignty; the state of nature and early political society; the origin and role of property; and liberty and equality" (Brown 1990:8-10). Brown's (1990) argument helps to explain the value of the social contract theory in contemporary times: There was the need for citizens to have a legal means of expressing and correcting their grievances against the state, corporate legal entities and individual wrong doers. In this regard, constitutionalism provides the possible means by which the quality of governance and democracy could be improved through appropriate and functional state institutions. In modern times, science and technology have provided unprecedented ways for the free flow of information, goods and services, together with complicated dynamics around human inequality. This is articulated by Rawls (1971) who shows that citizens require improved terms in the social contract to assert their rights, duties and responsibilities.

The history of the doctrine of constitutionalism as opposed to absolute monarchy was a recurring theme in classical political theory, most notably during the late 17th century England and 18th century America. It was expounded in writings of, among others, John Locke, Thomas Hobbes, Montesquieu, and the framers of the United States of American Constitution, particularly James Madison, and later on in the works of figures like Benjamin Constant, Alexis de Tocqueville and John Stuart Mill (Brown 1990). For Montesquieu (1748), as indicated in his discourse in *The Spirit of Laws,* constitutionalism is concerned with a view of political liberty and the doctrine of separation of powers, namely the legislative and judicial branches of public power, that are necessary in for social justice. In this regard, Gatmaytan (2009:32) outlines the five core elements of constitutionalism as the recognition and protection of fundamental rights and freedoms, separation of powers, an independent judiciary, the review of the constitutionality of laws, and the control of and the amendment of the constitution. These core elements of the doctrine of constitutionalism define channels through which citizens' liberty is promoted, protected and fulfilled.

By political liberty, Montesquieu (1748) means "a tranquillity of mind arising from the opinion each person has of his safety." Montesquieu's argument emphasises that citizens' minds cannot be at rest if two or three kinds of governmental power are held in the same hands because it will undermine representative democracy. Montesquieu further elaborates that although most

kingdoms in Europe are not representative democracies, citizens enjoy moderate governments, because "the prince, who is invested with the first two powers, leaves the third to his subjects." However, in Turkey, where these three powers are united in the Sultan's person, the subjects groan under the weight of a most frightful oppression as a glaring effect of constitutional failure. This comparison explains the value of constitutional theory as the foundation of citizens' liberty, equitable participation in their own governance procedures and continued defence of the terms of the social contract.

Machiavelli explains the impact of power on corruption by demonstrating, using historical examples from the Livy's *History of Early Rome,* how power corrupts (cited in Bondanella & Musa 1979:23). Machiavelli postulates that only special leaders could resist corruption arising from the exercise of power and does not emphasise the institutional restraints such as separation of power designed to help curb the abuse of power. Rousseau (1984:78) expands the understanding of how power corrupts, emphasising that politics should be a process of rising above self-interest to secure the common good. Rousseau asserts that the primary role of political institutions is to encourage and ensure that leaders work toward the common good. To John Locke (1977:xi), the common good, including political liberty, flourishes when there is no abuse of power. Experience has shown that every man vested with power is liable to abuse it. Locke shares the idea that government depends on the consent of the people with Hobbes (1977:14-15), wherein people agree with each other to surrender their natural freedom to a sovereign. Locke (1690:xi) goes much further to postulate that there must be limits to the power of government to protect the rights and freedoms of the individual. He relies for this on dividing up government into branches so that no one branch can be dominant over the other. This is the basis of the principle of separation of powers in a constitutional government.

The Doctrine of Constitutionalism and Good Governance

Constitutionalism underlines the rights and duties of citizens and illustrates the value of social stability and competent governance in such a way that powers of state are separated with clear limits, checks and balances. This section unpacks the conceptual relationship between good governance and constitutionalism. This approach explains why Bireete (2013:1) contends, "Constitutionalism is the idea that government can, and should, be legally limited in its powers, and its authority depends on observance of these limitations." The argument is consistent with

Gatmaytan's (2009:31) three principles of constitutionalism, namely, the limited government principle, the supremacy principle and the entrenchment principle. Bireete's (2013) contribution means that government itself should be subjected to the governance of law and required to abide by institutional mechanisms and recognize individual rights and freedoms and that limitations on state power cannot be subject to change by recourse to routine political processes. Its relevance is the promotion, protection and fulfilment of good governance.

For that same reason, the term good-governance refers to efficient, effective accountability and is sensitive to a citizen's participation rights based on rules in areas of state-society managerial perspectives that go hand-in-hand with respect for human rights. So, the essence of constitutional government is delineated governance founded in a prescribed division of powers but complimentary authority among public officials. Consequently, the contentious social contract-related issue is official institutions providing arenas for the political negotiation on various issues driven by conscientious and organised groups in society.

For explanatory purposes, Kanyeihamba (2010:263-266) clarifies that for good governance to be realised, constitutionalism must be respected in society where the legislature, the executive and the judiciary are independent but complimentary. In addition, the argument means that the legislature is the body within a state that is entrusted with making decisions that define new laws and alter existing ones, while the executive is the body in the state that is entrusted with the practical administrative functions of government in accordance with the constitution and laws of the state. Kanyeihamba further asserts that the judicial function consists of the interpretation of the law and its application by rules or discretion to the facts of particular cases. This clarification explains why the judiciary must not only be independent but also impartial in executing its functions.

The major role of the judiciary is to determine the legality of the different kinds of acts and behaviour of as well as the rules or laws government will enforce in society. Kanyeihamba (2010:263-266) submits,

The relationships between the three organs of government, on the one hand, and between the organs and citizens, on the other, are guided by two formulae of good governance and freedom, namely the doctrine of separation of powers and the theory of the rule of law.

These vivid attributes of good governance compliment efforts to ensure the liberty and the fundamental rights of the individuals under the conventional rule of law arrangement. The relationship between the doctrine of constitutionalism and good governance is a liberal idea fostering legitimacy of government, guarding against diffusion, discouraging oppression and tyranny, and promoting efficiency of public administration. The international IDEA Framework (2001:26) summarises this relationship and shows how "citizenship, law and rights; representative and accountable government; civil society and popular participation; and democracy beyond the state" are important variables fostering the quality of democracy. This analysis justifies the value of trustworthiness among public officials as an issue of central concern. This standard regulates all civil states' internal policies and the sovereignty of citizens and institutions of governance built along procedural international legal norms, especially the principle of separation of powers.

In a viable democracy, none of the three organs of state can usurp the authority and power assigned to either of the other because they all operate in harmony and promote cooperation. In that broad way, "Liberty can only be found in societies where there is no abuse of powers" (Kanyeihamba 2010:273). In the same vein, Clare Stansfield (2013:29), in her *Political Ideologies: the Development of Modern Liberalism* relates the doctrine of constitutionalism to good governance and specifies its outcomes as equality of opportunity, positive freedom, enabling state, developmental individualism and qualified welfare. This can be realised in a society where the separation of powers is promoted, protected and fulfilled. Stansfield's contribution gives more meaning to the relationship between constitutionalism and good governance by emphasising the creation of a constitutional environment conducive enough to the individual to flourish. In that regard, like Kanyeihamba (2010:269) on rule of law, Dyzenhaus (2013:58-81) argues that the rule of law is the rule of the liberal principle which has been adopted by practitioners as a benchmark for good governance following the social contract tradition.

To be specific, Governance Pro (2010:1-2) categorically states that good-governance has eight major characteristics, namely, rule of law, transparency, responsiveness, consensus orientation, equity and inclusiveness, effectiveness and efficiency, accountability, and participation. The essence of the argument is that good governance is an idea difficult to achieve in totality. This constraint is attributed to the fact that good governance typically involves well-intentioned people who will freely bring their ideas, experiences, and other vital human strengths and shortcomings

to the policymaking table. The emphasis is that good governance is achieved through an ongoing discourse that attempts to capture all the considerations involved in assuring that stakeholders' interests are addressed and reflected in policymaking and implementation initiatives. For example, the colonial policy initiatives were linked to globalisation through colonial administration structures reflected in the well outlined arrangement involving the allocation of financial and technical resources for development and welfare (GOU 1946:47). Furthermore, in *A Development Plan for Uganda,* colonial development plans and programmes identified improved transport as part of "the fundamental problem" involving maintaining steady public administration without resorting to calls for outside assistance. The colonial policy initiatives were the foundations of stabilisation and the law and order drive later adopted by post-independence governments towards improvements in the social services and transport sectors in Uganda (GOU 1946:67-72). At the time of this study, the effective intervention was more pronounced in the budget proposals emphasising building standard gauge railway and maintaining major trunk roads in Uganda. Improved transport has been a priority because the country has struggled to adjust to the rule of law even in the traditionally hard to reach remote areas. Improved transport facilities are considered vital to linking the country to regional and global markets and governance. The railway and roads networks in Uganda have improved, making the different formerly remote areas accessible, and the development boosted economic growth and tourism. Based on the colonial administration's five-year development plans strategy, adopted by self-rule governments up to 1975, changes towards improved quality of governance played a major role in transforming Uganda's economy socially, economically and politically.

Contemporary Thinkers' Contributions to the Doctrine of Constitutionalism

This present section links contemporary thinkers' contributions towards the development of the doctrine of constitutionalism with the notions of quality of governance and procedural democracy. Its focus is on constitutionalism in this age of intensified globalisation and global governance mechanisms with a specific focus on ideas on human rights, good governance, effective states, tackling inequality and intellectual property rights, and taking into account international finance and trade institutions encompassed in the World Bank, International Monetary Fund (IMF), UN, and IDEA. The globalisation process came with the advancement of ideas that allowed the best

form of government-society relationships. Influential drivers of globalization, such as the World Bank, tie developmental aid to good governance parameters such as respect for human rights.

According to Thomas Baker (2004:58), constitutional theory helps overcome the challenging state-citizens relationship that has proved problematic, especially when good governance indicators are invoked. Baker asserts constitutional law shapes history, re-invents nations, regulates state institutions, and promotes an audience of even dissenting opinions. Furthermore, constitutional law elaborates, revises and sometimes overrules previous understandings; it resembles a kind of civic religion for nations. The context is constitutionalism shaping the quality of civic government. Contractual political theories, like those of John Locke, Thomas Hobbes and Montesquieu, emphasise an idea that government can and should be legally limited in its powers and that its authority depends on the observance of those restraints. The focal term is constitutional restraints because it is used in reference to in-built institutional checks and balances on the actions of state agents, especially when dealing with the citizens or public authority and resources. The presence of institutional checks presupposes that the state is built on institutions. The problems of many countries in Africa is that there is a general lack of viable state institutions, whereas countries such as the United States have powerful institutions that suffer from political decay (Fukuyama 2004:5, 7, 455).This, according to Fukuyama (2004:7) means that government institutions that were supposed to serve public purposes had been captured by powerful private interests, such that democratic majorities had difficulty asserting their control. The problem is not just that of money and power; it also has to do with rigidities of autocratic rule and the ideas supporting autocratic rule.

Fukuyama's (2004) observation has implications for constitutionalism because any state must have an acknowledged means of constituting itself. Those ways specify the limits placed upon the three arms of government so that they can serve the broad common good rather the interests of a few. Thomas Baker (2004:58) argues that "It helps us to understand...decisions and helps us to cope with the elaborate and often conflicting opinions." Therefore, constitutionalism is closely linked to balancing multiple interests in the realm of governance. Quality of governance is closely associated with the social contract tradition and promotion of democratic system of governments and citizenship rights. According to Mamdani (2004:109), the hallmark of the modern state is the civil law whereby the citizens' rights are guaranteed by law, and that constitutes a limit on civil

power. This would ensure that the social contract between the government and the governed does not result in arbitrary use of power, as Locke (1977:xii) postulates. Rawl's (1971) *Theory of Justice* develops the main idea as a theory of justice based on the works of classical social contract theorists including Locke's *Second Treatise of Government*, Rousseau's *The Social Contract* and Kant's *The Foundations of the Metaphysics of Morals*. From these foundations, Rawls (1971:4-10) articulates his own contribution to the social contract tradition and asserts the following:

They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further terms; they specify the kinds of social cooperation that can be established. This way of regarding the principles of justices I shall call justice as fairness.

At the core of Rawls (1971) argument is the articulation of the principles of justice in a society that is well-ordered and designed to advance the good of its members who are governed by basic public institutions. His conception of quality of governance is the effective regulation of public justice where everyone accepts and knows that others accept the same principles and public institutions harmonise diverse interests of members in society. Rothstein and Treorell (2008), in their "*What is Quality of Government? A Theory of Impartial Government Institutions*" gives credence to Rawls' (1971) idea of basic public institutions as a requirement for good quality of government.

One way Rawls's (1971) proposition can be attained is to entrench political equality. This is amply demonstrated by Rothstein and Treorell (2008:170), who posit that political equality is a basic norm for legitimatizing democracy in general. Rothstein and Treorell claim that as long as the principle of equality in the access to power is not violated, for example, by giving one specific political party the right to rule or by refusing to give some specific groups of citizens the right to stand for office or take effective part in the public debate, every country may adopt particular equitable modes of organising its constitutional paradigm. The result will be quality of governance, which enhances the quality of life of citizens. Rothstein and Treorell (2008:169) pose the question and provide the answers: "What is required for the quality of life enjoyed by citizens? Quality of governance. What is quality of governance? That which promotes the quality of life."

Jessop (1990:176-177) argues that "in practice democratic rights are often eroded by a number of very serious obstacles resulting from deliberate political action and/or the unintended effects of

particular institutional arrangements." For example, Kanyeihamba (2010:6-9) discusses the colonial foundations of structural power in the state in Uganda. He elaborates how traditional kingdoms that had assumed "voluntary and special relationship with colonisers through signing agreements" were amalgamated with non-kingdom areas through annexation. These varied procedures account for the subsequent patterns of public sector administration involving inclusion of some while marginalising the rest.

A close look at Jessop and Kanyeihamba observations calls for a discussion on and debate about the definition of the closely related concepts, namely, struggles for democracy and quality of governance. These were some of the values associated with the social contract tradition that has guided the rise and growth of African nationalism, ignited partly by exclusive colonial economic policies and development plans (Ayandele, Omer-Cooper, Gavin and Afigbo 1984:147-173). Ayandele et al.'s (1984) contribution explains the centrality of politics as being a vehicle of socio-economic and cultural transformation closely related to governance. This explanation is confirmed by Krahmann (2003:323) and Hendricks (2007:54) through linking changes in foreign fund donors' attitudes associated with conditionality for aid in Africa since the 1980s to the concept of good governance. Krahmann and Hendricks argue that a bloated centralised bureaucracy with weak institutions, lack of transparency and accountability, disregard for rule of law, and a general absence of democratic practices have been identified as the culprits for the continued crisis of the post-colonial state.

Central to Krahmann and Hendricks are the definitions and uses of good governance as tools for desired changes in state-citizens relationships. Their points of view focus on defining correctly and applying the concept of good governance as a very important variable in fostering and assessing the quality of democracy. An approach by the International IDEA (2001:24) gives a prominence to "mediating values." For desired changes in state-citizens relationships, the concept of good governance found fertile ground for acceptability in political science parlance because it emphasises citizens' participation and rights, authorisation of officials through fair and free electoral choices, and the building of public institutions that are socially representative. Complimentary attributes include transparency and accountability of all officials in a variety of institutions, responsiveness to public needs, and promotion of equality that finds expression in solidarity amongst citizens with inter-linkages to popular struggles for democracy abroad.

Common to these notions is the changing locus of political authority under the social contract arrangement because conscientious citizens can form governments and dissolve them (Goodman 2010:1). The focus of Goodman's (2010:3) argument is its effects on individuals' liberty, in so much as "moral people form governments for the express purpose of protecting their rights...legitimate governments are created by consent, but fundamental rights are not grounded in consent."

To clarify the issue of political authority, International IDEA (2001:20) asserts "democracy is a political concept, concerning the collectively binding decisions about the rules and policies of a group, association, or society." The relevance of this assertion is that such decision making can be said to be democratic to the extent that it is subject to the controlling influence of all members of the collective considered as equals under the social contract arrangement. Consequently, Rothstein and Treorell *(*2008) link democracy to good-governance and the quality of government institutions by holding the view that the three have a direct correlation with understanding economic growth and social welfare in developing and transitioning countries. Based on the analyses of political theory, Rothstein and Treorell propose a more coherent and specific definition of the quality of government. Their emphasis is on the "impartiality of institutions that exercise government authority." To place the theory of impartiality in a larger context, they contrast its scope and meaning with the threefold set of competing concepts of quality of government namely, democracy, the rule of law, and efficiency/effectiveness. These have been emphasised in matters of global governance especially by the UN, the World Bank, and the IMF (Hendricks 2007:54-71).

Constitutionalism in the Formerly Colonised Countries

In that constitutional self-ruling government context, the term post-independence countries specifically refers to those nations generally found in the global South, states whose formal origins were European colonialism. The central focus in this subsection is to analyse political development perspectives and the construction of a social contract in the former colonies. Categorically, post-independence nation-states have had exclusive power structures of alienation of their citizens shackled onto progress (Davidson 1992:290). This was a structural problem inherited from their former colonial masters who generally regarded the native populace as their subjects to be exploited (Ayandele et al. 1984:5). The colonial origins of these post-independence nation-states

have had largely debilitating influences on constitutionalism, especially in Sub-Saharan African countries. For example, Mamdani (1993:522-543) discusses the trend "from colonial reform to state-defined nationalism," whereby national governments assumed public authority but retained largely repressive laws and procedures of the imperial nature.

In the same vein, Harberson and Rothchild (2009:124) use data from World Bank Governance Matters Surveys to demonstrate a distinctively more mixed picture of Sub-Saharan democratisation, stateness and governmental performance. Their findings demonstrate that post-independence Africa became a continent of many paradoxes and contradictions, which is congruent with Oloka-Onyango and Nansozi's (2007:xi) proposition that "constitutional reforms in Africa were a bastardised process." Harberson and Rothchild's (2009) proposition parallels Kanyeihamba's (2010:240) view that "the social and economic analysis of the *personalised state* began to reveal interesting phenomena." It was indicative of Africa's post-independence curse involving "the new leadership of Africa … chose to survive longest by riding on the backs of the peasants, the poor and the ignorant. Those who questioned the new priorities were threatened with unleashing the military forces against them" (Kanyeihamba 2006:83). In constitutional terms, Kanyeihamba's observation was given credence by Oloka-Onyango (2007:233) arguing that "Africa needs to be understood as a continent of tensions," a contention Davidson (1992:243-265) describes as "pirates in power." From that panoramic view, post-independence African rulers have found it easy to change constitutions and limit fair competition for political power and citizens' participation. Using Uganda as a microcosm for the African situation, Kanyeihamba (2010:227-247) observes that "the metamorphosis of the NRM" involved corruption, intolerance of critical press and opposition groups and neglect of constitutional governance became increasingly prominent. Therefore, as time passed, those post-independence African bureaucrats managing states enacted laws regulating public order management procedures that largely infringed upon the rights of their citizens, contrary to the requirements of representative democracy (Kanyeihamba 2010:253-254). Those procedural hardships involving oppression by and injustices of public authorities bleached the principles of the social contract tradition.

This argument explains the strategic relational approach, and it accounts for the structuralist perspective this study adopts from Jessop (1990). Its importance is to demonstrate why in the perverted post-independence African situation, the populations suffered generally bad socio-

economic and political outcomes of bad governance. For example, Nuwagaba and Rutare (2014:17) illustrate how the bad quality of governance in Uganda between 1999 and 2003 was responsible for the low prices of agricultural products, unfair terms of trade on world markets, high costs of imports, poor marketing infrastructure, inadequate education system, unacceptable levels of unemployment and generalised disempowerment of citizens. The gist of Nuwagaba and Rutare's analysis is the disturbing data on poverty as the cause of bad human conditions in Africa by the UN Development Programme (2011), in *World Development Report Indicators*, and the Chronic Poverty Research Centre (2005), in *Chronic Poverty in Uganda: Policy Challenges*, where the country is rated among the poorest and least developed countries. Consequently, Nuwagaba and Rutare (2014:17-18) are concerned about the poor quality of life caused by chronic poverty affecting over seven million Ugandans. They state the following:

> ***Despite strides made in lowering the rate of poverty Uganda remains one of the poorest countries in the world ranking 161st out of 187 least developed countries, with a human development index (HDI) of only 0.446...the number of people living in absolute poverty has increased in real terms...effective demand is lacking.***

To reverse such dismay, Nuwagaba and Rutare (2014) strongly call for good governance that stimulates conditions for a healthy population equipped with skills and a high earning capacity to improve their production and effective demand.

Rule of Law and Protection of Constitutional Arrangements

Rule of law refers to generally observed dispositions to exercise public power pursuant to publicly known rules (Gatmaytan 2009:31). Whether at domestic or international levels, it denotes a principle of governance

Whereby all persons, institutions and entities, public and private, including the state itself are accountable to laws that are enacted publicly, equally enforced and independently adjudicated (Sanni, 2019:10). Therefore, rule of law is one of the tenets of the social contract and protection of constitutional arrangements. In that regard, Reynolds (1987:79) asserts, "Constitutionalism is the practical science of designing and balancing institutions of public power and authority so as to prevent monopolies of power or emergency of tyranny." Reynolds' contribution gives more credence to Rothstein and Treorell 's (2012:12) work about defining and measuring quality of

government; they concur that rule of law involves a set of stable rules and rights applied impartially to all citizens. Its deeper meaning is that democratic governments are obliged to encourage institutional tendencies towards impartiality, inclusiveness and responsiveness in the course of executing their duties.

Its implications led Olukoshi (2007:11) to assert that good governance programmes cover the institutionalisation of the culture of rule of law and the enthronement of a system of minimal government that are centred on the provision of security and state accountability among others. Rule of law thus embodies the crucial principles of equality before the law and fairness.

Discussing law and the state, meaning the intersection of the juridical and the political structures, Jessop (1990:68) contends that the state is a functional unity of legality and illegality and should not be reduced to a purely juridical structure. He focuses on the activity, role and place of the state whose variables stretch beyond law and juridical repression. Not only do some of its activities escape juridical regulation, but it also transgresses its own legality and allows for a certain rate of violation in other cases. He emphasises that "… the monopoly of violence enjoyed by the state means that it can modify the law or suspend its operation when necessary to secure class domination." However, once that monopoly of legitimate violence is applied irregularly, it attracts severe unintended consequences and in extreme cases, riots, armed rebellion and/or revolution, which are aimed at restoring respect for the doctrine of separation of powers as an institutional dividend. Therefore, rule of law gives the social contract theory its practical meaning in state-citizens' relationships as regulated by public institutional arrangements following the doctrine of separation of powers.

Kanyeihamba (2010:269-273) clarifies that "closely associated with the doctrine of separation of powers is the theory of rule of law." His clarification is that rule of law is a collection of ideas and principles propagated in so-called free societies to guide law-makers, administrators, judges and law-enforcement agencies. Therefore, the overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land. Kanyeihamba (2010:269-273) further clarifies, "The theory is particularly important in the developing countries where the activities of government often appear out of step with legal norms and the constitution." The constitution implies the social contract whose terms legally govern both

the ruled and the rulers. So, changes in the legal order of a given society determine processes and trends of socio-economic development in that society.

Elucidating the major tasks involved in strengthening the weakest segments of post-independence society, Kothari (1993:152-164) asserts the following:

History has shown very clearly that one cannot constructively transform a society from the outside. All genuine social transformations have been initiated from within the society, even though the genesis for transformation lay in the cross-fertilisation of ideas and experiences from different societies.

My argument is that the ability of a given society to carry out meaningful and appropriate transformation involving enforcing limits and control of state-actors is dependent on a number of factors, most importantly, respect of the rule of law. Rule of law promotes rights to citizenship, relevant quality education and gainful work. Rule of law restores commitment to political pluralism, strengthens civil-political and socio-economic processes, fosters fulfilment of orderly decentralisation of power and control, weeds out corruption, and ensures quality social service delivery for all. In political science parlance, diversity management implies political pluralism, which is the focus of the next section.

Political Pluralism and General Principles of Political Morality

Political pluralism refers to civil tolerance of multiple and alternative centres of power and control in a given society, which explains the controversies of the state. Political pluralism governs freedom of choice, relative beliefs and convictions or is simply the protection and appropriate management of diversity in the interest of freedom. Some call it "the broad social interest," "the public interest," "the common good" or just "the general will" of the people. Dunleavy and O'Leary (1990:7) assert the following:

Ever mindful of the state's capacity to be manipulated and transformed for oppressive purposes they may "blind," "tame" and "control" what Hobbes called Leviathan. On this view constitutional devices should be used to make the state accountable; institutional and social pluralism to divide and fragment its organisations and capabilities; and extensive popular participation in political formulation and implementation to dissolve the state in the citizenry.

Basically, Paul Franco (2003:492) articulates the idea of pluralism as value or tradition which covers "a complex whole that does not point in a single direction, nor is it self-consistent...a somewhat miscellaneous composition... a multi-voiced creature consisting of a variety of beliefs, many pulling in different directions or competing with one another." Dunleavy and O'Leary (1990:13) define political pluralism as follows:

… the belief that there are, or ought to be many things. It offers a defence of multiplicity in beliefs, institutions, and societies, and opposes 'monism' - the belief that there is or ought to be, only one thing. Pluralism begun as a philosophy that argues reality cannot be explained by one substance or principle. Similarly, political pluralism recognises the existence of diversity in social, institutional, and ideological practices, values that diversity.

In that regard, Mamdani (1993:519-553) ably discusses pluralism in the light of the right of association, focusing on the right to organise in general, and specifically, to form or join political parties, professional associations, and trade unions and participate in local governments. Therefore, freedom of association has been viewed as an intrinsic component of representative democracy (Fung 2003:516). The essence of Fung view is that associations form a principal part of the structure of civil society in which individuals deliberate with one another to form public opinions and criticisms of official policies and state actions. The core of Fung's contribution is the following:

Associations enhance democracy in at least six ways: through the intrinsic value of associative life, fostering civic virtues and teaching political skills, offering resistance to power and checking government, improving the quality and quantity of representation, facilitating public deliberation, and creating opportunities for citizens and groups to participate directly in governance.

When discussing institutions, social pluralism and culture, Dunleavy and O'Leary (1990:25-26) assert, "The ways in which a mass public controls its government and politicians has less to do with Parliament and constitutional constraints and more to do with elections, party competition and interests group activity." Their central argument is that a fundamental safeguard of democratic liberties is the cultural dispositions of a politically aware citizenry who are competent to organise themselves. Consequently, for the social contract to take firm roots in society, diversity has to be managed properly through reconciling a plurality of ideas and the activities and interests of organised groups and associations.

Focusing on Uganda since British colonial rule was established, Mamdani (1993:519-553) emphasises the nature and constraints of legal pluralism and the role of political parties and other social movements in the development of national democratic processes. He argues for the separation of constitutional powers, without which a healthy social and ideological diversity, implying a healthy political pluralism, is not sustainable. The relevance of Mamdani's contribution is corporatism, also defined as a distinct form of political representation and state intervention (Jossep 1990:120). Under a pluralist arrangement, a determinate sovereign authority is also required to coordinate the different programmes and policies in a fully-fledged corporatist system. Mamdani further argues that "if corporatism is to form the dominant element in a state form, the corporations would need to be all-embracing and enjoy representational monopolies in relation to their members' various factions." Thus the core of his argument is as follows:

Many different institutions, organisations and agencies are involved in the struggle for hegemony; and hegemony in turn involves (indeed requires) the pluralisation of social forces rather than polarisation around basic class cleavage...For democratic politics is not just a question of securing an electoral majority in the contest of 'one-man-one-vote-one-value' but also raises the question of formulating policies that will prove realistic in terms of overall balance of forces and structural constraints confronting a party or coalition in office.

In that understanding of organisations, institutions, and agencies involved in the struggle for authority, it can be argued that political pluralism is the matrix within which struggles for hegemony occur. For Mamdani (1993:549-555), political pluralism, translated into the broader Ugandan context, influenced the basis of claims for individual rights of citizenship especially given the tendency for mass expulsions of immigrant populations that punctuated every major political crisis in the country.

The essence of Mamdani's (1993) contribution is, "The whole point of a constitutional exercise is not to limit our choices to those currently available, but to expand the ground for participation so as to broaden continuously the range of choices available to us." Promoting general principles of political morality is the grounds for participation, and it brings in citizenship rights' awareness creation for which education is possible partly through activism and the mass media. The mass media and politics is another area where pluralism applies. Pluralist approaches to mass media derive from arguments for a free press. Dunleavy and O'Leary (1990:40-41) contend that the

combination of a free press, increasing journalistic professionalism and countervailing powers in the media creates a system that generates the information necessary for effective citizens' control over politicians. Such a system is a powerful tool and extension of the accountability principle of governments. This argument leads to discussion about the concept of quality of governance.

LITERATURE REVIEW

Philosophical and Theoretical Rationale and the Bases of Constitutionalism

Rawls's (1971:3) contribution towards knowledge about the liberal thought is the role of the "justice as fairness" principle, and his articulation of the content of the principle of public justice is through institutional democracy and equal liberty of conscience. Equal liberty of conscience in a given society, political justice coupled with equal political rights, and equal liberty of persons and its relations to the rule of law form the foundations of constitutionalism and good governance. Furthermore, Rawls (1971:171-343) discusses public institutions and illustrates distributive shares as variables related to the utilitarian traditions embedded in the ideal of social institutions, economic systems and the role of the market. Then Rawls demonstrates duty and obligation from the standpoint of the theory of justice, the most important natural duty of which is to support and to further just institutions. Given the value and sense of public and effective senses of justice, it is important that the principle defining the duties of individuals be simple and clear and that it insures the stability of just arrangements.

Rawls (1971) describes the role of justice in social cooperation, accounts for it as the basic structure of society, presents it as the main idea of fairness, and carries it to a higher level of abstraction in the traditional conception of the social contract theory. According to him, justice is what equal and free persons before the law would agree as the basic terms of social cooperation in conditions that are fair to that purpose. His assertion is that justice as fairness is the guiding principle for managing major social institutions responsible for distributing fundamental rights and advantages of social cooperation. This assertion covers the political constitution and the principle economic and social arrangements. Therefore, his theory of justice as fairness hinges on the idea of one's own worth in one's effort towards accessing the primary social goods in broad categories like human rights, fundamental liberties, equality in accessing opportunities, income and wealth linked with a necessity for impartiality in government.

The rationale of justice as fairness is that once the principles of right are at hand and regulate society effectively, each individual might be able to develop and plan his or her life in a way that does not require violation of others' rights for fulfilment. Thus, each person has the responsibility to fashion his or her satisfying life in a just society by exercising political liberty and freedom of speech, assembly, conscience and thought as determinants of a person's integrity, property and freedom from arbitrary arrest as defined by the concept of rule of law. In the next section, the principle of separation of powers and the notion of quality of government is discussed.

The Principle of the Separation of Powers and the Notion of Quality of Government

The principle of separation of powers was articulated by Montesquieu (1748) in his discourse *The Spirit of Laws*. It is with a view of political liberty that the doctrine of separation of powers becomes necessary. By political liberty, he means "a tranquillity of mind arising from the opinion each person has of his safety." His political thought partly reworked the theory of 'feudal balance,' emphasising the merits of a political system with more than one source of official authority (Dunleavy & O'Leary 1990:14). Its meaning is that there is a prescription of institutional connection between the executive, legislative, and judicial organs of government. Explaining Montesquieu's tripartite division of power, Dasgupta (2012:1) asserts, "Structurally considered government consists of three branches having for their functions (i) legislation or law making (ii) their execution or administration and (iii) interpretation of these laws." Technically, this separation of the power principle is based on a division of governmental functions, namely, the legislative, executive and judicial roles, to check possible excesses of one or the other branch. Conventionally, the doctrine of separation of powers calls for adhering to good governance matrix, and not only does it ensure the checks and balances of power, but also, it guarantees that laws passed can be tested in the courts for their legality, and the judiciary can function without interference from either branch of government to ensure good governance.

According to UN Development Programme (1997), the characteristics of good governance include participation, rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness and efficiency, accountability, and strategic vision as the values to be promoted by liberal democratic institutions of political authority. Saul (1997:339) is in agreement with this view and emphasises it as an issue and key to constitutionalism by situating it in a popular democratic perspective. Its meaning is further explained by Holmberg et al. (2008:3) who argue for the

promotion of quality of government, a term they define as the traditions and institutions by which authority in the country is exercised in tandem with the social contract theory. Holmberg et al. emphasise the processes by which governments are selected, monitored, and replaced in civic and orderly ways. In addition, it covers the capacity of government to effectively formulate and implement sound policies. Its essence is respect for citizens' rights, and in turn, the state for the institutions that govern economic and social interactions among them; therefore, the principle of separation of powers and the notion of the quality of government go hand in hand to sustain institutional practices.

Underpinnings of Constitutionalism under an Impartial State

The notion of an impartial state implies that when implementing public laws and policies, government officials should not take into consideration anything about the citizen or a particular case that is not stipulated in the legislation or guiding principles (Rothstein & Treorell 2008:170). This procedure requires that officials of the state act impartially and not be moved by considerations, such as family relationships and personal preferences, so that people are treated fairly and in the same manner irrespective of personal connections and +idiosyncrasies. The notion of impartiality of the state is consistent with the idea of rule of law as an important underpinning of constitutionalism. Alder (2009:129) contends the notion of rule of law entails equality of all before the law.

Conventionally, public authority is official and practiced through institutions and constitutionally regulated agencies. These institutions and agencies are expected to be impartial so as to promote good governance. According to Holmberg et al. (2008:1), global governance institutions like the World Bank and the UN emphasise good governance and sound institutions from the perspective of economic development. Their contribution to the debates on institutions is the aspect of impartiality of government institutions whereby officials in positions of public authority, exercising state power, are expected to strictly follow written policies, laws and regulations governing relations with the citizens. This argument explains the authors' central focus on the quality of government as a concern of great importance because it determines issues of health, environmental sustainability, the economy, social policy and life satisfaction. For the Human Resources Research Council & Pennsylvania State University (2009:2), "Institutional arrangements in Africa remain fragmented, despite four decades of institutional building resulting

in delinking the state from society, failure to coordinate resources with broad social interests, and exclusionary policies and practices." The observation clearly defines the problem under debate and supports investigating alternative institutional practices for an impartial state with the aim of promoting good governance.

The term 'good governance' was used first by the World Bank in a report on Africa in 1989 entitled *Sub-Saharan Africa: From Crisis to Sustainable Growth*. The report identified "pitiable governance" as the main cause of the failure of structural adjustment programmes (SAPs) and for the recorded poor levels of economic growth in low-income countries, especially in Africa. The failure of SAPs was blamed not on the programmes themselves but on unfortunate governments, corruption, official secrecy, inefficient policymaking, lack of accountability, and disregard for the law. To qualify their study, the World Bank broadly defines the concept 'good governance' as embracing the idea of an efficient public service, respect for human rights, an independent judiciary and legal framework, economic liberalism, protection of private property, political pluralism, participation, administrative accountability, transparency and respect for the rule of law. These variables suffered greatly during the years of the global Cold War when bipolar ideological conflict was raging.

Governance is thus a relatively new paradigm that became popular in the last two decades of the last century and focuses on three actors, namely, government, civil society and the business community. Each of the actors has its respective duties and functions to create a good governance environment. The emergence and meaning of governance, and good governance in particular, coincided with the end of the Cold War and associated collapse of the communist economic bloc and political systems because they showed how potentially damaging big and inefficient state apparatus could be to economic development (Kjaer & Kinnerup 2002:2).

CONCLUSION

This paper has dealt with unpacking the main argument for the development of a theory of constitutionalism, a philosophy based on the classical liberal idea of the social contract and linked to the notion of measuring the quality of democracy. Systematically, it fixes the findings based on the literature to the purpose of the study whose thesis is that post-independence Ugandan leaders not only failed to adhere to the requirements of the doctrine of separation of powers but also, in effect, undermined constitutionalism and good governance. It delineated the study's relationship

to other associated concepts, made possible through discussing the elements of developing a theory of constitutionalism, contemporary thinkers' contributions to the doctrine of constitutionalism, constitutionalism in the Global South, the relationship between constitutionalism and good governance and rule of law, political pluralism, the philosophical and theoretical rationale and bases of constitutionalism, the principle of the separation of powers and the notion of the quality of government, and the institutional practices of an impartial state.

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