

## CHAPTER 2

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### History of Governance in Africa

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## 2.1 Introduction

Governance is a term that has been used over time all over the world. The noun ‘govern’ has been defined in the Black’s Law Dictionary as ‘to direct and control the actions or conduct of, either by established laws or by arbitrary will, to rule or regulate by authority’.<sup>1</sup> It is an act of laying down the necessary rules, regulations and modes of behaviour for the control, management and ‘governing’ of a group or collection of people.<sup>2</sup> Societies all over the world have different models of governance. This is seen in the various means through which governance is effected, some are formally stated and codified, while some are merely passed on from generation to generation. Traditionally, African societies fall into the second category, as governance within these societies was based on practices, hearsay and a host of verbal communication. African societies have always had a form of governance peculiar to them, and which operated in accordance with their traditions and belief systems. This is contrary to the ethnocentric view<sup>3</sup> that pre-colonial Africa had no form of governance,<sup>4</sup> and that one of the positive effects of colonisation was the introduction of governance, law and order into Africa.

It is this assertion that African societies have always had a form of governance peculiar to them that this chapter seeks to investigate. This will be done by surveying certain aspects of the history of Africa relating to modes and forms of governance and law making on the continent before, during and after colonialism. The peculiarities of these periods and the way the foreign influences worked together to impact on the African societies and the resultant impact of these on governance and the rule of law in the continent as a whole will also be examined. This is with a view to setting the foundation for the subsequent chapters.

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<sup>1</sup> Black’s Law Dictionary, 6<sup>th</sup> ed 695 (accessed on the 13<sup>th</sup> of October 2009).

<sup>2</sup> *Ibid.*

<sup>3</sup> This is the tendency to view and judge any other/foreign group(s) or cultures from ones’ own perspective.

<sup>4</sup> Menski W (2005) *Comparative Law in a Global Context*, section 6.1, where he discusses the different views about Africa lacking in culture and laws.

## 2.2 History of Governance in Africa

The history of governance in Africa can be told across the pre-colonial, colonial and postcolonial periods. There is presently no consensus as to the specific years that these periods span. Authors over the years have attempted to put an exact time frame to these periods, but have ended up choosing different years. The timeframes indicated in this chapter have been selected to provide a guide and an indication of the relevant period under discussion.

### 2.2.1 Forms and modes of governance

There have always existed different forms of governance within African societies, even before the advent of the colonial powers. These were African based, and built around the values, traditions and norms of Africans. These forms of governance did not conform to the western notions of constitutionalism, which entailed a unilateral form of governance where the need for a controlled, formal, governmental authority, as seen in western societies, is expressed. Pre-colonial African societies had laws, which while not manifesting as codified or formal laws, were of the nature that they might be heard rather than seen. This oral nature is the primary characteristic of African legal systems. Even in present times, much still depends on the spoken word in the orality-focused context of traditional African societies, where large segments of the population remain illiterate.<sup>5</sup>

Generally speaking, forms of pre-colonial African governance differed from the western-conceived form of governance because it was pluralistic (and can hence be distinguished from the unilateral governance explained above). This means that it consisted of many smaller and similar-looking forms of governance, principally because the African continent, due to its size, was home to a huge diversity of peoples at varying degrees of political, cultural and economic development. Such heterogeneity manifested itself in differences in the laws and beliefs of the people.<sup>6</sup>

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<sup>5</sup> Elias TO (1972) *Africa and the Development of International Law* 407.

<sup>6</sup> Elias TO (1956) *The Nature of African Customary Laws* 8. Elias explains that in spite of these differences, there is also strong evidence of general similarities in the patterns and modelling of the kingdoms and political institutions.

In other words, there were different laws and modes of behaviour for the different societies.

As has been observed by Woodman and Obilade, the discussion surrounding ‘African law’ should actually be about ‘African laws’, since it is wrong to assume that all African societies have common characteristic features and therefore have one legal system.<sup>7</sup> In actual fact, African societies have different legal systems, and thus different laws, the only common characteristic being the oral nature of these laws.<sup>8</sup> Thus the term ‘African law’ (despite its common characteristic, for example, being of an oral nature) within the context of this research will refer to this internally plural nature of the laws.

In pre-colonial African societies, governance was usually determined by existing systems of succession to power. Societal norms regulated these systems of succession to office and legitimacy was conferred through the respect accorded to these lines of authority. Despite the absence of the formulation of theoretical concepts, it does not mean that inherent values did not exist in the different political systems practised in those societies.<sup>9</sup> These values can be likened to governance values that we see in western societies. For example, Elias points out that social contract theories also provide a basis for the indigenous African ideas of government.<sup>10</sup> The construction of a pre-colonial African society is not dissimilar to the constructions of Locke, Rousseau and especially in their presuppositions, to that of Grotius.<sup>11</sup> These European legal philosophers recognised the fact that sovereignty resided in the generality of the people and thus they could depose of any chosen leader should the circumstances warrant it, and also that the ruler was ultimately bound by natural law to govern justly even in the absence of any specific undertaking on his part to that effect.<sup>12</sup> This is the same in African societies, especially pre-colonial Africa, where the leader or chief leads at the pleasure and behest of the people, and where the chief is also bound by tradition

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<sup>7</sup> Woodman GR & Obilade AO (ed) (1995) *African Law and Legal Theory* xi.

<sup>8</sup> This oral nature might exclude northern African societies who had elements of writing quite earlier.

<sup>9</sup> Quashigah EK ‘Legitimate Governance: The Pre-Colonial African Perspective’ in Quashigah EK & Okafor OC (ed) (1999) *Legitimate Governance in Africa: International and Domestic Legal Perspective* 43.

<sup>10</sup> Elias TO (1988) *Africa and Development of International Law* 36.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

and customs and must rule according to the dictates of the tradition of the land. This era of pre-colonial African history will be examined next.

### **2.3 Pre-colonial era (from about 1450s)**

The foundation of governance in pre-colonial Africa was based on the African conception that ‘the King [or Queen] ruled but at the pleasure of the people, for a King without subjects is no King [or Queen]’.<sup>13</sup> In terms of the form of governance that was practised then in Africa, ‘the people’ set the standards (constitution in today’s parlance) by which the actions of the ruler or leader were judged. The leader could not rule if the people did not sanction his leadership. In some cases and in certain societies, the will and desire of the people was expressed through the Chiefs who were considered to be the voice of the people, and who constituted some sort of ‘checks and balance’ for the authority and power of the Chief or King/Queen, as the case may be. This in many ways resembles the western democracy, whereby leaders are elected and can be removed by the people. Structures of political governance in pre-colonial African societies resulted from the interplay of mutual support between the people and the rulers. Honour and respect for the people by the rulers, and vice versa, was the basis of political authority in traditional African societies.<sup>14</sup> The people and rulers were bound by a common heritage, culture and mythology (belief in the supernatural).

Within the pre-colonial African societies, there were checks and balances on the powers of the rulers. These were evidenced in some of the practices, traditions and beliefs of the different societies. The allegiance of the subjects could, for example, easily be transferred from one ruler to another,<sup>15</sup> if the ruler turned out to be despotic, cruel or a tyrant. The ruler is also expected to earn the respect of his people, and this was not based on force or intimidation. If unsatisfied, the people may decide to stop visiting the rulers’ court, thereby isolating him, or they could move to another grouping or settlement and transfer their allegiance to the ruler of

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<sup>13</sup> Quashigah (1999) 44.

<sup>14</sup> *Ibid.*

<sup>15</sup> Quashigah (1999) 46.

that grouping.<sup>16</sup> A dictatorial attitude on the part of the ruler would often lead to his assassination or removal by his own kith and kin. A good example of this is the story of Shaka, king of the Zulus of Southern Africa, who reigned around 1828.<sup>17</sup>

Shaka was a great king and warrior, who won many battles and expanded his kingdom tremendously (stories of his military exploits continue to be told even till today).<sup>18</sup> However, with the many victories came enmity. He had made many enemies in the process of warring, and different assassination attempts were made on his life. This led to his becoming paranoid and erratic in behaviour, particularly after the death of his mother.<sup>19</sup> Believing everyone was plotting to kill him, he became exceptionally cruel and after the death of his mother, he ordered that everyone in the kingdom had to mourn.<sup>20</sup> He ordered that no crops should be planted during this period, no milk (the basis of the Zulu diet) should be used, and no woman was to become pregnant during this mourning period. Those found violating these orders were put to death immediately, including the women.<sup>21</sup> This caused great devastation throughout the land; those who were deemed insufficiently grief-stricken were killed and cows were slaughtered for the mere purpose of their calves knowing what it was like to lose a mother.<sup>22</sup> All of this led to great discontent in the land and a loss of allegiance for Shaka. Consequently, in 1828, he was assassinated by his half-brothers Dingaan and Mhlangana.<sup>23</sup>

Religion played a very important role in pre-colonial African society. There was hardly any aspect of societal life in which religion did not play its part, such as warfare, the first-fruit ceremonies,<sup>24</sup> and the different stages in the life of the

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<sup>16</sup> *Ibid.* History, for example, has it that the Ewes of present day Ghana migrated there from the then Notsie, in Benin, in a bid to escape the despotic behaviour of their then leader, King Agokoli I, also the destoolment and subsequent execution of king Kofi Adzanu Fiayidziehe.

<sup>17</sup> Morris DR (1994) *The Washing of the Spears: A history of the rise of the Zulu nation under Shaka and its fall in the Zulu war of 1879.*

<sup>18</sup> Morris (1994) 40-67.

<sup>19</sup> Morris (1994) 98.

<sup>20</sup> *Ibid.*

<sup>21</sup> Morris (1994) 99.

<sup>22</sup> *Ibid.*

<sup>23</sup> Morris (1994) 107-108; see also *Shaka Zulu*, culled from South African History Online [www.sahistory.org.za/pages/people/bios/zulu-shaka.htm](http://www.sahistory.org.za/pages/people/bios/zulu-shaka.htm) (accessed on 27 October 2008).

<sup>24</sup> These are ceremonies indicating the commencement of the harvest; it is a time when the first fruit of the harvest in the community is offered up to the gods or to the ruler as a sign of gratitude and appeasement.

individual.<sup>25</sup> Traditional African societies' ideas on religion are extremely vague, since it is largely metaphysical, magical and naturalistic. Monning, referring to the Pedi of South Africa, describes the basic belief in life after death, which explains the high emphasis placed on ancestral worship, as it is believed that when people die, they become spirits (gods) to watch over, help and guide those remaining on earth.<sup>26</sup> This is in line with the belief systems in other traditional African societies. The spirit is believed to live on in the spirit world of magic and supernatural powers. Religion in these societies was communal, and although the well-being of the individual depended largely on his daily actions, most of the ritual actions engaged in were performed by the community or kin groups as a whole.<sup>27</sup> Belief in the gods and ancestors was communal and absolute, and never questioned. Things happened as the gods had designed them to happen. It was the duty of the individual and of the community to be devout and pious, in order to ensure prosperity, health and happiness during life.<sup>28</sup>

In these societies, the chiefs and kings had their powers circumscribed by the will of the gods and ancestral spirits. The king was the embodiment or spiritual live wire of the society, and calamities and natural disasters were mostly blamed on his failure to obtain the blessings of the gods and ancestors.<sup>29</sup> Also in many societies or kingdoms, the ruler depended on the assistance of the priests, as their ritual powers derived from sources beyond his own control.<sup>30</sup>

Traditional African societies had constant change as a characteristic, as they were constantly changing. This was because changes in the level of centralization and development of hierarchy led to transitions from small polities to larger and bigger polities.<sup>31</sup> These changes were usually brought about as a result of wars and conflicts, or even for economic purposes, where a smaller chiefdom might merge itself into a larger one in order to ensure its economic sustenance, or if it was expedient in order to win a war. On the other hand, groups of petty chiefdoms

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<sup>25</sup> Krige EJ (1950) *The Social system of the Zulus* 280.

<sup>26</sup> Monning HO (1967) *The Pedi* 43.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Examples are the Anlo King and the Oba of Benin, who were regarded as having divine attributes and as being sacred people, any injustices or illegalities on their part would immediately taint their sacredness, and hence their authority.

<sup>30</sup> Quashigah (1999) 47.

<sup>31</sup> Adejumobi SA 'Politics and Government' in Falola T (ed) (2000) *Africa* 151.

could also become segmentary states. This would usually occur when one chiefdom assumed control over the others. A wide range of possible political and governmental arrangements also existed within each category.<sup>32</sup>

The organisational structure of indigenous political systems was generally based upon kinship, ancestry and survival. These formed the bases upon which groups and societies were built and have evolved into what we now refer to as ethnic groups. The affiliation of these groups is what is now referred to as ethnicity. Ethnicity provides a rallying point around which political systems were organised. The law within each ethnic group was homogenous, the cultural, religious and linguistic traditions are the same and binding on the members of the group. Each ethnic group devised its own system of government based on its customs and traditions. The multitude of ethnic groups gave rise to much diversity in these political systems. However, in spite of these diversities, an underlying principle existed, as Vaughan observes, namely that ‘all of the diverse political organisations were based upon the validity of public means of resolving disputes and conflicts, that is, upon the rule of law’.<sup>33</sup> This does not necessarily mean that they had formal statutes to regulate behaviour, but rather members of the societies accepted that there was a moral basis to public order, and they also accepted that publicly sanctioned resolutions of disputes and conflicts were necessary for the continuance of social life beyond the family or clan.<sup>34</sup>

Different crimes had different forms of punishment, with those of the likes of murder and treason being punishable by death at times. The procedure for reporting a matter to the chief for settlement would include notifying him (the chief). This would be done by bringing gifts and other payments to the chief; otherwise he would not give audience.<sup>35</sup> It is apparent that most of the societies allowed an appeal to the higher force of the gods or ancestors. The knowledge of the law was personal; the chief would rely on his own knowledge of the law, and also on guidance of other elders present. Material token was usually demanded and paid by both the plaintiff and defendant when a matter was brought before the

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<sup>32</sup> *Ibid.*

<sup>33</sup> Vaughan JH (1986) ‘Population and Social Organisation’ in Martin and O’Meara (1986) *Africa* at 175.

<sup>34</sup> Ayittey G (1991) *Indigenous African Institutions* 71-72.

<sup>35</sup> Ayittey (1999) 49-50, where reference is made to the example of the Bantu.



‘court’. The plaintiff would usually be the one who paid more. The payment was used to open proceedings; a token could also be demanded as an admission of guilt, or a material sign of reconciliation (as was seen with the Shona of Southern Africa, Ashanti of Ghana and Yoruba people of Nigeria).<sup>36</sup>

Indigenous African societies had varying forms of social, political and legal institutions, which included many different patterns of philosophy and culture. They may be classified into two broad groups; those that have ‘centralised’ / chiefly political systems (also referred to as ‘acephalous societies’ in some quarters), and those that have ‘non-centralised’/chiefless political systems (also referred to as ‘stateless/ non-acephalous societies’). These broad groups will be considered next in order to highlight the differences and similarities.

### **2.3.1 Chiefly or centralised societies<sup>37</sup>**

Under this type of social grouping in the pre-colonial period, societies existed as separate political entities and governed themselves independently. They had centralized authority, administrative machinery and judicial institutions; had their own courts and their indigenes were subject to the courts.<sup>38</sup> Examples include the Fanti of Ghana, the Yoruba of Nigeria, the Zulus and Pedi of South Africa, the Bayankole of Uganda and the Bemba of Zimbabwe. Changes in the level of centralisation and development of hierarchy led to transitions from a small polity to a state polity.<sup>39</sup> These usually differed from nomadic bands to intermediate forms, to complex, hierarchical kingdoms. A high level of advanced political consciousness and a sense of racial or even national identity distinguished these societies.<sup>40</sup>

These societies had chiefs or rulers who acted as the source of centralised authority.<sup>41</sup> They had authority in every area of the community life, and were usually assisted by a well-established council of elders, called the inner council, as

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<sup>36</sup> *Ibid.*

<sup>37</sup> Described as ethnic groups with organised bureaucracy and a central authority.

<sup>38</sup> Elias (1972) 34; Monning (1967) 250.

<sup>39</sup> Falola (2000) 151.

<sup>40</sup> Elias (1972) 34.

<sup>41</sup> Ayittey (1991) 83.

seen in some cases. This ‘council of elders’ were the advisors to the chiefs, and worked in tandem with the chiefs in governing the societies. A chief could not and was not customarily allowed to take unilateral decisions; he needed to consult and seek his advisers’ opinions first before taking any action related to the administration of the village. He could also not impose his own opinion on the council. He could attempt to make them see things from his own point of view, but if they did not agree with him, he could do nothing but to adopt the general opinion.<sup>42</sup>

The advisory council was usually made up of elderly men of good standing in the societies, headsmen of the different wards or lineages making up the village, who were well respected. They acted as intermediaries between the chief and the village or tribe.<sup>43</sup> They carried out two principal duties; firstly, they brought to the attention of the chief the concerns of their people, and the happenings from the different wards, thus advising and assisting the chief in administering the village. Secondly, they acted as a sort of check on the use of authority by the chief, thus preventing abuse of power. They could criticise the actions or inactions of the chief and could ultimately demand his deposition in cases where he disrespected the time-honoured customs and traditions of the village.<sup>44</sup>

The underlying drive exhibited by the village gatherings at any level was unanimity, as also seen in the case of non-centralised societies. At every meeting, at any level, the goal was to reach a unanimous decision that would be accepted by all. Discussions and at times arguments would thus continue until a unanimous decision was reached. Consensus was a cardinal feature of the indigenous African system. Majority opinion did not count in the council of elders; and unanimity was the rule in most tribal systems. This is what led to the African political systems characteristic of debating, sometimes for days to reach unanimity.<sup>45</sup> At times the meetings would be adjourned for a while in order to allow everyone involved to ponder on the issues in question. After this period, they would then gather, deliberate and decide on the actions to be taken. This consultative process was

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<sup>42</sup> *Ibid.*

<sup>43</sup> Ayittey (1991) 95.

<sup>44</sup> *Ibid*; see also Amoah GY (1988) *Groundwork of Government for West Africa* 172 and Arhin K (1985) *Traditional Rule in Ghana: Past and Present* 19.

<sup>45</sup> Ayittey (1991) 99.

observed amongst the Fanti people of Ghana as follows: ‘... the Fanti chief has to consult his councillors on all decisions affecting the society ... the council consisting of elders of the society. They were not appointed as councillors because of their wealth but because of their maturity, thus both rich and poor find themselves on the council...’<sup>46</sup> The advisors were responsible for making sure that orders or decisions taken that affect the villages under their direct control were made known to the people.

### 2.3.2 Chiefless or non-centralised societies

As stated above, this type of society was non-centralised, meaning that ruling or governing power was not vested in any particular person or group of people. In these societies, governing power was vested in all and the majority ruled. This mode of governance prevailed and was found in descent societies. Descent societies are formed having derived from an ancestor or ancestral group or lineage. They have evolved in such a way that they had no chiefs or centralised authority. The people in these societies were often homogeneous, and their political awareness is often much more limited to the requirements and social attitude of a closely-knit group. The tie of kinship is stronger and more pervasive in these societies than in the chiefly ones. The families form and supply the bonds of social cohesion.<sup>47</sup> In some instances, in order to guard against autocracy, they have institutionalised methods of deriding centralised political authority through any means, including the use of oral narratives.<sup>48</sup> Their way of life and nature of livelihood (most often pastoralists) at times played an important role in the evolution of political systems. This is why for some societies it was impossible to have a centralised system of government. Examples of these societies are the Ibos of Nigeria, the Degaaba of North-western Ghana, the Masai of Kenya and the Nuer of Sudan.<sup>49</sup>

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<sup>46</sup> Ayittey (1991) 98; Oguh BE ‘African and Western Philosophy: A Study’ in Wright RA (ed) (1984) *African Philosophy: An Introduction*.

<sup>47</sup> Elias (1972) 34.

<sup>48</sup> Ayittey (1991) 79.

<sup>49</sup> *Ibid.*

Justice was maintained through the extended family organisations, by using ad hoc councils of the kinsmen and neighbours of the parties involved to resolve whatever disputes arose.<sup>50</sup> These disputes would usually be about marital and other domestic problems. The council, also called ‘moot’ would deliberate and reach a decision binding on the people involved. Such extended deliberations further perpetuated kinship behaviour amongst the members of this organisation.<sup>51</sup> Procedures were always in place to hear disputes either in the ‘courts’ or in the ‘moots’, with witnesses and pleadings also present in oral form.

This system created a way of checks and balances in which two or more centres were balanced against each other and applied in all levels of the community.<sup>52</sup> For the most, there were no holders of ‘office’, only representatives of groups, making it easier to reach compromises in conflict resolution, as was their norm, rather than making judgements and applying sanctions. A few of them had leaders, whose main responsibility was to execute the collective will of the people. This is as opposed to rulers, who would rule and lord their power over the people; leaders merely guided and led the way. At times, the leadership was descended through lineage lines, but at times it was also based on the character, prowess and admirability of the person. Using the Degaaba society as an example, it can be seen that the most important criterion was age, followed by personal attributes of the individual.<sup>53</sup> The recurring index in these types of societies is the fact that the collective will of the people determined whatever action had to be taken regarding any matter. The ‘village in council’ made the decisions and the leader implemented it.<sup>54</sup>

The case of the Igbo people of the eastern region of Nigeria is no different. They predominantly occupy what is now known as Abia, Anambra, Enugu, Ebonyi, and Imo states in Nigeria. Some are also found in Delta and Rivers states. Traditionally, they subscribed to a set of beliefs where there is no centralisation of authority. They are highly individualistic, believing strictly in the equality of all

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<sup>50</sup> *Ibid.*

<sup>51</sup> For example the Fulani of Nigeria.

<sup>52</sup> Ayittey (1991) 80.

<sup>53</sup> Yelapaala K ‘Circular Arguments and Self-Fulfilling Definitions: Statelessness and the Degaaba’ (1983) 10 *History in Africa* 349-385.

<sup>54</sup> *Ibid.*

people. Everyone perceived himself or herself to be as good as everyone else and as having a right to a voice in the local affairs. The culture emphasized competition between families, lineages and between clans. As a result, over the years, they adopted a loose democratic system, which though based on the lineage structure, was characterised by autonomous federations of lineages or villages organised through lineage heads, age grades and title societies.<sup>55</sup> The organisation of the society was in layers with the highest being the collective village, followed by wards, sections and extended families (signified by compounds).

Governance in the traditional Igbo society (and even today in certain areas) was through two basic institutions; ‘the Council’ comprising the heads of the extended families or lineages (title holders and wealthy persons were usually included in the council), and the ‘village assembly’ (made up of every full aged member of the village)<sup>56</sup> usually depicted by the market square gatherings. The council was the controlling authority in the village, performing all the functions that a chief and his elders would do in the chiefdom. Though the council was a gathering of the elders in the village, the meetings did not preclude any adult male from attending, and such member had the right to voice his opinion, though this was rarely done.<sup>57</sup> In instances where decisions affecting the entire village had to be made, the council would summon a ‘village assembly’ at the market place for deliberations. Everyone had a right to speak in such meetings and to agree or disagree; ultimately, the decisions had to be unanimous. The council could not overrule anyone or any decisions reached at such meetings. As further described by Webster and Boahen, ‘the village assembly was considered the Igbo man’s birthright, the guarantee of his rights, his shield against oppression, and the means whereby the young progressive impressed their views on the old and conservative’.<sup>58</sup>

In conclusion, it is clear that these two major forms of social, political and legal institutions within the indigenous African societies existed and flourished freely without any constraints up until the time of the European invasion. The next

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<sup>55</sup> Ayittey (1991) 83.

<sup>56</sup> *Ibid.*

<sup>57</sup> Ayittey (1991) 84.

<sup>58</sup> Boahen AA & Webster JB (1970) *History of Africa* 170.

section will examine the history of colonialism on the continent and its impact on the governance system of the indigenous African society.

## **2.4 Colonialism in Africa (1450's – early 1900's)**

### **2.4.1 Gradual colonialism**

It has now been realised that the European invasion and conquest of Africa was not as dramatic and sudden as had been portrayed for many years. It was instead subtle, resulting from almost one hundred years of European interaction in the African continent, before colonisation took place under different pretexts.<sup>59</sup> It was thus a gradual process. The year used above is a guide because the effective year when it began cannot be determined. The renowned British historian, Fage, sees European colonisation as 'the culminating stage in a process of interaction between Europeans and Africans which had been growing in momentum and intensity over a much longer period'.<sup>60</sup> What this points to is the fact that there is no definite date or year when it can be said that colonisation started. Different events occurred which marked the commencement of subtle colonisation. These include the exploration of the interior; the abolition of the slave trade;<sup>61</sup> the introduction of legitimate commerce; missionary activity; the establishment of commercial posts; the seizure and occupation of strategic areas; entry into treaties with African rulers; and the establishment of permanent settlements.<sup>62</sup>

The indirect conquest of Africa had been underway long before Europeans actually decided to enforce their presence against Africans. This was mainly done through explorers who, under the guise of exploring Africa, in effect claimed informal spheres of influence for their different countries. Missionary efforts were also surreptitiously targeted to 'tame' and 'pacify' the so-called savages, and to invoke the benefits of the 'trinity' (Christianity, civilisation and commerce) in readiness

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<sup>59</sup> Fage DJ (1978) *History of Africa* 325-326.

<sup>60</sup> *Ibid.*

<sup>61</sup> Early slave trade in Africa was initially dominated by the Arabs, but later Europeans joined in. The trade was abolished 1807, thus putting a lot of Europeans out of business, after which they focused on commerce in Africa.

<sup>62</sup> Nwauwa AO 'The Europeans in Africa: Prelude to Colonialism' in Falola T (2000) 316.

for the ultimate take-over.<sup>63</sup> All of this resulted in the Europeans gradually biting away at bits and pieces of the continent under the guise of commerce, religion and a need to ‘enable the savages to see the light’.

In the 1870s, all of the above gave way to direct political control. The economic gains seemed to be the most pressing motivation for the Europeans to secure political control, as the potential for extracting raw materials and agricultural produce from Africa was realised in connection with the industrial revolution in Europe.<sup>64</sup> The industrial revolution started in Europe around the eighteenth century. It was a period when Europe experienced profound social changes in its economy and technology. It moved from a primarily agricultural and rural economy to a capitalist and urban economy; from a household, family-based economy to an industry-based economy. This transition to an industrial, manufacturing economy required raw materials and more people for labour.<sup>65</sup> These arguments have also been advanced by Hobson<sup>66</sup> and Lenin<sup>67</sup> in their respective works. The belief is that overproduction, surplus capital and under-consumption in the European industrialised nations forced the Europeans to expand overseas and seek additional territories. This coupled with the need for raw materials to serve emergent factories, and the need for newer and wider markets to absorb the products from factories. All of these further led to attempts to monopolise the raw materials and markets, resulting in direct imperial control. Lord Lugard is on record to have said that the need to foster the growth of trade and to find other outlets for British manufacturers and surplus energy, gave rise to British colonial expansion.<sup>68</sup>

As with the British, the French, German and Portuguese were also extending their spheres of influence in Africa, and had begun to exercise political control over the regions they could lay claim to. This led to tension amongst the European

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<sup>63</sup> *Ibid.*

<sup>64</sup> Menski (2005) 446.

<sup>65</sup> ‘The Industrial Revolution of the 18<sup>th</sup> Century’, available at <http://www.wsu.edu/~dee/ENLIGHT/INDUSTRY.HTM> (accessed on 9 November 2008).

<sup>66</sup> See generally Hobson JA (1965) *Imperialism: A Study*.

<sup>67</sup> Also Lenin VI (1975) *Imperialism: the Highest Stage of Capitalism*.

<sup>68</sup> Lugard FD (1983) *The Rise of Our East African Empire*, vol 1 379 -382. Lugard served as Governor General of Nigeria from 1914–1915.

powers<sup>69</sup> which ultimately led to the German Chancellor summoning a European conference in Berlin to discuss the ‘African question’, with the aim of stopping the bickering amongst European nations over Africa. In December 1884 through to early 1885, the ‘Berlin West Africa Conference’ was held. Delegates from thirteen European countries and the USA attended the conference and there, divided out amongst themselves, spheres of influence in Africa (without any input from Africa or Africans).<sup>70</sup> This effectively constituted a drawing of borders and boundaries within the continent, without any thought of the people, how they lived and the impact this would have on them. It was agreed at the conference that claims to any territory in Africa must be upheld by effective occupation. This inevitably gave rise to a rush towards inner parts of Africa, which were still then largely unoccupied.<sup>71</sup> The conference had both military and economic advantages. It gave the European trading firms the excuse to travel to Africa for trade purposes, and in the process to demand military protection from their nations.<sup>72</sup>

Between 1870 and 1914, the scramble for Africa by the Europeans resulted in the addition of about one-fifth of the land area of the world to their overseas colonial territories.<sup>73</sup> It is recorded that this was achieved through deceitful and unprincipled steps taken by the Europeans to convince themselves and others that Africans had indeed given away their land, freedom and rights to the Europeans to be governed by them.<sup>74</sup> Unscrupulous adventurers used lies, threats, extortion, forgery, blackmail, murder, and genocide to acquire the ‘so-called’ proof of this.<sup>75</sup> In most cases a thumbprint or an "X" mark by quill pen on a piece of paper was all that was required to share out African territory. In some cases the people whose thumbprints they took were not even community authorities, and had no

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<sup>69</sup> In 1882 Britain unilaterally occupied Egypt and increased its territorial claims in West Africa. France responded with the declaration of protectorates over Porto Novo and the northern bank of the River Congo, whilst at the same time annexing Tunisia in 1883.

<sup>70</sup> ‘Conflicts in Africa’, Global Issues Website, available at <http://www.globalissues.org/Geopolitics/Africa/DRC.asp> (accessed on 7 of May 2008).

<sup>71</sup> Menski (2005) 447.

<sup>72</sup> This led to the almost total occupation of Africa by hostile military forces in the employ of European companies and of European governments. These forces went on to carry out all manner of verbal, psychological and physical abuses, mutilation and death on Africans.

<sup>73</sup> ‘Conflicts in Africa’ website, n 70 above.

<sup>74</sup> Menski (2005) 447.

<sup>75</sup> Spears IS ‘Reflections on Somaliland and Africa’s Territorial Order’ (2003) 95 *Review of African Political Economy* 89 – 98.



knowledge of the true consequences of their acts.<sup>76</sup> All these pretentious treaties where entered into with African chiefs and kings in a bid to secure commercial advantages.

Furthermore, these treaties were subsequently nullified by the force of the European military power which was available to back the various commercial interests, as they took over the commercial interests in the societies by force.<sup>77</sup> Initially, many Africans conceived the signing of the treaties and colonisation as a strengthening of friendship with the Europeans, rather than as an act of occupation; they eventually realised their folly.<sup>78</sup> These chiefs and kings entered into the treaties thinking that friendship, mutual respect and equitable commercial gain was the driving force behind the treaties. They did not realise that from the European side, it was all a ploy to gain access to the vast commercial opportunities present on the continent and within the territories of the different chiefs.<sup>79</sup>

Thus it has been argued that, colonial demarcations of African borders which are still being maintained today are illegal.<sup>80</sup> This is based on the fact that Africans, who were the owners of the land, had no say and were not consulted in the drawing of the borders. The borders were drawn arbitrarily and have not been able to inspire any sense of nationhood or nationalism in Africans; it instead encouraged

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<sup>76</sup> *Ibid.*

<sup>77</sup> Ayittey (1991) 379.

<sup>78</sup> This led to ferocious resistance against colonial rule. Notable amongst this was the resistance of the Abe people of eastern Ivory Coast who fought for 27 years to maintain their independence; the rebellion of the Ashante of Ghana in 1891; the exploits of the Zulus led by Shaka the warrior in rebelling against colonial domination, and many more.

<sup>79</sup> Ayittey (1991) 379.

<sup>80</sup> This point has been argued by many renowned authors such as Prof Wole Soyinka in 'Africa's Outdated Colonial Boundaries Must be Redrawn', *Plain Dealer* Editorial of September 26, 1994, available at the University of Pennsylvania website at [http://www.africa.upenn.edu/Articles\\_Gen/colon\\_bound.html](http://www.africa.upenn.edu/Articles_Gen/colon_bound.html) (accessed on 26 December 2009), wherein he is quoted as saying: 'We should sit down with square-rule and compass and redesign the boundaries of African nations. If we thought we could get away without this redefinition of boundaries back when the Organisation of African Unity was formed, surely the instance of Rwanda lets us know in a very brutal way that we cannot evade this historical challenge any longer'. Prof Antony Allott also expressed a similar view in 'The Changing Legal Status of Boundaries in Africa' in Ingham K (ed) (1974) *Foreign Relations of African States* London: Buttersworth 117. See also Herbst J 'The Creation and Maintenance of National Boundaries in Africa' (1989) 43(4) *International Organization* 673 – 692; Ratner SR 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1996) 90 *AJIL* 590; Englebert P & Tarango S 'Dismemberment and Suffocation: A Contribution to the Debate on African Boundaries' (2002) 35(10) *CPS* 1093 – 1118; Killingray D 'The Maintenance of Law and Order in British Colonial Africa' (1986) 85(340) *African Affairs* 411-437.

Africans to be become more ethnically conscious and more tribalistic in their thinking. In the process of drawing the borders, tribes, groups, societies and kingdoms were split into different countries. Borderlines many times passed through settlements, causing a split amongst the inhabitants. The resolution of the OAU in 1964<sup>81</sup> to ‘respect the frontiers existing on their achievement of national independence’, did not remove the illegality or lack of legitimacy of the preceding act. The object of the resolution was purportedly to maintain stability and peace, and that de-colonisation should not be used as an occasion for the flourishing of separatist policies or movements.<sup>82</sup>

The impact that these colonial demarcations have had on African self-determination and freedom have been extremely negative. The current borders were designed to serve the narrow interests of imperial and neo-colonial structures. The act of colonisation in itself went beyond the delineation of borders. It introduced and imposed foreign systems of governance and law in many cases and thus attempted to radically change the balance of norms and traditions as existed before. This system of governance would now be examined here.

#### **2.4.2 Governance during the colonial period**

The system of governance employed by the colonialists in Africa was designed to serve colonial interests. It was in many instances contrary to the manner in which Africans governed themselves. Under the African system, authority was based on kinship. Authority from the people was needed to rule, without which governance would be illegitimate. In colonising Africa, Europeans tried to establish their authority and mode of government, and by doing so, removed and exiled many African chiefs and kings, and replaced them with other individuals whom they felt they could control, but who lacked the requisite traditional authority to command obedience and respect from the people.<sup>83</sup> The impact of this was most visible in the chiefless societies like the Ga of Ghana, the Igbo of Nigeria and Fulani of Nigeria. These societies had no formal or centralised leaders or chiefs for the

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<sup>81</sup> Brownlie I (1971) *Basic Documents on African Affairs* 361.

<sup>82</sup> Brownlie I (1979) *African Boundaries: A Legal and Diplomatic Encyclopaedia* 11.

<sup>83</sup> Ayttey (1991) 386.

colonial powers to depose, and thus the colonial powers had to create their own leaders, by selecting those they felt would carry out their wishes. The leaders they created were rejected and shunned by the people, and in many cases became autocratic because they felt they had the backing of the colonial masters. These leaders were empowered to collect taxes imposed on the people on behalf of the Europeans, in the form of the produce of the land or whatever natural resources existed.<sup>84</sup> In this role, they became petty tyrants with the right to punish anyone on the spot by for example whipping. In a case of collective resistance or failure to meet their demands, they could get a punitive expedition of the colonialists to destroy a village or punish a whole district.<sup>85</sup>

The policies and strategies adopted by the different colonial powers differed. The French and Portuguese regarded their colonies as integral parts of their countries and therefore as ‘mere provinces overseas’. The British, on the other hand, regarded their colonies as complete entities and therefore treated them as such.<sup>86</sup> This pattern of British colonial administration in Africa was largely influenced by their experiences in India, as observed by Boahen.<sup>87</sup> They entered into treaties with local rulers and princes, ensuring British political sovereignty, while at the same time leaving local legal regulation and the administrative machinery largely to existing rulers. This was informed by the notion that some respect for existing indigenous institutions and laws was an appropriate policy. This form of administration has been referred to as ‘indirect rule’. This policy adopted by the British helped to facilitate the process of installing their own ideas on their territories. Under the British colonial system, each colony was divided into regions with regional administrators, each region into provinces with provincial commissioners, and each province into districts with district commissioners.<sup>88</sup> A district was usually made up of one or more of the traditional societies, and the daily running of the society was under the traditional rulers and their council of elders. Boahen and Webster likened the African chief to the instrument of local

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<sup>84</sup> It was these taxes that the Europeans used to build up their empire and administration as colonial masters.

<sup>85</sup> Ayttey (1991) 389.

<sup>86</sup> Boahen AA (1986) *Tropics in West African History* 123.

<sup>87</sup> Boahen (1986) 450, in India the British had found it impossible to conquer the entire Asian subcontinent and to impose English rule and laws directly.

<sup>88</sup> Ayttey (1991) 391.

government. The indirect rule system of governance adopted by the British proved light and cheap, it also made it easier for potential issues of conflict between the two cultures to be identified and resolved timeously.<sup>89</sup>

The policies adopted by other Europeans differed from the British system in that they were highly centralised and authoritarian. The French, for example, pursued a policy of deliberately destroying the great rulerships and kingdoms they met.<sup>90</sup> They pursued the policy of *assimilation* by which, for example, in Senegal, the colony became an integral part of their home country, rather than a separate state. The indigenes were expected to assimilate French culture in every aspect, as it was deemed to be of the highest possible standard. Another good example of this is the Belgian colonial policy in the Congo. The Belgians followed a policy of basically doing away with everything African; they totally took over the running of the Congo. All laws, edicts and directives came from Brussels. The Congolese people were never consulted in the administration of their own affairs, as they were subjugated and denied any control over their own affairs, due to the disdain with which the Belgians held Africans.<sup>91</sup> Thus assimilation was a comprehensive colonial theory which sought to influence every aspect of the lives of the colonised people.<sup>92</sup>

*Association* was another policy adopted by those French colonialists who believed that assimilation was impracticable because Africans and other non-western people were racially inferior to Europeans. Thus it was more realistic to aim for a mere association with Africans in order to enable them develop within their own cultures.<sup>93</sup> In this regard, this policy was similar to the British policy of ‘indirect rule’, only that the French did not allow the traditional rulers to act as intermediaries, they rather neutralised or deposed them and then re-organised the society to suit their own purpose, thus fundamentally changing the structure of the societies as they existed before. What happened in the kingdom of Dahomey, now called the Republic of Benin, in western Africa in 1894, illustrates this clearly. The French, upon conquering Dahomey, dismembered the kingdom, leaving only

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<sup>89</sup> Boahen & Webster (1970) 242.

<sup>90</sup> Ayittey (1991) 392.

<sup>91</sup> *Ibid.*

<sup>92</sup> Ayittey (1991) 394.

<sup>93</sup> *Ibid.*

the central area around the capital. The rest of the area were converted to kingdoms, and placed under direct French rule.<sup>94</sup>

All of these policies adopted by the different colonial authorities had varying impact on the indigenous traditional African systems. In the following paragraphs, the impact of the British policies will be examined.

### **2.4.3 Impact of European incursion on the native system of African laws**

The policies of the colonial authorities, while having a great impact on the African systems and structures, did however not lead to the complete obliteration of African social, legal and political cultures. At various instances the colonial administration attempted to wipe out the existing chieftaincy systems. This they did by imposing forced labour, expelling natives from their land, meddling with the existing political institutions, deposing of traditional rulers and appointing their ‘chiefs’. Through all of this, the indigenous structures by and large survived, though severely weakened.<sup>95</sup> The analogy of a slow-moving train has been used to depict this ability of the African traditional cultures to survive.<sup>96</sup> From another view however, it is argued that the colonialists actually sought to strengthen the native system of courts and law.<sup>97</sup> Attempts were made to codify traditional law and to actually record decisions of the native courts. This was seen with the British commissioning reports of the Code of Native Customs and Law. In Ghana, John Mensah Sarbah wrote on Fanti customary laws.<sup>98</sup> In matters of property rights, civil and criminal matters, Africans were governed by African law and Europeans by European law. This attempt at ‘strengthening’ the native system was criticised on the basis that the recording of the decisions of the native courts, the reports and attempts at codifying the native laws and customs, fundamentally changed the unique nature of African laws. The uniqueness of African laws as it was prior to colonialism is the fact that it was orally transmitted from generation to

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<sup>94</sup> *Ibid.*

<sup>95</sup> Ayittey (1991) 397.

<sup>96</sup> Menski (2005) 444, where he states that ‘like a band of marauders, colonialists imposed their concepts onto existing structures, claiming overall control, but the train kept moving and did not change its basic characteristics as much as the literature has claimed’.

<sup>97</sup> Ayittey (1991) 398.

<sup>98</sup> *Ibid.*

generation. This meant that African laws were of a fluid nature, changing and adapting to the exigencies of the time, as and when needed. It can be argued that the act of writing and documenting the laws may have introduced some measure of legal certainty, but has conversely imposed a rigidity that was never present in African laws before.

Indeed, it was not the case that everything changed in Africa overnight.<sup>99</sup> Firstly, the colonial laws merely formed a new ‘layer of official law’ for the Europeans then living in Africa. This was initially the case as the main purpose of European expedition into Africa was trade. However, the ‘layer of official law’ thickened, as more inroads were made into the continent, minerals and raw materials in abundance were discovered.<sup>100</sup> This coupled with the industrial revolution ongoing in Europe at the time, made it seemingly imperative for the Europeans to take over control of both the trade and the people, as they realised the immense value these ‘colonies’ could give them. They did this under the guise of the need to civilise the people of Africa. In addition, they gradually applied and imposed their ‘official laws’ on Africans. The new official laws remained largely distant and inoperative for most Africans due to the fact that they had no historical or ancestral connection to the laws, and could not identify with the laws. This remains true even today.<sup>101</sup>

Thus, though traditional African systems were relegated in the face of the new official laws, they continued to flourish and evolve within the unofficial realm, as the people continued to apply them in their daily relations with one another. This resulted in a new hybrid.<sup>102</sup> The new laws imposed by the colonialists did not have the capacity to abolish people’s religions and traditional socio-legal systems of community-based regulation by the stroke of the pen. The colonial positivist laws claimed superiority, denying equal status to the traditional laws. They represented the ideal western model of ‘rule of law’.

By the time when virtually all of Africa had been colonised, the laws of the respective colonising nation had been imposed or ‘superimposed’ all through the

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<sup>99</sup> Menski (2005) 444.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

colonised territories, with various adaptations, and to varying degrees.<sup>103</sup> Allott describes this as ‘highly organised legal systems developed in and for utterly different environments, motivated by different objectives, ... backed up by the military and police forces of the colonising powers, which were swiftly and overwhelmingly superimposed on the traditional systems and people’.<sup>104</sup> Due to the fact that the majority of Africans were at the time uneducated in the European laws or ways, and could not speak any of the European languages, there was slow progress made in the attempt to obliterate the traditional laws and systems. This resulted in the imposed laws remaining out of reach and largely inaccessible to the indigenous population for a long time,<sup>105</sup> and even in cases where it was adopted, it was wrongly adopted. As has been explained above, the British system of indirect rule encouraged the continuation of African traditional systems during the colonial period, more than the systems of other Europeans.<sup>106</sup> Other authors have gone to great lengths to point out that, while traditional Africans had their own laws, these laws were too undeveloped to be of use to the colonialists who wanted to bring about change and an entirely new social order at a very fast rate.<sup>107</sup> Allott explains that many of the changes that have taken place in customary law, before and after the advent of colonial rule, have come from the traditional system itself in its characteristic nature of changing to meet the needs of the society, as opposed to being the result of colonial imposition of laws.<sup>108</sup>

During the period of colonial rule, African indigenous institutions and systems were however significantly corrupted. For example, in place of traditional land tenure rules and community relations, colonial regimes began a restructuring process that introduced the dominance of the colonial state in the social, political and economic lives of African societies.<sup>109</sup> For example, cultural checks on royal prerogative were destroyed in centralised traditional states; while in the decentralised states, dispersion of power along cultural formations was reversed

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<sup>103</sup> Allott AN (1970) *New Essays in African Law* 137-138.

<sup>104</sup> *Ibid.*

<sup>105</sup> Allot (1970) 132-133.

<sup>106</sup> Indirect rule as the policy adopted by the British meant that indigenous culture was still allowed to exist to a certain degree.

<sup>107</sup> David R & Brierley JEC (1978) *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* 513; Menski (2005) 452.

<sup>108</sup> Menski (2005) 453.

<sup>109</sup> Ezetah CR ‘Beyond the Failed State’ in Quashigah (1999) 424.

with the imposition of appointed warrant chiefs.<sup>110</sup> This created an ideological foundation of hegemony for the colonial state that replaced the traditional state. The colonial state with its alien foundation is what has transited to the post colonial state. This transition was on the one hand, marked by the strengthening of the inherited centralised control from the west, and on the other, by the adoption of authoritative socialist institutions from Eastern Europe.<sup>111</sup> In all cases, the systems were alien to the underlying conditions of Africa, including the nature and structure of indigenous institutions.<sup>112</sup> This post-colonial era will be examined next.

## 2.5 Post-Colonial Era (late 1900's – 1960's)

As has been seen from the above, the present day post-colonial African states are direct successors of the European colonies. Their legitimacy and borders were derived from international agreements (not from internal African consent) amongst European states, beginning with the Berlin West Conference of 1884-5.<sup>113</sup> Every aspect of the African state was affected. Its government, laws and policies were organised and fashioned after European colonial theory and practise. The interests and values of a European imperial power (strategic military uses, economic advantages, Christianisation) dominated the laws and policies as well. With the advent of independence, there came a new fervour, and a new wave of hope for nationalism swept through the continent. There was the strong hope and desire for independence and nationalism (even though this nationalistic sentiment was based on the nation states as carved out by the colonial powers). This stemmed from the astonishing success of the anti-colonial crusade in India, led by Mahatma Gandhi, who became an inspiration for African nationalists.<sup>114</sup> As the move and demand

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<sup>110</sup> *Ibid.*

<sup>111</sup> It has been opined that this has led to the resulting post-colonial states being 'political artifacts upheld by the international community'. See Jackson R & Roseberg C 'Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis' (1986) 24(1) *J. of Modern African Studies* 1-31 at 21.

<sup>112</sup> Sahn DE & Sarris A 'The Evolution of States, Markets and Civil Institutions in Rural Africa' (1994) 32(2) *J. of Modern African Studies* 279-303 at 286.

<sup>113</sup> See again Alott in Ingham (1974) 117; Herbst (1989) 43(4) *International Organization* 673-692; Ratner (1996) 90 *AJIL* 590; Englebort & Tarango (2002) 35(10) *CPS* 1093-1118; Killingray (1986) 85(340) *African Affairs* 411-437.

<sup>114</sup> Menski (2005) 453.



for independence grew, the colonial governments were forced to realise that they needed to take measures to relax the rules and to usher in independence. Thus in the African countries that the British ruled over, they started to ease off their control and power, in getting set for the end of colonial rule.

At the time when de-colonisation started, many African colonies did not have the capacity (skills) for the type of government which the colonialists had introduced, and which they called ‘self-government’. The colonial powers had not envisaged a situation where they would have to leave the continent for the next couple of years, as they felt that Africans still lacked, at that time, the capacity to govern themselves. However, by the late 1950s, there was increased moral and political pressure by the international community on the colonial powers to grant independence.<sup>115</sup> This led to their hurried withdrawal from the colonies, without any proper preparation of the Africans that they were to hand over the reigns of power to.

Traditionally before independence could be granted, it was required that there had to be the capacity to govern (in the western way as we have come to know it),<sup>116</sup> however, as a result of the then ongoing international pressure, the United Nations (UN) decided to separate the ‘right to independence’ (self-determination) from the ‘capacity to govern’,<sup>117</sup> as the right to independence was rapidly becoming a new doctrine of international legitimacy.<sup>118</sup> De-colonisation was removed from the capacity to govern and from the capacity for political development in the plans of the colonial government.<sup>119</sup> This resulted in the rapid granting of independence,

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<sup>115</sup> Wangome (1985) ‘Military Coups in Africa: The African ‘Neo-Colonialism that is Self-Inflicted’, available at [www.globalsecurity.org/military/library/report/1985/WJ.htm](http://www.globalsecurity.org/military/library/report/1985/WJ.htm) (accessed on 2 October 2008).

<sup>116</sup> Jackson & Roseberg (1986) 24 (1) *J. of Modern African Studies* 1 at 9.

<sup>117</sup> S.3 of UN Doc A/RES/1514 (XV) of 14<sup>th</sup> December 1960 stated that ‘the inadequacy of political, economic, social or educational preparation should never serve as a pretext for delaying independence’.

<sup>118</sup> It should be noted that ‘governance’ as used in this context, and as perceived by the Europeans and the rest of the international community meant governing in the western way; governing according to the western rules and regulations that had been imposed on the African continent. Africans could and had governed in their own traditional way and through their traditional systems for years before the advent of European arrival.

<sup>119</sup> Jackson & Roseberg (1986) 24(1) *J. of Modern African Studies* 9.

which began in British West Africa in the 1950s and spread to other parts of the continent, under international pressure.<sup>120</sup>

Against this backdrop, there is widespread acknowledgement of the fact that many Africans continued to adhere to their own perceptions and practices of ‘indigenous’ African traditions. The west have continued to view this as a fact of continuing cultural backwardness and lack of ‘development’ on the part of Africans, rather than a skilful survival-centred method of exploring sustainable legal arrangements that has continued to be strong.<sup>121</sup>

The colonial impact went well beyond law reform and the construction of new official laws; it went beyond loss of independence or self-governance. It created a crisis of cultural and philosophical identity; the consequence of delegitimation of values, notions and philosophy about the individual, society, nature and politics developed over centuries.<sup>122</sup> It also affected the psyche of many Africans, who were made to feel inferior by European-dominated discourses about globalisation, eurocentric policies of legal regulation and social reform, and the latent general contempt of black people, their cultures and their achievements.<sup>123</sup> Equally negative is the realisation that Africans themselves, their cultures, achievements and laws, are not being accepted as equal or equivalent to others. Despite statements to the contrary, Africans and their laws are simply not fully respected in their own right. In the minds of many, Africans have remained backward people who need to be taught about modernity and who are simply not ‘up to speed’ on progress and development. Such earlier views and perceptions, however obnoxious, have remained tenacious.<sup>124</sup>

Some articulate African scholars and writers have opposed such oppressive modes of thinking and action.<sup>125</sup> They assert the fact that there are inherent values in African cultures and traditions, including traditional laws, which are not only

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<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> See Wa Mutua M, ‘The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa’ (1996) 17 *MJIL* 591.

<sup>123</sup> Menski (2005) 467.

<sup>124</sup> Menski (2005) 467 – 468, where he made reference to Quaison-Sacle, who in his 1963 book, titled *Africa Unbound: Reflections of an African Statesman* 9, recounts being confronted on the street in Oxford during his student days in 1949 – 52, with questions like ‘which of our possessions do you come from?’

<sup>125</sup> Menski (2005) 468.

useful, but almost essential for the construction of a sustainable legal order in the future. What this really points to is the fact that there is an African natural law that needs to be taken seriously and which demands respect in a global context.<sup>126</sup>

When African states began to gain independence from colonial rule in the late 50's and early 60's, there was a lot of euphoria, and new hopes swept through the continent.<sup>127</sup> There were new dreams and expectations as the colonial masters handed over the instruments of power to the indigenous peoples.<sup>128</sup> To most Africans, this was the end of the demand and agitation for independence in which so many had suffered and died. They accepted that the end of slavery, human degradation and exploitation, would signal the beginning of a new life of freedom, integrity and development.

Unfortunately, the euphoria of independence did not last long. Africans leaders suffering from centuries of disempowerment, found themselves being thrust into leadership without the 'capacity to govern'. They were not prepared for the complexities involved in governing their separate countries, especially the different balancing acts that were required to be done between the different arms, structures and bodies composing a nation. This led to discontent in some sectors of the nation, for example the public service and the army. Coupled with this was the expectation from some of those involved in the struggle for independence, that they could now 'enjoy the fruits of their labour'. This led to mismanagement in many African countries and ultimately contributed to the various incursions by the military in governance all over Africa.

## 2.6 Military Regimes and Dictatorships

The new African states quickly became helpless and crippled at birth, as they lacked the skills and knowledge to govern in the new system. These states began to fall victim to military takeovers (coup d'états), as the new crop of military rulers accused the civilian governments of acts of corruption, fraud, incompetence and

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<sup>126</sup> *Ibid.*

<sup>127</sup> Wangome (1985) *ibid.*

<sup>128</sup> *Ibid.*

mismanagement of the economy,<sup>129</sup> even though they themselves were not any better as experience in Africa has shown. Rather than solve any of these political and socio-economic problems themselves, military coup d'états in Africa ended up compounding the problems.<sup>130</sup>

Contributory to this was the fact that the colonial armed forces, inherited by the various African states after independence, were viewed by the Africans with a great deal of suspicion. The colonial legacy left military organisations that were not fully accepted in African societies,<sup>131</sup> both in terms of their composition and also in the way and manner they had operated during the colonial period. This was due to the military being used against the people and against the nationalist fighters during the struggle for freedom and independence and to protect European vested interests on the continent. The population had developed an aversion to, and mistrust of soldiers, as they saw them as agents of imperialism. Another problem with the armed forces stemmed from the fact that colonial officers had made up a large percentage of the composition of the armed forces at the time.<sup>132</sup> On average, only about ten percent of members of the army were Africans. To worsen matters, the recruitment policy for the African population, which was based on getting 'worthwhile soldiers', ended up favouring one ethnic group above the other.<sup>133</sup> This led to deep-rooted mistrust, frustration and rebellion amongst the other groups. This act of favouring one ethnic group over another is reflective of the way Europeans generally operated in Africa. They preferred to work with whatever ethnic group that was 'most compliant', and set them as lords over the others.<sup>134</sup> This issue has been an underlying factor in many of the conflicts in Africa stemming from both feelings of superiority and inferiority amongst ethnic groups, created by the actions of the colonial government.

Exacerbated by the above factors, the position in many African countries following independence was a lack of sufficient military capacity and an existing one that did not reflect the national identity of the various countries. Gutteridge notes that

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<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> Decalo S (1976) *Coups and Army Rule in Africa* 11-12.

<sup>133</sup> Gutteridge WF (1975) *Military Regimes in Africa* 6

<sup>134</sup> See the case of the Hutus and Tutsis of Rwanda, Brundi and Congo; also the case of the elevation of the Hausa ethnic group over others in Nigeria.

nationalist leaders saw the members of the military as agents of imperial rule designed to protect European property. Although they had fought and served in two world wars, they were still regarded in some quarters as stooges of the colonial rule.<sup>135</sup> This view has also been echoed in other quarters.<sup>136</sup> He further observes that the recruitment policy into the military whereby people from certain tribal groups were preferred to others, due to their being considered as ‘martial races’, contributed to the lack of nationalistic spirit amongst the military institutions across the continent. This resulted in the nationalist leaders preferring to retain expatriate members of the army to be in control of the native members of the army.<sup>137</sup>

Independence brought about definite moves to ‘nationalise’ the different areas of governance. Civil administration was a priority, and Africans began to take over civil service posts that had been previously held by Europeans. The military was initially neglected in this regard, as the nationalist leaders and politicians felt that they had not contributed in any positive way to the struggle for freedom. Wangome notes that this failure to ‘nationalise’ the military was later to become a major source of concern and of grievance to military personnel themselves that were to turn catastrophic in many African states.<sup>138</sup> Eventually attempts to change the military to conform to the new national image, led to the changing of their uniforms; of the names of the different regiments; names of the barracks; changing of the traditions and values that were been instilled into the officers. All of this was aimed at eliminating the colonial mentality that still existed in the military.<sup>139</sup>

While the military was being moulded to attain a national character, the civilian politicians in power were busy ‘learning’ the ropes of governance. Governance for them became a matter of self-interest. The so-called ‘progressive’ governments

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<sup>135</sup> Gutteridge (1975) 6.

<sup>136</sup> Wangome (1985) agrees with Gutteridge on this point and refers to the army as existed then as ‘armies of occupation or mercenaries in the service of a foreign power’.

<sup>137</sup> Gutteridge (1975) 6. At the time of independence many of the African states still had a large percentage number of white officers in their armies. At the time of Ghana’s independence in 1957, only about ten percent of the entire military consisted of locals. The Belgian Congo even superseded this with no single Congolese officer in its entire force of over 4,000 men at the time of independence. This state of imbalance, together with other factors, later contributed to the dissatisfaction and frustration felt by the native officers, leading, for example, to the mutinies in Tanganyika and Uganda in 1964.

<sup>138</sup> *Ibid.*

<sup>139</sup> Wangome (1985).

became increasingly power-hungry and ambitious, forgetting the struggle that took them to power, or the people they were meant to be serving. They rather focused on enriching themselves, their families and friends.<sup>140</sup> This enabled ethnicity that had always been an underlining influence in the continent to once again rear its head.<sup>141</sup> Governments in Africa have tended to be more tribal than national in structure, with inter-tribal oppression and discrimination becoming common practice. This in effect created more societal tension and turmoil, as politicians favoured their family members, friends and those from their ethnic groups in government appointments, contracts and so on.

Government appointments were made regardless of the qualifications, merit, or ability to perform. Nepotism, corruption and bribery spread like a scourge across Africa. The new breed of leaders was not equipped for governance the western way,<sup>142</sup> and neither had the intention of reverting to the traditional African system of governance. They struggled and battled to get a grip on the economy, politics, social security and virtually all aspects of national life. The problems of inflation, devaluation of the currency, gross mismanagement of public funds, the gradual collapse of the economy, the educational system, health system, and transportation were commonplace in many of the ‘newly’ independent African countries. Furthermore, this resulted in a high unemployment index and high crime rates as a result of inadequate policing, coupled by a high mortality rate. Disenchantment and frustration on the part of the ordinary citizens soon followed. This kind of situation prevailed in Ghana, Nigeria, Uganda and other countries when the first coup d’états were carried out.<sup>143</sup>

The purpose of the coup d’états, according to the military, was to establish a military government, to improve on the legacy of politicians. Consequently, their rhetoric at the times of the coups indicated that they believed they were on a rescue

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<sup>140</sup> *Ibid.*

<sup>141</sup> The foundation for ethnicity was laid due to the traditional African structure of monolithic societies. African societies developed in groups (both centralised and non-centralised ones). These groups of people identified themselves as a people, an ethnic group. This was not a problem, until colonialism pitched groups against each other and exacerbated rivalries. Post-colonial leaders have further worsened the rivalries through their acts of corruption, nepotism and other ills.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

mission.<sup>144</sup> They believed that it was their national and patriotic obligation to rescue the country from total collapse and to help rebuild what the politicians had destroyed and to restore lost national prestige. However, more often than not, these military regimes, though having high and noble ideals of governance, usually got to power and perpetrated more harm and evil than the politicians. They were more corrupt, oppressive (using the power of the gun) and more inefficient than the politicians they deposed of. As more and more coups were executed successfully, without challenge, the whirlwind of coup d'états swept over Africa from which few countries escaped over the years.<sup>145</sup>

There are different views as to the reason for the spate of coups across the continent. Some feel that the reasons are the underlying societal and structural weaknesses inherent in the society as a whole. These are issues such as low levels of political culture, institutional fragility; and systemic flaws.<sup>146</sup> Another school of thought, as cited by Decalo, believes that the reason for continued occurrence of coup d'états is because military hierarchies seemingly have characteristics of professionalism, nationalism and cohesion, which in the face of the corruption and selfish ambitions exhibited by politicians; propel them to move into the political front to rescue the state from corrupt politicians.<sup>147</sup>

Decalo is of the view that these two schools of thought are basically 'two sides of the same coin'. Ultimately for him, it all boils down to the view that sees military intervention in the political realm as a function of the syndrome of destabilising strains and stresses in African societies that provoke the armed forces to overthrow civilian regimes.<sup>148</sup> He believes that the idea that African armies inherited professionalism, nationalism and cohesion from their colonial ties is wrong. These were superficial norms introduced into African armies, which were meant to get them ready for the post-colonial period. According to him, 'African armed forces never were cohesive structures, nor have they been particularly infused with

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<sup>144</sup> Wangome (1985).

<sup>145</sup> Togo and Congo-Brazzaville in 1963, Gabon in 1964, Burundi in 1965, Nigeria in 1966 and many others. Global security website at [www.globalsecurity.org](http://www.globalsecurity.org) (accessed on 10 October 2008).

<sup>146</sup> Decalo (1976) 11.

<sup>147</sup> *Ibid.*

<sup>148</sup> Decalo (1976) 12.

patriotic zeal ...<sup>149</sup> In actual fact, according to him, the deep cleavages and ethnic problems introduced into African states by the colonial governments, were also very much reflected in African armies, as these are only miniscule African societies. These problems within the army came to the forefront and became full-blown in many states after independence. Thus military takeover is a direct result of the deep cleavages, personal animosities and power struggles within the army.<sup>150</sup>

Decalo refers to Sandbrook, who uses the analogy that African armies were ‘an assemblage of distinct armed camps owing primary allegiance to a handful of mutually competitive officers of different ranks seething with a variety of corporate, ethnic, and personal grievances’.<sup>151</sup> He feels that petty personal jealousies and rivalries, normal behavioural drives and corporate gripes against the ‘politicians’ within the beleaguered civilian regimes can trigger ‘personalist’ takeovers.<sup>152</sup> The principal parties in these takeovers did not and could not bring anything new to the table, though they made all sorts of promises as to effecting good governance. They could not change things because, like their civilian counterparts, they are most times not equipped for the job, and have no idea what governance means or entails. This lack of preparedness was central to the frequent and dismal failure of the military regimes. In many cases, military governments left the countries worse-off than they were before.<sup>153</sup>

Military rule has thus not been free of the incompetence, corruption and maladministration that their civilian predecessors were accused of. Soldiers often are wealth-seeking, property-grabbing and bribe-taking people. Self-enrichment, embezzlement, smuggling and many other crimes was the order of the day under military rule. This they were able to do effectively because they had the barrel of the gun to use to intimidate others.<sup>154</sup>

In recent times, changes have occurred on the continent and the spate of military take-overs and coups have reduced drastically. These changes may be linked to

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<sup>149</sup> Decalo S (1998) *The Stable Minority: Civilian Rule in Africa* 4-5.

<sup>150</sup> *Ibid.*

<sup>151</sup> Decalo (1998) 5 referring to Sandbrook R ‘Patrons, Clients and Factions: New Dimensions of Conflict Analysis in Africa’ (1972) 1 *CJPS* 109.

<sup>152</sup> *Ibid.*

<sup>153</sup> For example, Nigeria is one of the countries still feeling the effects of years of military rule.

<sup>154</sup> We will see this in the case of Nigeria in chapter four.



the fact that there has been an increase in the awareness of people to their political, social and economic rights. This has enabled democracy to gain a tentative foothold amongst African leaders, and has heightened resistance to all forms of military take-overs and dictatorships. These facts, coupled with the deep damage and negative track record of military rule, have made it more difficult for the military to attempt to take over power. Though the deep suffering and turmoil effected on the economic, social and political life of the countries in the continent is still being felt, there are visible glimpses of progress.

In a bid to see Africa progress, develop and prosper, there have been recent experiments with different forms of democratic governance and institutions on the continent. There is a growing desire amongst Africans to see change coming to Africa; to see Africans being able to govern themselves without the foreign interference that comes under the guise of ‘aid’ and ‘debt relief’. Former president of Nigeria, Olusegun Obasanjo raised this issue at the G8 Summit in 2000, in Japan. While making a formal appeal for Africa’s debt relief, he was quoted as saying that ‘the chronic debt burden is without a doubt, the biggest monetary and financial obstacle confronting Africa and the developing world.’<sup>155</sup> This sentiment was also expressed by former president Thabo Mbeki at the same gathering when he lobbied the world community for a greater focus on African affairs in the form of debt relief and greater market access to the North for Africa’s trading goods.<sup>156</sup> This further represents the sentiments of a lot of Africans, who desire to see good governance, entrenchment of the rule of law, growth and development in Africa. This brings us to a discussion, mentioned in the preceding chapter, of one of the recent initiatives to effect good governance and political stability on the continent.

## **2.7 NEPAD and the APRM**

The New Partnership for Africa’s Development (NEPAD), as the name indicates, is a developmental initiative aimed at Africa’s development. It evolved from the New African Initiative (NAI) which was aimed at fostering the economic

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<sup>155</sup> Obasanjo O (2000) ‘Presidential Address to the G8 Summit in Okinawa, Japan’ quoted in Ijeoma EOC ‘NEPAD Leadership: A Comparative Analysis of Roles by Nigeria and South Africa’ (2008) 43(2) *Journal of Public Administration* 141-159 at 150.

<sup>156</sup> Ijeoma (2008) 43(2) *Journal of Public Administration* 154.

development of the continent. The NAI was adopted at the extraordinary summit of the Organisation of African Unity (OAU) in 2001.<sup>157</sup> This was later changed to NEPAD.<sup>158</sup> It was conceived and developed by a group of African presidents, including Olusegun Obasanjo of Nigeria, Thabo Mbeki of SA, and Abdoulaye Wade of Senegal. It is conceived as a ‘wholly African solution to Africa’s many problems’. It is an attempt to solve decades of misguided and failed developmental policies, incessant intrusion of the military in government, and the lack of will power by the politicians to lead effectively, which have contributed to Africa’s problems, and helped push Africa further into a state of crises.<sup>159</sup>

NEPAD is premised on the need for improved democratic, political, economic, corporate governance and an end to conflict as preconditions for sustainable economic growth.<sup>160</sup> It is a partnership between Africa and her external partners (like the G8, the United Nations Development Program, the United Nations Economic Commission for Africa, and the African Development Bank)<sup>161</sup> based on mutual accountability and responsibility. Its aim is to promote better government, end Africa’s wars, eradicate poverty and place African countries on the path of sustainable growth and development.<sup>162</sup> In order to measure and facilitate the attainment of the NEPAD goals, a set of parameters to guide the activities of states at all levels (political, economic, social etc) was devised, giving rise to a form of peer review called the African Peer Review Mechanism (APRM).

The APRM is a voluntary review mechanism open to all members of the African Union (AU). With its voluntary nature, Africa has for the first time deviated from the consensual approach.<sup>163</sup> It is an African self-monitoring mechanism that undertakes a voluntary review process through which African states evaluate their

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<sup>157</sup> Abioye ‘Africa’s drive towards self-monitoring: NEPAD’S Peer Review Mechanism’ (2005) 30 *SAYIL* 194.

<sup>158</sup> Resolution AHG/Decl 1 (XXXVII) of the OAU.

<sup>159</sup> Abioye (2005) 30 *SAYIL* 194.

<sup>160</sup> Cilliers ‘NEPAD’s peer review process’ Occasional paper 64 Nov 2002, Institute for Security Studies available at [www.iss.co.za/pubs/papers/64/paper64.html](http://www.iss.co.za/pubs/papers/64/paper64.html) (accessed on 15 April 2009).

<sup>161</sup> International Peace Academy (IPA) joint report, *NEPAD: African initiative, new partnership?*, available at [www.ipacademy.org/publication/publications.html](http://www.ipacademy.org/publication/publications.html) (accessed on 16 August 2005).

<sup>162</sup> Abioye (2005) 30 *SAYIL* 194, meaning that a state can exercise its will to join and be a part of the program, without having to wait for the consent of others.

<sup>163</sup> Grimm S & Katito G ‘African Developments: Continental Integration in Africa – AU, NEPAD and the APRM’ *German Development Institute Briefing Paper* April 2010, available at [http://www.diegdi.de/CMS-Homepage/openwebcms3.nsf/\(ynDK\\_contentByKey\)/ANES-82JKD8/\\$FILE/BP%204.2010.pdf](http://www.diegdi.de/CMS-Homepage/openwebcms3.nsf/(ynDK_contentByKey)/ANES-82JKD8/$FILE/BP%204.2010.pdf) (accessed in May 2010).

performance against standards and parameters set out in the base document, and known as thematic areas. These are:

1. Democratic and Political Governance
2. Economic Governance and Management
3. Corporate Governance; and
4. Socio-Economic Development.

The base document is modelled on the NEPAD priorities and programs.<sup>164</sup> It was established to ensure that the policies and practices of participating states conform to the agreed political economic and corporate governance codes that can be found in the NEPAD's Declaration on Democracy, Political, Economic and Corporate Governance.<sup>165</sup> These are meant to lead to political stability, high economic growth, sustainable development and accelerated integration amongst African states.

The mechanism provides for the sharing of experiences amongst participating countries, and the reinforcement of best practices including identifying deficiencies.<sup>166</sup> It was conceived that solutions and resources needed would be proffered for the problems identified in each reviewed country by the other participating countries. They can also collectively lobby donor agencies and international organisations for assistance.<sup>167</sup> The APRM is headed by the Committee of the Heads of State and Government (CHSG) of the participating countries. This committee appoints about seven eminent persons from the various participating countries to an independent Panel of Eminent Persons (PEP), which is tasked with managing and overseeing the review processes. It is assisted by a secretariat.<sup>168</sup>

The base document provides for four types of review: the country review which is carried out within eighteen months of a country becoming a member of the APRM;

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<sup>164</sup> APRM base document - 2003/09/16 paragraph 2, available on the NEPAD website at [www.nepad.org](http://www.nepad.org).

<sup>165</sup> Approved at the AU summit in July 2002.

<sup>166</sup> IPA joint report.

<sup>167</sup> FIDH (2004) *A Human Rights Approach to NEPAD and the APRM* 123.

<sup>168</sup> APRM Base Document, par 6; the APRM secretariat is based in Midrand in South Africa.

the periodic review (every two to four years); the special review (can be requested by a member country for its own reason); and a review based on early signs of impending political and economic crises in a member country (this can be called for by the CHSG).<sup>169</sup>

The country review process as stated is carried out when a country first joins the APRM. The country review process in itself involves five stages, starting with the sending of specialists and experts (Peer Review Teams) in the different fields and areas for review (democracy, political, economic and corporate governance) into the countries to be reviewed.<sup>170</sup> Based on the submissions from the member country, and the observations of the review team, a Country Review Report (CRR) is compiled, which measures the country's performance in relation to the thematic areas. It highlights successes, problems and areas of improvement. This is used as a starting point for subsequent reports and updates that would need to be submitted by the member country on a regular basis. The review process ends with the delivery of the CRR to the CHSG, who then decide on the support and assistance to be given to the country.<sup>171</sup> Accompanying the CRR is the National Program of Action (NPoA) which is a document that is drafted by the reviewed country, in response to the issues raised in the CRR. It states ways by which the government undertakes to address the issues that have been raised.

### **2.7.1 Challenges to the success of the APRM**

The salient point about the APRM is the combined pull of resources by African countries and the collaboration towards meeting set goals. The political will on the part of the CHSG to commit to ensuring the independence of the IPEP, to submit themselves and their countries to review and to take steps to rectify problems is very important to making the mechanism work.<sup>172</sup> This is one of the main challenges to the success of the mechanism.

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<sup>169</sup> APRM Base Document, par 4.

<sup>170</sup> *Ibid.*

<sup>171</sup> APRM Base document.

<sup>172</sup> Abioye (2005) 30 *SAYIL* 201.

The APRM is unfortunately perceived as being elitist and exclusionary in some quarters, as it is seen as being driven by the leaders of countries without the contribution and involvement of the people on the ground in the countries.<sup>173</sup> To rectify this, there must be a conscious attempt made by the subject country (that is the country being reviewed) and the APRM team to involve and get the contribution of civil society and the citizens and people in the country in the review process.<sup>174</sup>

The NEPAD initiative has also been criticised that it is one of the many neo-colonialists prescriptions meant to continue the control that the west and developed economies have on Africa and her economy. It is said to be a guise with which they continue to lay down rules and standards for Africa's continued subjugation.<sup>175</sup> Similar reservations were expressed by about 200 organisations from 45 African countries at a preparatory meeting for the World Social Forum in January 2002. They expressed concern that the initiative was based on accepting the neo-liberal analysis and strategies of the rich countries and it was therefore not acceptable as a basis for planning Africa's future.<sup>176</sup> The former executive secretary of Codesria (Council for Development and Social Science Research in Africa) also joined in the criticisms. He voiced the general suspicion and reservation that greeted Nepad, when he observed that 'the Nepad document reflects many of the assumptions that underpinned the neo-liberal economic, social and political reform agenda for Africa during the 1980s and 1990s'.<sup>177</sup>

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<sup>173</sup> Melber H 'South Africa and Nepad - Quo Vadis?' (2004) 11(1) *SAJIA* 89, who describes Nepad and the APRM as, '... a *'pact among elites'* which seeks to gain control over defining Africa's future development discourse...' (own emphasis).

<sup>174</sup> *Ibid.*

<sup>175</sup> Issa Shivji 'Pan Africanism or Imperialism? Unity and Struggle Towards a New Democratic Africa' (an excerpt article from his new book, 'Where is Uhuru?'), lecture delivered at the Second Billy Dudley Memorial Lecture series at the University of Nigeria, Nsukka, July 2005. Professor Issa Shivji is the Mwalimu Nyerere Professor of Pan African Studies at the University of Dar es Salam, Tanzania.

<sup>176</sup> The African Social Forum Report, Bamako Mali 11-12 available at <http://www.worldsummit2002.org/texts/AfricanSocialForum.pdf> (accessed in May 2010), which indicates that most of the participants at that gathering rejected Nepad and suggested that alternatives should be sought, instead of the neo-liberal framework in which Nepad was drafted.

<sup>177</sup> Olukoshi A 'Governing the African Developmental Process: The Challenge of the New Partnership for Africa's Development' in Hansen & Johannsen (eds) (2003) *NEPAD – The Challenge of the New Partnership for Africa's Development* 11-44 at 14.

At the end of its 2002 conference, Codesria resolved that the Nepad initiative had fundamental flaws which were mere reflections of the attitude of the World Bank and the UN to Africa. These flaws included the following:

- the fact that the initiative despite its claims of being of African origins, targeted foreign donors;
- it was a neo-liberal economic policy (which repeated the mistake of the structural adjustment programs);
- in spite of its claim to be an African initiative, the people of Africa had no part in its conception, design and formulation;
- it did not focus enough on the external reasons for Africa's crisis, and as a result does not proffer any reasonable measures to deal with it.<sup>178</sup>

Overall is the fact that there exists the challenge of implementing AU/NEPAD programs at both national and regional levels. Whilst the continent is not short of visionary leadership and great political figures, her institutions often lack the required technical expertise to pursue the mundane work involved in the implementation of its goals. The AU itself continues to struggle with the same challenges of lack of capacity, funding, and even political will. NEPAD and the APRM are constantly changing and strengthening in order to meet the challenge of Africa. It is therefore imperative that civil societies and development partners are part and parcel of the process. These are challenges that impact on the progress and actualisation of the NEPAD/APRM goals.<sup>179</sup>

The APRM secretariat also struggles with the issues of monitoring and evaluation of the processes underway in the different member countries. It has limited means to verify what is reported by states. This means that within the countries, tracking

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<sup>178</sup> Bond 'NEPAD, the APRM and South African sub-imperialism: Civil society co-option or resistance?' (2008) 2(1) *Critical Dialogue* 2 – 48 at 46, available at [http://cpp.org.za.dedi279.your-server.de/attachments/124\\_art7-CDVol2-No1.pdf](http://cpp.org.za.dedi279.your-server.de/attachments/124_art7-CDVol2-No1.pdf) (accessed on 2 June 2010).

<sup>179</sup> See Ndayi Z 'Contextualising NEPAD: Regionalism, plurilateralism and multilateralism' (2009) 16(3) *SAJIA* 371-387 at 380; Grimm & Katito, 3-4.

progress is left to participating governments, often to the exclusion of their citizens and civil society organisations.<sup>180</sup>

As with many other grand ideas, the main test of the effectiveness of the APRM would be seen in the positive impact it makes on its members. The implementation of the steps identified in the National Program of Action (NPOA) would be a good indication of progress being made.<sup>181</sup>

### 2.7.2 Progress made by the APRM

Despite and in spite of the criticism and challenges faced by the NEPAD and APRM initiatives, there are still quite a number of positives and possibilities that have been identified for NEPAD and the APRM. These initiatives have enjoyed a level of success in African countries. In particular, the APRM has helped in the much needed process of evaluation and ‘stock taking’ that is necessary for any one or country to move forward. The countries reviewed have been compelled to look back and attempt to evaluate how effective or (in)effective they have been in different areas.

Other inspiring outcomes of the NEPAD/APRM initiative have been suggested.<sup>182</sup> It is argued that in the context of regionalism, multilateralism and plurilateralism, the initiatives have led to increased foreign direct investment (FDI) and economic growth attributable to the improved political atmosphere that the review process, which deals with good governance, has brought about.<sup>183</sup> Though, the APRM does not have powers to enforce its recommendations, the fact that a country knows it will be intermittently reviewed by its peers, makes it to be more cautious of its actions in these areas.

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<sup>180</sup> Gruzd S ‘African Peer Review: A Progress Update’, available at [http://www.saiia.org.za/index.php?view=article&catid=62%3Agovernance-aprm-opinion&id=1199%3Aafrican-peer-review-a-progress-update&tmpl=component&print=1&layout=default&page=&option=com\\_content&Itemid=159](http://www.saiia.org.za/index.php?view=article&catid=62%3Agovernance-aprm-opinion&id=1199%3Aafrican-peer-review-a-progress-update&tmpl=component&print=1&layout=default&page=&option=com_content&Itemid=159) (accessed on 24 June 2010). This was evident in the compliant of civil society in South Africa during the review process; the same was the case with the Nigerian review.

<sup>181</sup> *Ibid.*

<sup>182</sup> Ndayi (2009) 16(3) *SAJLA* 371-387.

<sup>183</sup> See generally Ndayi (2009) 16(3) *SAJIA* 371.

Ndayi indicates that the initiatives have also led to increased interactions on the international plane with bodies such as the G8, the European Union (EU) and various other organisations.<sup>184</sup> This has resulted in more awareness and attention being paid to Africa in these organisations. An example of this is the G8 Africa Action Plan (AAP) adopted in the G8 summit in 2002. This indicates the agreement of the members of the G8 and EU to individually and collectively encourage co-operation with African countries whose performance reflect the objectives of NEPAD/APRM.<sup>185</sup>

Grimm and Katito have also expressed the hope that the NEPAD agenda (despite its insufficiency in itself and being mired in internal coordination challenges) might be instrumental for a better co-ordinated approach to tackling Africa's most pressing political, economic and developmental challenges.<sup>186</sup> Perhaps the expectations that have been built on the initiative (both of the continent and of external partners) need to be tamed down, in order not to lead to undue frustration with the initiative.<sup>187</sup>

It has been suggested by Melber that in view of the arguments for and against the process, the way to respond to the initiatives would be to engage in critical and analytical debate on NEPAD/APRM, and not to just discountenance it. He further states that 'those vehemently dismissing the blueprint as simply another neo-colonial offensive ... might want to think about acknowledging such appeals (*the appeal to think critically and analytically*) and becoming critically engaged, without having to abandon their scepticism (*about the initiatives*)'.<sup>188</sup>

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<sup>184</sup> Ndayi (2009) 16(3) *SAJIL* 371 at 380.

<sup>185</sup> *Ibid.* In fulfilling the objectives of the AAP, Canada set up an Investment for Africa (CIFA) and Canada Africa Fund (CAF), both of which have expended hundreds of millions of US dollars on NEPAD programs; in 2006, the World Bank approved 3 International Development Credits and a grant to improve trade and transport services in 3 member states of the East African Community (EAC); Japan has also contributed to NEPAD in the areas of investment and technology, as is the case with the EU.

<sup>186</sup> Grimm & Katito, 4.

<sup>187</sup> *Ibid.*

<sup>188</sup> Melber (2004) 11(1) *SAJIA* 81 at 97 (own emphasis).



## 2.8 Conclusion

In this chapter, a critical examination of African history with attention paid to the mode of governance in African pre-colonial, colonial and post-colonial societies have been carried out. The long-lasting impact and influence of military regimes in Africa have also been analysed. This examination buttresses the fact that African societies have always had ‘forms’ of governance, different to the western notions of governance that were imposed by the colonial masters. The type of governance and the impact of the western imposed forms of governance on the indigenous systems have been highlighted. This has created hybrid systems of law and governance all across Africa, resulting in the continued imposition of foreign systems on the African people even after colonialism. With the background and foundation set in this chapter, the next chapter will continue with an examination of the theories underpinning the rule of law in constitutional democracies. This theoretical foundation is necessary in order to provide a proper basis for understanding the way in which constitutional democracies are designed to function, and to see if this is the case in the two African countries in issue here.