

**RULE OF LAW IN ENGLISH SPEAKING  
AFRICAN COUNTRIES:  
THE CASE OF NIGERIA AND SOUTH AFRICA**

**by**

**FUNMILOLA TOLULOPE ABIOYE**

**Submitted in fulfilment of the requirements for the degree of**

**DOCTOR OF LAWS**

**in the Faculty of Law, University of Pretoria**

**FEBRUARY 2011**

**Supervisor: Prof ME Olivier**

## DECLARATION

**I, Funmilola Tolulope Abioye, declare that: *The Rule of Law in English Speaking African Countries: The Case of Nigeria and South Africa* is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete and proper references.**

---

**FUNMILOLA TOLULOPE ABIOYE**

---

**DATE**



## **DEDICATION**

In loving memory of my father, Mr. J.O. Soyinka, who instilled in me from an early age, the value of hard work and diligence, and who taught me to persevere.

## ACKNOWLEDGEMENTS

First and foremost, I would like to thank my Heavenly Father, without whom I would not have been able to get this far. I would like to thank my promoter, Prof. Michele Olivier, for her constant encouragement and support during this long process. Her guidance and push for excellence have been very contributory to this work. Prof. Neville Botha was kind enough to offer me assistance during the times I got stuck, and Prof. Bekker, graciously made his copy of a book available to me at the very early stages of this work. To both professors, I am very grateful.

I would like to thank my family members for their support, patience and forbearance during the years of putting this work together.

To ‘Toye, my friend and husband, I say a big “thank you”, for encouraging me to go for gold; for your constant support and willingness to accommodate my crazy work hours; and for being there. You mean much more to me! To my sons, Temiloluwa and Oluwanifemi, thank you for understanding when mummy had to work weekends, or was too busy to play. To my mum, for the times you travelled over for many months to help on the home front while I was busy with this research, you really are worth more than rubies! To my siblings and brother-in-law; Taiwo, Kemi, Bola and Folorunso, thanks for your understanding, you guys are the best! To my father-in-law, Prof. J.O. Abioye, thank you for your constant calls of encouragement and questions about the progress I have made. Indeed, I think I am walking in your footsteps! I would also like to thank the entire Dr. Robert Oyedipe family. I had to resort to you so many times to take care of the boys while I was busy with this research. Thank you for your being there.

My colleagues and friends have cheered me on and contributed immensely towards this goal.

To Prof. Irma, my head of department, thank you for being flexible and accommodating in granting me time off to work in pursuit of this goal. To Freddy, thanks for the many conversations we had on the topic, and thanks for allowing me to bounce my ideas off you. To Augustine and Tosin Ayo, Gloria, Magdaleen, Melodie, Sola, and others that are too many to name, you are all greatly appreciated! Special words of thanks to Nini, my editor, whose insightful suggestions on the format and structure of this document have helped greatly.

## SUMMARY

Over the past years, Africa has increasingly been in international news, be it in relation to poverty; malnutrition; incessant and sporadic conflicts; ineffective and self-seeking leadership; or in relation to the failure to develop in spite of the vast natural resources or manpower with which the continent is endowed. The failure of good governance in Africa epitomises the plight of the continent and has led to the inability of the continent to develop. This failure has been brought about by many factors, including diverse ethnic divisions across the continent; inequitable wealth distribution; poor capacities in governance; the imposition of foreign systems through colonialisation and many other factors. One of the factors identified by this thesis for Africa's continued failure is the challenge to the entronement of the rule of law on the continent.

The study of the rule of law in Africa is of crucial importance in understanding Africa's problems. In order for the rule of law to reign within a particular society, the law first has to be an integral part of that society. It has to be legitimate, respected, owned and internalised by the society. This is concretised through the law-making process within the society. For laws and the law-making processes to be legitimate, there needs to be the consent and participation of the people of the society which the law seeks to bind. This is not so in the case of most African countries where laws are many times vestiges of the colonial era (or apartheid era as the case may be), or a mutation of colonial and indigenous legal systems; and where the post-colonial law-making mechanisms as depicted in the constitution-making processes have not induced confidence. This had led to a deficit in the legitimacy of the law in Africa, and in the ability of such laws to order, control, bind and govern the nations of Africa. This is because the people who the laws are meant to bind and order, have more often than not been excluded from the law-making process, nor given their consent to be bound by the laws in force.

The resultant effect of these realities is that the laws generally lack legitimacy; and are usually adhered to only when sanctions are attached and when there is the possibility of those sanctions being enforced against the individual. This thesis seeks to draw a nexus between the lack of legitimacy of laws in Africa (as evidenced in the constitution making processes) and the problems and challenges faced by the rule of law on the continent, using the cases of Nigeria and South Africa. In doing this, the extent to which international law has been able to govern will also be examined.

## **Key words and phrases**

Rule of law, Africa, South Africa, Nigeria, legitimacy, social contract, consent, will, constitution, military regimes, APRM, international law, treaties, customary international law.

## TABLE OF CONTENTS

<b>Declaration</b>	<b>ii</b>
<b>Dedication</b>	<b>iii</b>
<b>Acknowledgements</b>	<b>iv</b>
<b>Summary</b>	<b>v</b>
<b>Key words and phrases</b>	<b>vi</b>
<b>Chapter 1: Introduction</b>	<b>1</b>
1.1 Introduction	2
1.2 Rule of Law: Meaning and Interpretation	3
1.3 Rule of Law in Africa	9
1.4 Purpose of the Research: Problem Statement	16
1.5 Scope or Context of Research	16
1.6 Methodology	19
1.7 Structure and Overview of Research	20
<b>Chapter 2: History of Governance in Africa</b>	<b>22</b>
2.1 Introduction	23
2.2 History of Governance in Africa	24
2.3 Pre-colonial Era	26
2.4 Colonialism in Africa	35
2.5 Post-Colonial Era	45
2.6 Military Regimes and Dictatorships	48
2.7 NEPAD and the APRM	54

2.8	Conclusion	62
<b>Chapter 3: Theories and Developments guiding Constitutional Democracy</b>		<b>63</b>
3.1	Introduction	65
3.2	What is ‘Democratic Legitimacy’?	66
3.3	The Social Contract Theory	69
3.4	Kelsen’s Pure Theory of Law and its Implications	97
3.5	Impact of Globalisation and Democracy on the Rule of Law in Africa	99
3.6	International law angle in terms of its impact and influence on Africa	120
3.7	Conclusion	142
<b>Chapter 4: Regional Case Study: Nigeria</b>		<b>144</b>
4.1	Introduction	146
4.2	Historical Background of Nigeria	146
4.3	Critical Analysis of the 1999 Constitution and preceding constitutions in line with the social contract theory and its requirements	171
4.4	Mechanism for the rule of law in Nigeria: The Nigerian Legal System	183
4.5	Impact of Oil and Globalisation on Democracy in Nigeria	198
4.6	International Law Impact in Nigeria	233
4.7	Conclusion	246
<b>Chapter 5: Regional Case Study: South Africa</b>		<b>250</b>
5.1	Introduction	252
5.2	History	253



5.3	Apartheid South Africa	275
5.4	Post Apartheid South Africa: An analysis of the Constitutions	297
5.5	Mechanism for the Rule of Law: The South African Legal System	308
5.6	Impact of the Legal System on the Rule of Law in South Africa	325
5.7	International law in South Africa and its impact on the Rule of Law	341
5.8	Conclusion	354
	<b>Chapter 6: Conclusion</b>	<b>357</b>
6.1	Scope and Purpose	358
6.2	Overview	359
6.3	Recommendations	364
6.4	Concluding Remarks	368
	<b>Table of Abbreviations</b>	<b>370</b>
	<b>Bibliography</b>	<b>373</b>
	<b>Annexures</b>	<b>416</b>

*For in reason, all government without the consent of the governed is the very definition of slavery*

- Jonathan Swift (Drapier's Letters iv, 13 October 1724, written while he was Dean of St Particks Cathedral, Dublin)

*The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law*

- Dwight David Eisenhower (1890-1969), 34th US President