Chapter 6

Conclusion

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6.1 Scope and Purpose

The purpose of this thesis is to examine the state of the rule of law in the two English-speaking African countries of Nigeria and South Africa. This is done by analysing the role of the constitution-making process, against the background of the social contract theory, in enthroning the rule of law in these countries. The presence and enthroning of the rule of law are important for the survival of any democracy, and particularly so in Africa with its colonial history. This thesis lays the foundation that in order for the rule of law to be established and maintained in a country, there must be an innate ownership and allegiance of the people to the laws of the land. This can only be achieved when the citizenry is involved in, and participate in the law making processes, and above all, when they give their consent to the results of such processes, by means a national constitution. Shklar has observed that the rule of law should be 'recognized as an essential element of constitutional government generally… .'[1]

The process of constitution making in Nigeria and South Africa are explored extensively in order to determine how legitimate such processes are in terms of the participation of the people. Participation likewise grants legitimacy to the outcomes of the processes in terms of the laws that emanate from the constitutions.[2]

The differing impacts of legitimacy issues are apparent in the cases of South Africa and Nigeria. This thesis further explores the impact of participation by the people in the process of making the constitution. The constitution is seen as the grundnorm of the nation or country, and participation by the people in moulding such grundnorm leads to a fostering of a sense of ownership of the constitution; an allegiance to the implementation of the constitution and of the other laws of the land that are all offshoots of the constitution.

Again, the context in which the phrase 'rule of law' has been used in this thesis must be emphasised, as it differs from its common usage by academics, authors,

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[1] Shklar JN 'Political Theory and the Rule of Law' in Hutchinson & Monahan (1987) *The Rule of Law: Ideal or Ideology* 16.

[2] This view is reinforced by the view of Claude (1966) 20 *International Organisation* 367 at 369, that 'popular consent' is broadly acknowledged as the legitimising principle in contemporary political life.

politicians and the like. These have used the phrase to apply to different concepts like institutions of law and order within a country; issues pertaining to democracy and good governance; elections procedures and many others.[3] Kairys, in noting the 'huge range of formulations and meanings for the rule of law …', sees the focus as sometimes on justice; or on democratic processes; or separation of powers issues; or increasingly, to depict a social or political system.[4] As indicated above, the phrase has been used in this context to refer to the way in which the making of the constitution within a country impacts on the observance of the laws of the land by the people; more particularly, the impact of a legitimate, all-inclusive constitutional making process on the observance and upholding of the law by the people.

6.2 Overview

Africa, as it has been observed in chapter two, was not devoid of governance before the arrival of the Europeans (colonialists). The continent had its own modes of governance, and of maintaining observance of the law within the different social groupings (societies) that existed at the time (be it the centralised or non-centralised societies). This process was an inclusive one, in which the members of the societies (either on their own, or through their representatives) had a say in how they were governed by the king and his chiefs, and in what rules and laws were binding on them. The people were the ones who elected their kings and/or chiefs, and these leaders led at the pleasure and behest of the people.[5] Such leaders were also bound by tradition and customs, and ruled according to the dictates of the tradition of the land.[6] Elias pointed out over two decades ago that the basis of

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[3] See Skaaning Sven-Erik 'Measuring the Rule of Law' (2009) *Political Research Quarterly* 449- 460 at 451-453, where he refers to the maximalist/minimalist and thick/thin conceptions of the phrase; Bedner A 'An Elementary Approach to the Rule of Law' (2010)2 *HJRL* 48-74 at 48-50; Fukuyama F 'Transitions to the Rule of Law' (2010) 21(1) *Journal of Democracy* 33-44 at 33-35; see generally, Hutchinson & Monahan (1987) *The Rule of Law: Ideal or Ideology*;

[4] Kairys D 'Searching for the Rule of Law' (2003) 36(2) *Suffolk University Law Review* 307 at 308.

[5] Quashigah (1999) 44.

[6] *Ibid*.

these pre-colonial ideas and practice of governance in Africa can be traced to the social contract theories.[7]

The colonialisation of Africa brought about changes in the modes of governance, in the structure of the societies, and led to a situation whereby the participation of the people was removed from the law making processes. Rather, law making became a process that was foreign to the people, together with the laws made. These were imposed on them by the different colonial governments as the societies were divided in states as we have it today. Traditional African laws and governance processes were mostly lost to the colonial incursion, as very few survived this period.

Military rule afflicted the continent for so long that it affected the cohesiveness of the society, and broke down the law making structures within the countries in Africa. In many cases, it has affected the sense of ownership and allegiance of the population to the state. In the case of Nigeria, this thesis has explored how the years of military rule have further resulted in the breaking down of legitimate governance structures. Bearing in mind that military rule by its very nature is not based on participation of the public, but is rather an imposition of a system of governance and an 'elite' group of people on the society; this period further eroded the rule of law within the countries which were subject to such rule. In Nigeria, a larger part of its fifty years of independence from colonial rule has been spent under military rule.

An exploration of the theories governing state formation and the constitutional state is necessary to give perspective to the research carried out in this thesis. Chapter three provides such perspective, using the social contract theory as a point of departure. This theory, in its emphasis on participation of the people and the notion of consent (however given or granted) in law making or governance, provides a basis for the question of the legitimacy of any system of law making. The need for the society to 'consent'[8] to be governed and bound by the laws in force is essential in order for the rule of law to persist. This is so because the

[7] Elias TO (1988) *Africa and Development of International Law* 36.
[8] The issue of 'consent', whether it is implied, or express, whether notional or real has been dealt with in chapter three of this work. Consent as used here denotes an active will, some element of participation.

constitution and laws made through such a process would encapsulate the values and mores of the people or the society. Thus a sense of ownership, of allegiance, is created within the society, which propels not only obedience to the law, but also a consciousness of what the law expects from them. This moulds behaviour into that of compliance with the law, a process whereby the rule of law exists and is strengthened.

Conversely, a failure to seek the participation and consent of the citizenry in the making of a constitution, or in the making of the consequential laws of the state, would result in a situation whereby the citizens would not identify with constitution and the laws made. Thus compliance with, and obedience of such laws would be lacking (and if at all would be as a result of the threat of sanctions). Even when such is obtained by possibly force or fear of sanctions, it would not be innate, and not be sufficient to effect compliance with the rule of law.

Another aspect of the rule of law explored is the way in which the influences of the global world, and especially of the development of international law, impacts on the strengthening of the rule of law in Africa generally, and in Nigeria and South Africa particularly. International law has experienced rapid development in the past couple of decades. This has impacted on the laws that are binding within a country, as no country can claim to exist in isolation. Globalisation continues to make the world a smaller place, and encourages inter-dependence amongst countries. This necessarily means that there are other influences which mould, to a large extent, the state of the rule of law within a country. Notwithstanding this reality, the participation and consent of the people in the process remain essential.

The comparative chapters of Nigeria and South Africa in this thesis have sought to establish the status of the rule of law in these two countries in the light of the different factors affecting it. These chapters have also sought to identify some of the problems and challenges faced in the functioning of the rule of law, in particular against the historical trajectory that each country has taken in reaching its present state.

The colonial history of Nigeria is similar to that of many other African countries. As indicated in chapter four, the combined effects of colonial rule and military rule (post-independent Nigeria has had more years of military rule than civil rule) have

not bode well for the strengthening of the rule of law in the country. Beyond and above this, however, is the failure of leadership in the country which has further compounded the challenges faced by the nation. These different scenarios have resulted in a situation whereby the past and present constitutions of Nigeria have failed to encapsulate the values and mores of the society. They are not products of societal participation or consent, and as such do not reflect the hopes and desires of the people. These have been more or less impositions on the people, and to this extent they can be said to lack legitimacy. The effect of this state of affairs is that there is no sense of ownership or allegiance on the part of the people, to the document. Compliance with the law (in cases where it exists) is usually a matter of force and not a matter of cause.

This fact is also borne out by the crop of leaders that the country has had in the recent past and present. The majority of these have not shown or exhibited true leadership, and their actions have been seeped in either self-enrichment or in an unquestioning followership of the dictates of various international actors (as long as their interests were preserved).[9] Government in Nigeria seems no longer to be for the people, for the provision of social services, but rather for the purpose of self-enrichment and profiteering.

In South Africa, there are signs and trends emerging that point to the need for a critical look and possible intervention in the state of the rule of law in the country. Chapter five first explored the rule of law in South Africa from a historical perspective. ‘Law’ was used as a weapon against the black majority during the period of apartheid. Rules and regulations, and law and order became associated with racism and discrimination. These laws were not made through participatory means and were impositions of the white minority on the populace. The pre-1993

[9] There is desperation among the elite to hold public office. This manifests in the lengths that individuals go to attain positions. Election irregularities, rigging, bribery, intimidation and violence have characterised elections in Nigeria. For example, the 2007 elections resulted in state governorship aspirants, who, although they did not win the majority votes, were declared the winners by the Independent National Electoral Commission (INEC). The courts have gone to great lengths to attempt to rectify some of these decisions. Examples of such cases are the declaration of Chris Ngige as governor of Anambra state by the Independent National Electoral Commission (INEC) that was nullified by the courts in favour of Peter Obi; the declaration of Prof O Osunbor of Edo state that was nullified in favour of Adams Oshiomhole; and also the nullification of the declaration of Dr Agagu of Ondo state in favour of Dr Mimiko, and that of Oyinlola of Osun state in favour of Aregbesola. These are clear cases of instances where elections have been hijacked.

constitutions of the country entrenched apartheid as a system and gave the system legality, even though the constitutions themselves lacked legitimacy.

In the post-apartheid period since 1994, attempts made for an inclusive and participatory constitution gave yield to the 1996 Constitution. The 1996 Constitution is a product of extensive consultations and public engagement as recorded in chapter five. It expresses the hopes, values and aspirations of the majority of the people of the country. This confers legitimacy on the 1996 Constitution through the participation and consent of the people, and makes the document one that is owned and accepted by the very same people. This legitimacy has impacted on the way South Africans have interacted with the 1996 Constitution, and also with the laws that emanate from the Constitution. The immediate years following apartheid saw a determination by all to see the enthronement of the rule of law in the country. South Africans were exceedingly proud of their constitution, and identified with it.

As a matter of course in the growth of a nation, South Africa is now experiencing the pains and challenges of growth and development. This signifies the real test of the state of the rule of law within the country. These challenges have come in diverse and multifaceted ways; from the legacies of the apartheid system that includes debilitating poverty amongst blacks; high crime and violence rates; high HIV and AIDS infection rates (one of reasons for the spread of which is the breakdown in the family structures which was caused by apartheid); to the deployment and reward system of the ruling party;[10] a growing lack of accountability in and amongst public office holders (and consequently private office);[11] government's growing inability to balance economic growth and development with the need to alleviate poverty; the spreading corruption; disrespect of the judicial processes and for the courts, and other issues that were raised in the chapter.

[10] This is a system whereby appointment to political positions is viewed as reward for involvement in 'the struggle', without any consideration for the skills and ability of such person(s) to perform on the job and to deliver.

[11] State-owned enterprises and agencies have been particularly hit by reports of inflated tenders, wastage of monies, embezzlement and others, for example the SABC, Transnet, and the SAA. This is despite and in spite of the massive poverty and development needs that exist in the country.

6.3 Recommendations

It should be noted that while this thesis deals primarily with the rule of law in English-speaking African countries, the recommendations suggested here are relevant to the continent as a whole, as other African countries have similar problems with the rule of law.

Paramount in the possible solutions to the problems as explored in this thesis is the need to ensure the participation of the people, and consent of the people in whatever processes are put in place to make laws and ultimately provide governance. Such participation confers legitimacy on the laws and on the system. The notions of legitimacy and democracy are notions and concepts which African countries have struggled to abide by and to practise for decades. This thesis has explored one of the causes of this problem, and has posited that it is due to the fact that the systems of governance and leadership currently in force in Africa are alien to the continent. They are imposed and lack ethical authority.

As a step towards surmounting this problem, it is suggested that African states revert to and adopt some of the fundamental tenets of the law making processes that existed on the continent prior to colonialism. These tenets, which have been explored in chapter two, can be found in the mode of governance in pre-colonial African societies, which was such that the people themselves determined who governed and what type of governance model was implemented. Power resided in the people; they had the final say and could remove a leader if such failed to govern properly in ways which identified with the norms and values of the society. By this means, the society, collectively, was able to consent to whoever governed them, and to whatever mode of governance was adopted.

Though it can be argued that this system is in principle similar to the western standards of legitimacy and democracy, the difference is that the pre-colonial system of governance was founded in the people, in their ways of life, in their existence as a people, in their norms, their values, and in their very being. The system of governance was birthed by the people, and they identified with it, obeyed the rules, considered themselves bound by it and lived it. It was part of the value system, part of the norms by which the way of life was guided. As already

explored in this research, the position is no longer the same in the case of the system of governance in operation in many African countries now. Governance within these countries no longer has a connection with the people, and stems mainly from a foreign system. Quashigah and Okafor aptly refer to the crisis of legitimate governance in African states today as 'a crisis of ethical constitutionalism'.[12]

Using the example of the constitutional arrangement under the old Oyo empire[13] (a great militaristic empire of Yoruba states that thrived in the area now known as Western Nigeria), Quashigah and Okafor specifically allude to the checks and balances that were entrenched in the system,[14] and posit that the reason these checks and balances were successful 'was that everyone, including the emperor, had internalised the rules of the game, and held such constitutional ethics in the highest regard'.[15] They conclude that the ethnocentrism of the colonialists resulted in the destruction of these ethical rules in Africa in their attempt to establish authority over the African political and legal systems. What they replaced these systems with, however, lack ethical authority, as the colonial state in itself was alien and exploitative.[16] Unfortunately, the post-colonial African state has also done little to attract the allegiance of its population.[17]

African states need to adopt the elements of inclusion, participation, consent and constitutional governance in the true sense of the word. These, as indicated by the research, were present in traditional African societies. These elements will help to foster a more positive sense of nationhood within each state and amongst the people, and provide a foundation, a basis for lawmaking.

In the post-colonial African states, the medium through which the people express their 'inclusion', 'participation', and 'consent' in law making and in the structures of governance is through the constitution-making process. When these elements

[12] Quashigah EK & Okafor OC 'Toward the Enhancement of the Relevance and Effectiveness of the Movement for the Securement of Legitimate Governance in Africa' in Quashigah & Okafor (ed) (1999) *Legitimate Governance in Africa* 539-557 at 555.
[13] Quashigah & Okafor (1999) at 555.
[14] Particularly the traditional African rule, which though oral and unwritten anywhere, held that the *Alafin* (emperor) was obliged to flee the empire or commit suicide if he was presented with a certain gourd or plate by the *Ogboni* (the kingmakers).
[15] Quashigah & Okafor (1999) 555.
[16] Quashigah & Okafor (1999) 556.
[17] *Ibid*.

are present in the constitution-making process, the constitution would contain laws that are people-based; that emanate from the society, and that meet the needs of the people for development. The constitution and all laws that derive their authority from the constitution would be products of the society, and thus would be internal to the people. Law in such a situation transcends the written law and rules of governance, to the level of being ethics of behaviour regulated by the society. When this is the case, one is able to talk of the legitimacy of law, and the enthroning of the rule of law. This is important for the progress and development of African states. It is essential that governance within African states reflect the norms and values of the people, and only when this is achieved, can it be said that the people 'consent' to be bound by the laws and walk according to the tenets of the law(s). This would confer legitimacy on the law and would consequentially establish and elevate the rule of law within the countries.

Another way in which progress can be made in enthroning the rule of law in Africa is through the work of the APRM. The mechanism, despite and in spite of its issues and challenges, continues to make progress and inroads in governance in African countries. The operation of the APRM in the two African states that have been discussed provides a basis for the states to go through a process of 'introspection', in order to investigate how much inroads and progress are being made towards the realisation of the goals of development and growth that have been set. One is encouraged to see that there are positives that can be leveraged upon. Part of the positives is that the APRM provides a process for accountability, albeit of a soft nature, on the part of African states. The fact that each state, in compiling the report, has to look inwards and actually rate itself is a measure towards accountability.

The creation and operation of the APRM on the continent is encouraging and brings about an acknowledgement that things are not all bad, and that with political will, movement can be made in the right direction. The mechanism has been successful in cementing itself as a critical part of the African governance architecture (even whilst outliving the political tenures of two of its main

architects, former President Mbeki of South Africa and former President Obasanjo of Nigeria).[18]

Gruzd identifies areas in which he feels that the mechanism has 'racked up important achievements', which include the growth in its membership; the increase in the number of countries that have completed the peer review process,[19] the number of countries undergoing review; and the diagnostic validity of the reports in identifying critical issues affecting governance in the countries reviewed.[20]

Along with all these, he mentions the fact that the APRM opens up the discourse on the problems in countries and provides a forum for African countries and Africans to acknowledge and discuss the problems by themselves, and then to begin to proffer solutions.

However, in spite of these achievements, there remain challenges that the mechanism needs to face head-on in order to survive, and in order for it to achieve its goals.[21] Participating countries have eased off on meeting their reporting deadlines, and as a result NPoA reporting deadlines have been missed with no consequential penalty. Some of the commitments for implementation made by participating countries that have already been reviewed have not been kept to, and unfortunately, the APRM does not have the administrative capacity to monitor compliance.

It is important that the commitment of participating countries to the mechanism must be maintained. The integrity of the process also needs to be closely guarded by ensuring transparency and accountability. This is no longer the sole responsibility of the governments of participating states, but also of the citizens and non-governmental organisations of these states. These have to hold their

[18] Gruzd S 'African Peer Review: A Progress Update', available at http://www.saiia.org.za/governance-and-aprm-opinion/african-peer-review-a-progress-update.html (accessed on 24 June 2010)

[19] Now standing at 13, with the completed review of Mauritius in July 2010.

[20] *Ibid.*

[21] Gruzd states in his progress update that on an institutional level, the mechanism had suffered a number of challenges. These, according to him, include the fact that the transparency with which the Panel of Eminent Persons were being replaced had waned, also that the review process itself was expensive, complex and time consuming; and that it was difficult to track the development progress made by participating countries on its own.

governments accountable to comply with the mechanism's commitments and reporting deadlines, as this is in the greater interest of the collective.

6.4 Concluding Remarks

It is necessary to bear in mind that there are no short-cuts to developing the rule of law.[22] It has been reiterated by Peerenboom that, '[i]n any country, the realisation of the rule of law is the result of protracted struggle by many people and organisations on many different fronts over a long period of time'.[23] Building the rule of law and enthroning it is therefore an ongoing process that needs concerted efforts by the citizenry and the state in Africa.

For the rule of law to be enthroned in Africa, the people must be part of the law making process. As the law is evidenced in the Constitution of a state, the populace must consent to the constitution-making process, and their consent must be reflected in the values and norms contained in the provisions of the constitution. This is the foundation of any legitimate government, which would have the support and allegiance of the people. The allegiance of the people is very important to the state of the rule of law in Africa today. When the people have a sense of ownership of their state; ownership of the processes and structures of government; when they feel that 'ontological connection to the state'[24]; they will lay aside personal considerations and do everything in their power to make the state work.

To conclude, reference is made to the words of Woodrow Wilson:[25]

> 'What we seek is the reign of law, based upon the consent of the governed and sustained by the organised opinion of mankind'

and that of Thomas Jefferson:[26]

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[22] Peerenboom R 'The Future of Rule of Law: Challenges and Prospects for the Field' (2009) 1 *HJRL* 5-14 at 14.
[23] *Ibid*.
[24] Ezetha in Quashigah & Okafor (1999) 424.
[25] (1856-1924) 28th President of the United States of America, in his Mount Vernon speech at Washington's Tomb on the 4th of July 1918.
[26] Thomas Jefferson (1743-1826) in the Declaration of Independence for the United States. He was the 3rd President of the United States of America,

'[W]e hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed…'